EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Lillie**

Respondent: **Shergroup Limited**

Heard at: Newcastle (CVP)(v) **On:** 23 February 2021 (deliberations)

Before: (1) Employment Judge A.M.S. Green
(2) Mrs D Newey
(3) Mr S Wykes

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant will pay the respondent's costs, restricted to £4850.

REASONS

Introduction

1. A hearing was listed for 28 & 29 October 2020 to determine the claimant's claim and to decide on compensation or other remedy if the claim succeeded. The claimant was neither present nor represented at the hearing. She had informed the Tribunal that she was unable to engage with the hearing because her partner had Covid-19 symptoms and she had a lack of childcare arrangements. We adjourned the hearing to 29 October 2020 to give the claimant an opportunity to make representations and be present at that hearing. If the Tribunal was not minded to strike out the claimant's claims, we were invited by the respondent to consider its application for costs should the case be adjourned.

2. However, matters developed because, by an email dated 29 October 2020, received by the Tribunal administration at 08:17 hours, the claimant withdrew

her claims. Consequently, the Tribunal dismissed her outstanding claims upon withdrawal.

3. At the hearing on 29 October 2020, Ms Compton, counsel for the respondent, made an application for costs. She referred to her skeleton argument and written submissions, a copy of which the claimant had. She noted that the claimant had not explained why she had failed to comply with the Tribunal's orders concerning disclosure of documents and exchange of her witness statement. She told the tribunal that the email did not address why the claimant had failed to engage completely or to correspond with the respondent's solicitors. The claimant could have withdrawn her claims much earlier without any cost consequences. Furthermore, there was correspondence between the parties under which the respondent's representative had warned the claimant that they would seek costs against her if she continued with her claims. We were referred to two costs warning letters of 17 September 2020 and 16 October 2020. The claimant had refused to engage with the respondent's solicitors. She had not applied for an extension to the orders requiring disclosure of documents and exchange of her witness statement. We were also told that there had been an offer to settle her claim in August 2019 which the claimant had rejected. Essentially, Ms Compton's position was that the claimant had two years to get her "house in order". In August 2019, the respondent had been sympathetic to the claimant because of her health issues and had agreed an extension to the timetable. Since then, the respondent was forced to continue to defend the claims despite the claimant failing to disclose her documents and exchange her witness statement. We were informed that the respondent was seeking £4850 as per the costs schedule prepared by Ms Compton's instructing solicitor. Ms Compton submitted that the sum claimed was a modest proportion of the overall costs incurred which exceeded £20,000. We were invited to make a costs order for the sum claimed.

4. Ms Compton has also provided written submissions in support of her application. The application is limited to costs incurred in the period September 2020 until the hearings 28 and 29 October 2020.

5. The Tribunal was mindful of the EAT's guidance in **Gwara v Mid Essex Primary Care Trust EAT 0074/13** which held that both natural justice and rule 38 (9) under the old rules of procedure required the Tribunal to ensure that the paying party had a fair and reasonable opportunity to give reasons why the order should not be made. Having considered Ms Compton's application and the supporting documentation provided by her instructing solicitors regarding correspondence that passed between them and the claimant, which included cost warnings, the Tribunal was minded to make a costs order of £4850. This is on an unassessed basis and was made by reference to the schedule of costs provided by Ms Compton's instructing solicitors. We understood that it represented a modest proportion of the overall costs incurred in defending the claims. The basis upon which such an order would be made proceeded from the fact that the claimant had failed to comply with orders of the Tribunal, has behaved unreasonably in withdrawing her claims at the 11th hour and had no reasonable prospect of success for the reasons set out in Ms Compton's skeleton argument.

6. Rule 77 of the Tribunal Rules provides that no costs order may be made unless the proposed paying party has had a reasonable opportunity to make

representations in writing or at a hearing, as the Tribunal may order in response to the costs application. The claimant must be given a reasonable opportunity to make representations. Consequently, we invited the claimant to make written representations to the Tribunal and believed it would be reasonable for her to have 28 days to do so. She submitted written representations and supporting documents. The respondent's solicitors, Felton's Law, produced a written reply to the claimant's submissions on costs and a bundle of supporting documents. It was agreed that the Tribunal would consider the costs application without a hearing.

7. In reaching our decision, we have considered the oral and written submissions and supporting documents provided by the parties. The fact that we have not referred to every document produced should not be taken to mean that we have not considered it.

Key facts in the litigation

8. On 20 February 2019, the claimant presented her claim form to the Tribunal. She claimed unfair dismissal and discrimination based on pregnancy or maternity. The respondent entered a response to the Tribunal. The response was accepted by the Tribunal 15 April 2019.

9. Throughout these proceedings, the claimant has been unrepresented. However, on reading the documentation, she is clearly an intelligent and articulate person. The respondent was initially represented by a firm of solicitors called Howes Percival LLP. It subsequently instructed another firm of solicitors called Feltons Law ("Feltons").

10. The claimant produced a schedule of loss dated to 10 May 2019. The total sum of money that she was claiming in respect of all of her claims was £57,740.55.

11. On 10 May 2019, Employment Judge Morris conducted a private preliminary hearing. The claimant appeared in person. The respondent was represented by Mr Anderson of Counsel.

12. In paragraph 4 of the case management summary relating to the issues, Employment Judge Morris states the following in respect of the claimant's pregnancy:

> *4.1 Self-evidently, the claimant relies upon pregnancy as the fundamental basis of her claims. She informed me that she had found out that she was pregnant 10 August 2018 when she conducted a pregnancy test at home but that, sadly, she miscarried 19 September 2018.*
>
> *4.2 Given the wording of section 99 of the Employment Rights Act 1996 ("the 1996 Act") and the related Regulations, the Tribunal will need to be satisfied that the claimant was actually pregnant when she was dismissed 6 September 2018. It is not sufficient for these purposes that the claimant had advised the respondent that she was pregnant on that date, albeit that might be sufficient in relation to a complaint of direct sex discrimination based on the same or similar facts.*

4.3 The claimant has no objective evidence (such as from a midwife or her GP) that she was pregnant. That is not to say, of course, that she could not satisfy the Tribunal on the basis of oral evidence that she was pregnant.

In respect of her claim of unfair dismissal in circumstances of pregnancy, Employment Judge Morris stated the following issues:

5.1 Did the claimant inform the respondent that she was pregnant prior to her dismissal?

5.2 Was the claimant pregnant at that time?

5.3 Was the reason (or if more than one reason the principal reason) for the dismissal a reason connected with the claimant's pregnancy?

13. The claimant withdrew her claims in respect of post-employment discrimination and unfair dismissal. She indicated that she wished to continue with her claim of pregnancy-related detriment.

14. Employment Judge Morris also identified time limit issues. If the effective date of termination of her employment was 6 September 2018, her claims were potentially out of time unless the Tribunal agreed to extend time in relation to the pregnancy-related unfair dismissal.

15. At the hearing, Employment Judge Morris made several case management orders, including the following:

    a. The parties were ordered to give mutual disclosure of documents relevant to the issues by list and then copy those documents so as to arrive on or before 31 May 2019. The parties were required to comply with the date for disclosure but, if despite their best attempts, further documents came to light (or were created) after that date, the nose documents were to be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

    b. The respondent was ordered to provide to the claimant a full, indexed, paginated bundle to arrive on 14 June 2019.

    c. The parties were ordered to exchange witness statements so as to arrive on or before 28 June 2019.

16. The case management orders notify the parties of the consequences of non-compliance one of these was as follows:

    3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

17. The parties were also warned that failure to comply with an order for disclosure could result on summary conviction of a fine of up to £1000. The parties were also warned that the Tribunal may make a further order (an "unless order") providing that unless it has complied with, the claim, or as the case may be, the response shall be struck out on the date of non-compliance

without further consideration of the proceedings. The case management orders are dated 28 May 2020.

18. At a date unknown, the parties produced a paginated bundle of documents.

19. The respondent ceased instructing Howes Percival LLP and instructed Feltons. On 15 September 2020 Feltons wrote to the claimant to notify her that they were now acting for the respondent and asked her whether she had legal representation. She did not reply to that letter.

20. On 17 September 2020, Feltons wrote another letter to the claimant asking her about documentation that was to be used at the hearing. In that letter, they invited the claimant to engage with them regarding disclosure generally and exchange of witness statements. They asked the claimant to confirm that the paginated bundle of documents represented all the documentation on the matter. They stated that claimant had not complied with the order to serve her witness statement on or before 28 June 2019. The letter went on to express concern that what was in effect a very simple case was incurring substantial costs and accused the claimant of pursuing a claim that was nothing more than mischief and vexatious. It identified two issues that the Tribunal had to determine: first whether her claim had been brought in time and, secondly, whether at the time of her dismissal, the respondent was aware of her pregnancy. The letter goes on to narrate that the claimant had confirmed that in her view, she was dismissed on 6 September 2018. It referred to her ET 1 and the narrative of her claim in support of that. The documentation in the bundle confirmed that the claimant was dismissed on 6 September 2018 and was paid in lieu of notice. On that basis, her claim was out of time. The letter then went on to refer to paragraph 9 of her particulars of claim where the claimant averred that on 6 September 2018, the claimant was suffering from very bad morning sickness. The claimant is then referred to the respondent's evidence relating to the decision to dismiss her and the respondent suggested that her claim that her dismissal was by reasons of pregnancy could not succeed. She had not mentioned an earlier message sent at 08:07 hours. The documentation in the bundle also showed that the decision to dismiss was made in August 2018. The letter then states:

> *The contemporaneous exchange of messages which appear in the bundle failed to give any indication of your pregnancy. It would appear from the text of those messages conspicuously does not mention pregnancy merely that you are being offered alternative employment.*
>
> *…*
>
> *Your letter of appeal against your dismissal dated 14 September 2018 is wholly focused on performance issues which in view of your having not been employed for two years were wholly irrelevant. You only mention in passing your claimed pregnancy. You have been entirely disingenuous in this matter as you have failed to mention the initial message sent at 08:07 6 September which does not mention pregnancy at all. Even your message timed at 08:18 confirms that you have not told anyone about your pregnancy.*

The letter warned the claimant that if her claim failed, an application would be made to the Tribunal for an order for costs to be made against the claimant. On the same day, a letter was sent to the Tribunal copied to the claimant. No response was received.

21. On 17 September 2020, Feltons wrote to the claimant expressing concerns that they had regarding her schedule of loss. In that letter they referred to page 244 of the bundle which comprised a text message passing between the claimant and a former colleague referring to an insurance policy paying her full wages. They referred to the schedule of loss where she claimed loss of earnings in the sum of £23,881.42. They accused the claimant of making a fraudulent claim given the fact that she was in receipt of insurance payments which she had not disclosed to the Tribunal. She was accused of recovering sums not properly due to her. She was asked to provide full details of the insurance policy and amounts paid to her under that policy. If she did not disclose the information, Feltons reserved the right to refer the matter to the appropriate authorities. She did not reply to that letter.

22. On 7 October 2020, the Tribunal issued an amended notice of hearing by video hearing.

23. Feltons wrote to the claimant on 14 October 2020 inviting her to confirm her position regarding the exchange of witness statements and the issue of costs was reserved. She did not reply.

24. On 14 October 2020, Feltons wrote to the Tribunal expressing their concerns regarding the forthcoming hearing dates. They also stated that they had prepared witness statements on behalf of their client, but these had not been served because the claimant had requested an extension of time. They were concerned about the position concerning the claimant's witness statement which had not been provided. They were concerned that the hearing on 28 October 2020 might not be effective and asked the Tribunal to give a further order requiring compliance by the claimant and, in absence of compliance, that her claim be struck out.

25. Feltons wrote to the claimant again 15 October 2020 expressing their concerns about the fact that the claimant had failed to adduce evidence by reference to the disclosure that had already been made. They also expressed disappointment that the claimant had neither acknowledged receipt nor responded to any correspondence that Feltons had sent to her. They reminded her that this was her claim, and she was obliged to assist in assuring that the matter was fit for trial. They noted that they could not see how her claim could proceed in the absence of any proper evidence from her. They referred to the fact that she had failed to adduce any witness evidence and commented on the fact that her disclosure and her failure to comply with the case management orders dated 10 May 2019. They reserved their position regarding costs. The letter also refers to the case management summary of 10 May 2020 and says:

> *At paragraph 4.2, the Tribunal refers to section 99 of the Employment Rights Act 1996 and the related Regulations. It is specifically stated that the Tribunal will need to be satisfied that the claimant was actually pregnant when she was dismissed 6 September 2018. It is not sufficient for those purposes that the claimant advised the respondent*

that she was pregnant on that date, albeit that might be sufficient in relation to a complaint of direct sex discrimination based on the same or similar facts.

…

We are surprised to note that you have not produced any contemporaneous medical evidence whatsoever to support your claim to have been pregnant.

We note that disclosure of documents has now taken place and a paginated bundle of documents has been prepared by our predecessors. That bundle incorporates the documentation provided by you.

At the hearing 10 May 2019 you indicated to the Tribunal that you had what you referred to as transcripts of telephone calls. You were informed by the Tribunal that those transcripts should be contained in your documents and that you should create a "paper" documents of anything relevant that is saved on your mobile telephone such as text messages, photographs et cetera.

The bundle contains a number of social media exchanges however although reference is made to the telephone calls there are no transcripts provided. Having listened to those telephone calls it is quite clear that your dismissal was for failure to properly perform your role or to comply with the reasonable requirements placed on you by our client.

Paragraph 3.2 clearly indicates that documents to be disclosed include, from you, documents relevant to all aspects of any remedy sought: for example evidence of all attempts to find alternative employment; for example a job centre record, all adverts applied to, all correspondence in writing or by email with agencies or prospective employers, evidence of all attempts to set up in self-employment, all payslips from work secured since dismissal, the terms and conditions of any new employment.

You have manifestly failed to provide any such documentation.

…

Bizarrely, you indicated that you are playing cards close to chest, with respect to suggest that you have engineered the dismissal for your own ends

26. The letter then refers to a number of matters relating to alternative employment and other behaviours from which the only conclusion that can be drawn from the claimant's disclosure of documents is that her claim is entirely fabricated. The claimant was accused of overstating her schedule of loss and of perjuring herself. It concludes by referring her to the consequences of failure to comply with case management orders set out in the Case Management Summary and Orders dated 28 May 2010. She is accused of failing to comply in any meaningful way. The claimant did not reply.

27. On 16 October 2020, Feltons put the claimant on notice that they would make an application for costs if her claims were unsuccessful. They stated that they believed that her claims had no reasonable prospect of success for the following reasons:

    a. Her claim is out of time and she would need the Tribunal's permission to extend time.

    b. To succeed in her claims, she would need to prove that she was pregnant at the relevant time. Notwithstanding an order from the Tribunal and Feltons' request, she had provided no evidence of that.

    c. To succeed in her claims, she would need to prove that the respondent was aware of her pregnancy at the time of her dismissal. It referred to the evidence which is clearly showed that the decision for dismissal was made in August 2018 at which time she does not dispute that her pregnancy was unknown to the respondent.

    d. The evidence also showed that the respondent was unaware of her pregnancy at the time of her dismissal.

    e. Even if the respondent had known of the claimant's alleged pregnancy, of which there was no evidence, the decision to dismiss it was clearly made for performance reasons.

28. The letter went on to say that, in Feltons' opinion, they believed that she had behaved unreasonably. However, they erroneously referred to an offer for settlement under a cover of letter dated 12 August 2019.

29. The letter estimated that their client had incurred £26,000 in costs and estimated that a further £5000-£9000 of costs would be incurred. They urged the claimant to seek independent legal advice and, in the penultimate paragraph of the letter, they offered the claimant the opportunity to withdraw her claims without any costs penalty if she did so by 4 PM on 20 October 2020.

30. The letter invited the claimant to serve her witness statement.

31. In an email dated 21 October 2020, Feltons offered the claimant another opportunity to withdraw her claims without any costs penalty provided that she did so by 3 PM on the same day.

32. The claimant emailed Feltons on 21 October 2020 at 14:16 hours suggesting that an offer of settlement had been made to her for £1000 and she would be seeking an adjournment of the hearing. The claimant did not apply for an adjournment.

33. The hearing was scheduled for 28 and 29 October 2020. However, the claimant was neither present nor represented at the hearing on 28 October 2020. The Tribunal adjourned the hearing. Feltons wrote to the Tribunal on 28 October 2022 to confirm that they would be seeking a strike out order against the claimant. This was copied to the claimant by email on the same day at

13:41 hours. The claimant responded to say that she was speaking with a solicitor and invited the respondent to make an offer to settle.

34. Feltons responded to the claimant at 14:18 hours on the same day indicating that no offer of settlement would be made and warned her that an application would be made for costs occasioned by any adjournment and, in the alternative, for a deposit order to be made.

35. Further emails passed between the parties. In an email dated 28 October 2020 timed at 14:56 hours, the claimant asserted that the only outstanding matter was the exchange of witness statements. The claimant also stated on a subsequent email that her husband was experiencing COVID-19 symptoms. She did not provide any supporting medical evidence.

36. On 29 October 2020, the claimant withdrew her claims. The Tribunal dismissed her claims upon withdrawal.

37. At the hearing 29 October 2020, Ms Compton made an application for costs against the claimant.

Applicable law

38. Rule 75 (1) (a) of the Tribunal Rules gives the Tribunal the power to make a costs order against one party to the proceedings (the "paying party") to pay the costs incurred by another other party (the "receiving party") on several different grounds. The grounds for making a costs order are as follows:

    a. A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof).

    b. A claim or response had no reasonable prospect of success.

    c. A party has breached an order or Practice Direction.

    d. A hearing has been postponed or adjourned on the application of a party.

    e. The Tribunal decides an allegation or argument for substantially the reasons given in an earlier deposit order.

39. A costs order under rule 75 (1) (a) can only be made in respect of the cost that a party to proceedings in respect of the cost that a party to proceedings has incurred while represented.

40. Rule 78 (1) of the Tribunal Rules sets out how the amount of costs will be determined. The Tribunal Rules provide that such an order is in respect of costs incurred by the represented party meaning fees, charges, disbursements, and expenses.

41. It is important to recognise that even if one (or more) of the grounds is made out, the Tribunal is not obliged to make a costs order. Rather, it has a discretion whether or not to do so. As the Court of Appeal reiterated in

Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA, costs in the employment tribunal are still the exception rather than the rule. It commented that the Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal, by contrast, costs orders are the exception rather than the rule. If the Tribunal decides to make a costs order, it must act within rules that expressly confine its power to specified circumstances, notably unreasonableness in bringing or conduct of the proceedings.

42. It is not unreasonable conduct *per se* for a claimant to withdraw a claim. We remind ourselves that in **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA** the Court of Appeal observed it would be unfortunate if claimants were deterred from dropping claims by the prospects of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full hearing and failed. It further commented that withdrawal could lead to a saving of costs and the tribunal should not adopt a practice on costs that would deter claimants from making "sensible litigation decisions". On the other hand, the Court was also clear the tribunal should not follow a practice on costs that might encourage speculative claims, allowing claimants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of costs sanction. The critical question in this regard was whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable.

43. If a party allows preparations for the hearing to go on too long before abandoning an untenable case that party may be liable for costs on account of their conduct.

44. In order to deter an un-meritorious claim, respondents may write to the claimant warning them that they will apply for costs if they persist with the claim. Alternatively, they may apply to the Tribunal for a preliminary hearing if they believe that the claim has no prospects of success. The fact that a costs warning has been given is a factor that may be considered by the Tribunal when considering whether to exercise its discretion to make a costs order. The absence of a warning may be a relevant factor in deciding that costs should not be awarded. A costs warning is not, however, a precondition of making an order. The fact that a party is unrepresented can also be a relevant consideration in deciding whether to award costs against them. However, it is also important to emphasise that the fact that a party is unrepresented is no barrier to an award of costs being awarded against them should the Tribunal think it appropriate to do so. In **AQ Ltd v Holden 2012 IRLR 648, EAT** the EAT said:

> *This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.*

45. In considering whether to make an order for costs, and, if appropriate, the amount to be awarded, the Tribunal may have regard to the paying party's

ability to pay. It is not obliged to do so; it is permitted to do so. The Tribunal is not required to limit costs to the amount that the paying party can afford to pay. However, we remind ourselves that in **Benjamin v Inverlacing Ribbon Ltd EAT 0363/05** it was held that where a Tribunal has been asked to consider a party's means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done. Any assessment of a party's means must be based upon evidence before the Tribunal.

46. We are guided by **Arrowsmith v Nottingham Trent University 2012 ICR 159, CA** where the Court of Appeal held that the Tribunal is not required to limit costs to an amount that the paying party can afford to pay. Indeed, the Presidential Guidance on General Case Management for England & Wales states that a Tribunal may make a substantial order "even where a person has no means of payment". In **Arrowsmith** the Court of Appeal noted that the claimant's circumstances "may well improve and no doubt she hopes that they will". Although these comments were obiter, they suggest that the likelihood of a party's circumstances improving is a relevant factor when assessing the amount of costs in view of a party's means.

47. In **Vaughan v London Borough of Lewisham and Ors 2013 IRLR 713** the EAT upheld a Tribunal's decision to order the claimant to pay 1/3 of the respondents costs even though her share was estimated to be around £60,000 and she could not at the time afford to pay it. The Tribunal referring to Rimer LJ's judgement in **Arrowsmith** accepted that the claimant was not present in a position to make any substantial payment but took the view that there was a realistic prospect that she might be able to do so in due course when her health improved, and she was able to resume employment. The EAT considered that, in principle, there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order is made. Indeed, that was the basis upon which the Court of Appeal proceeded in **Arrowsmith**, albeit that the relevant reasoning in that case was extremely briefly expressed. It had to be remembered that whatever order was made would have to be enforced through the County Court, which would itself consider the individual's means from time to time in deciding whether to require payment by instalments, and if so in what amount. **Vaughan** summarises the questions which the Tribunal must ask on the basis that it was right to have regard to the claimant's means as follows:

    a. Was there a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and thus be in a position to make a payment of cost?

    b. If so, what limit ought, nevertheless, be placed on her ability to take account of means and proportionality.

48. The EAT commented that since affordability is not, as such, the sole criterion for the exercise of the discretion, a "nice estimate of what can be afforded is not essential".

49. In this case, we have been asked to determine costs on the "unassessed basis". This term is commonly used to refer to general costs which must not exceed an upper limit of £20,000 that can be awarded by the Tribunal without

the need for the precise amount to be determined separately by means of a detailed assessment. The Tribunal must state the following:

a. On what basis, and in accordance with what establish principles, it is awarding any sum of costs.

b. On what basis it arrives at that sum.

c. Why costs are being awarded against the party in question

Discussion and conclusions

50. At the case management hearing on 10 May 2020, the claimant knew or ought to have known what steps were required to be made by her and when. The case management orders issued by Employment Judge Morris were very clear. Furthermore, the claimant should not have been under any misapprehension about when witness statements were to be exchanged, her duties of disclosure, and the consequences of not complying with the Tribunal's orders. Indeed, as we have already commented, having read the claimant's submissions and other correspondence, she is clearly intelligent and articulate.

51. The claimant made a series of serious allegations against the respondent. The respondent denied those allegations and had no alternative but to file a response. Had it not done so, the claimant would have been entitled to apply for a judgment in default which could have led to a substantial award of compensation against it as set out in in her schedule of loss. The potential consequences for the respondent were not only financial but also reputational.

52. Having made her claims, it was incumbent upon the claimant to pursue them and to comply with the overriding objective. Central to that was the requirement to comply with the Tribunal's orders and to cooperate with the respondent's representatives. It is axiomatic that a respondent is entitled to know the case that is being made against it and this is something that is not simply limited to the particulars of claim but also the evidence that is relied upon by a claimant to prove their claim. Evidence comprises documents and witness statements. There is a duty to disclose documents that are relevant to the issues arising from the claim. In the absence of witness evidence or where disclosure is deficient, a respondent cannot properly prepare its defence and is unfairly prejudiced as a consequence. The claimant failed to comply with her obligation to produce her witness statement as ordered by the Tribunal. She also did not disclose documents relevant to her pregnancy despite being told to do so by the Tribunal and being asked to do so by Feltons. These were highly relevant to the question of whether the claimant was pregnant at the time when she was dismissed and whether the respondent knew about her pregnancy. Indeed, they go to the heart of her claim. Furthermore, in the absence of a witness statement, the respondent would not know what the claimant was going to say in her evidence. How could it be expected properly to prepare things such as cross examination to challenge her claims in the absence of her witness statement?

53. If the claimant was in difficulties concerning meeting her obligation to comply with the Tribunal's orders she should have applied for a variation. We have not seen any evidence of that happening.

54. When Feltons were retained by the respondent, they quite properly reviewed the file and identified concerns about the claimant's failure to serve her witness statement and deficiencies in her disclosure of documents. Solicitors must do that when they are instructed. They considered that her claims were unmeritorious which warranted an application for strike out and/or a deposit order. They also conducted a review of the documentation and warned the claimant that if she were unsuccessful with her claim, they would seek costs. They did this several times. They also invited the claimant to withdraw her claims by a specified time. If she did this, they would not seek costs. That was a reasonable and, indeed, generous offer. The claimant did not withdraw her claim within the time limit they specified but went on to withdraw her claim on 29 October 2020 when she was faced with an application for strike out.

55. The claimant has suggested in her submissions that she suffers from medical conditions which adversely impacted on her ability to conduct the litigation. She has not provided any supporting evidence to substantiate that. She did not attend the hearing on 28 October 2020 because of her partner's alleged ill-health but she did not provide supporting medical evidence concerning her partner's Covid-19 symptoms or any supporting evidence regarding difficulties in obtaining childcare on 28 October 2020.

56. The claimant has suggested that she does not have the means to pay costs of £4850. She states that she lives on her overdraft and has no savings and only debt on credit cards and that she has no car or mortgage. She has not provided any supporting evidence regarding her means. She could have provided bank and credit card statements to substantiate her position. She also states that she receives maternity pay of £669.60. We note that in paragraph 19 of her written submissions, she says she is working for one of the largest High Court enforcement companies. She is earning an income which suggests that she would have the means to pay the respondent's costs. It would not be unreasonable to infer that her income with her new employer is comparable to what she enjoyed earning from the respondent as they both operate in the same industry. We note that she claims in her ET1 that her net monthly pay from the respondent was £2454. This suggests a reasonable prospect of the claimant being able to pay costs of £4850 (the equivalent of two months' net pay). Even if we are incorrect about the level of her income, she has secured another job suggesting that her prospects for the future have improved and she has an actual level of earnings or an earnings potential to pay the sum claimed in costs. Furthermore, should the order be enforced through the County Court, it will consider the claimant's means in deciding whether to require payment by instalments, and if so in what amount.

57. Having looked at the evidence, we believe that the claimant has behaved unreasonably in the conduct of her litigation against the respondent. She withdrew her claims literally at the very last moment. She might have thought that she could avoid a possible costs penalty in withdrawing her claim at such a late stage in the litigation. That would be a false assumption because costs are incurred well in advance of the hearing proper. She allowed the respondent to continue preparing for the hearing far too long before abandoning her claims. She knew what the respondent had already incurred

in costs and what they were likely to incur if she did not withdraw her claims by 21 October 2021 and yet she persisted.

58. We cannot ignore the fact that the claimant had previously been invited to withdraw her claims by Feltons. On at least two occasions, she was presented with the opportunity to do so **without any costs consequences**. She simply ignored those offers and yet she obviously intended to withdraw her claims because that is what she ultimately did. We do not understand why she did not do that earlier when invited by Feltons to do so. Her behaviour in this regard was unreasonable and necessitated further preparation with attendant cost by the respondent.

59. The claimant failed to comply with the Tribunal's order regarding her witness statement and made deficient disclosure of documents that were central to the issue of her pregnancy. She did not make any application to the Tribunal to vary the timetable to give her more time to prepare and serve her witness statement or to make further disclosure. She knew or ought to have known that was an option available to her given the contents of the case management orders issued by the Tribunal 10 May 2020.

60. There may well have been parallel without prejudice discussions regarding a possible settlement. That is commonplace in litigation. However, that did not justify the claimant disregarding the case management order to prepare and serve her witness statement and to make full disclosure. Without prejudice discussions operate in parallel rather than instead of ongoing litigation. They cannot be relied upon as a pretext for disobeying the Tribunal's orders and failing to prosecute a claim. For as long as the claim was subsisting, the respondent had to continue to prepare for the hearing and incur costs. If it failed to do that, it would have been in breach of the Tribunal's orders and would have placed itself at risk of having its response struck out or losing at a final hearing through lack of adequate preparation.

61. The fact that the claimant was unrepresented does not necessarily mean that she should be exonerated in terms of her unreasonable behaviour. We have made an allowance for the fact that she is unrepresented but, ultimately, this does not justify excusing her behaviour and making no costs order. She is not immune to a costs order being made. Feltons engaged with the claimant in a robust but fair manner, as soon as they were instructed, they reviewed the claim, took the view that it was un-meritorious. They have a professional duty to act in their client's best interests and to protect its position in relation to costs. They were dealing with a claimant who did not comply with the Tribunal's orders and did not meaningfully engage with Feltons in respect of fundamental aspects of her claim (i.e. her witness evidence and deficiencies in her documentary evidence). They recognised that the claimant was not represented and urged her to take independent legal advice. They warned her that they would seek costs. The claimant chose to ignore those warnings and, ultimately, was the author of her own misfortune.

62. Finally, we are conscious of the fact that the respondent is only seeking a relatively small percentage of its overall costs (which are in excess of £20,000) that it has incurred in defending these proceedings. These are restricted to the period of September to 29 October 2020.

63. For all the foregoing reasons, we conclude that it would be reasonable to award £4850 in costs on an unassessed basis in respect of the claimant's unreasonable behaviour.

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Employment Judge Green

Date 1 March 2021