Case No: 1304471/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss R Taylor

Respondent: Jaguar Land Rover

HELD AT Birmingham **ON** 22 January & 4 February 2021

EMPLOYMENT JUDGE Hughes **MEMBERS** Mr TC Liburd
Mrs RJ Pelter

Representation
For the Claimant: Miss R White, Counsel
For the Respondent: Mr T Sheppard, Counsel

JUDGMENT having been sent to the parties on 5 February 2021, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Reasons following a cost hearing.

1 This tribunal reconvened to consider the claimant's application for costs on 22nd January and 4th February 2021. We decided to order the respondent to pay 25% of the claimant's costs, to be agreed by 18th February 2021, failing which to go for a detailed assessment. We gave oral reasons. The claimant's representative requested written reasons. Some parts of these reasons refer to the reasons we gave on liability in this case and we shall merely summarise those here because they are already on the website.

2 The application for costs essentially fell into two parts. Firstly, the claimant applied for the whole costs of the legal proceedings, although this was modified by the time of the hearing before us because Miss White of Counsel quite properly accepted that part of the respondent's defence of the claim could not be said to be unreasonable. The second application was in respect of specific costs incurred at various points in the litigation, for instance the need for a case management discussion about disclosure before Judge Dimbylow, which the claimant said

would not have been necessary if the respondent had provided proper disclosure. For these purposes it is convenient to think of the two applications for costs as been the macro application i.e. relating to the bulk of the proceedings and the micro application i.e. relating to various aspects of preparation for the hearing.

3 The claimant's representative submitted that costs should be awarded on an indemnity basis. The argument was that the respondent should have known that its defence of the claims was misconceived and or had no reasonable prospect of success by reference to Rule 76(1) (b). For the sake of completeness we should just point out that no arguments were put forward as to the respondent's ability to pay, perhaps unsurprisingly.

4 Essentially therefore, in relation to the macro application, the issue was whether there were grounds to award costs and, if so, whether to exercise our discretion to do and, if so, the amount. The claimant's argument was that at the point when the respondent submitted the Response Form, it knew and/or should have known that it had no evidence to counter many of claimant's claims. The claimant's representative pointed to the fact that the Response Form set out a defence which was the same as was argued before us. There had been one amendment to the defence but that was simply to add an argument pertaining to Section 7 of The Equality Act 2010 concerning whether the claimant did in fact have the protected characteristic of gender reassignment. Apart from that amendment, the respondent had not further amended the response or provided any further detail.

5 It was the claimant's position that in relation to, for example, the acts of harassment pleaded in detail by the claimant in her Claim Form, the respondent in its response acknowledged that it was unable to defend those claims. Specifically, the respondent clarified that it was unable to state whether or not the acts of harassment occurred. The claimant's representative submitted that the respondent had made reference to all of the witnesses who were called at the hearing before us in the Response Form, and consequently could be presumed to have taken their instructions on these matters. It was also pointed out that the respondent company has the benefit of an internal legal team as well as being represented by external solicitors. Finally, it was pointed out that this was a case where there was substantial documentation in relation to the acts complained of and consequently the respondent was in a good position to understand the case against it and to be clear that it would not be able to defend many of the allegations.

6 The claimant's case was that the discrimination element of the claim was the major part of the case, and the constructive unfair dismissal claim was to a large extent parasitic on that. Miss White also pointed out that at the time that the Response Form was filed, the respondent had in its possession substantial amounts of documentation in relating to a grievance brought by the claimant and an appeal against the outcome of that grievance. The claimant's representative accepted that we had to judge the situation as it was at the time and not after dust had settled, but said that this was a case where it was entirely possible to do so for the reasons stated above.

7 The claimant's representative submitted that the documents painted an extreme picture in the workplace in relation to sustained and serious harassment of the claimant, and that the respondent should have been well aware that there was no way to meaningfully defend those claims. She also pointed to the fact that

the respondent has a very big Human Resources Department and has both local central Human Resources Officers. It was argued that it must have been quite plain to the respondent that many of the allegations brought by the claimant would succeed and that effective action to protect her was not taken despite managers and HR being aware of the situation. In support of her submissions, the claimant's representative made reference to numerous paragraphs of our reasons on liability (see paragraph 49 written submissions). It is unnecessary to reproduce those findings here as we have adequately summarised them.

8 The claimant's representative acknowledged that the Section 7 Equality Act 2010 argument had merit (as we had found), but pointed out even if we had decided that the claimant did not have a protected characteristic, the pleaded acts of harassment which the respondent could not defend, would have gone to the question of constructive unfair dismissal. Ultimately, we did find that the claimant had a protected characteristic and was badly harassed because of it.

9 Miss White also pointed out that the respondent had relied on the statutory defence in the Response Form and continued to do so in final submissions at the end of the case. In the circumstances, plus the fact that the respondent's managers were wholly unaware of the respondent's own procedures, Miss White argued that the statutory defence was unsustainable. It is fair to say that we remarked on the continued reliance on this point with surprise in out liability reasons given that the way the evidence gone (specifically the respondent's witnesses all conceding that the claimant had been subject to harassment and they failed to protect her). In fact, we found that the statutory defence argument was totally without merit.

9 The claimant's representative submitted that although the respondent had criticised the amount of costs claimed which is of the order of £93,000, the respondent had failed to disclose details of its own legal costs. It was suggested that if the respondent had approached the case in a reasonable manner the claimant's costs should have been of the order of 10 or 20% of the amount incurred i.e. of the order of £9,000 to £18,000. The claimant's representative argued that the respondent was treating a no costs jurisdiction with a lack of respect and that the claimant had properly incurred the costs which she was entitled to do.

10 The Employment Judge questioned the claimant's representative as to the basis of an application for indemnity costs pointing out that that indemnity costs are awarded in the County Court applying the same high threshold as would apply to ordinary costs in the Employment Tribunal. This is why costs awards in the Employment Tribunal and indemnity costs awards in the County Court are unusual. The Judge drew the attention of both representatives to the one case that she was aware of on the question of indemnity costs in the Employment Tribunal – Howman v Queen Elizabeth Hospital EAT/0509/12.

11 One further matter which was canvassed in the claimant's written submissions was the proposition that in some way the claimant's award for costs could be increased on a discretionary basis to reflect the fact we had found that there was a case for awarding aggravated damages. In fact, the remedy hearing settled for virtually the whole sum claimed in the costs schedule and did include an element of £10,000 for aggravated damages. The Employment Judge said that she was unable to accept that there was any basis at all to increase costs as a result of conduct by the respondent such as would merit aggravated damages and it

appeared that Miss White, quite sensibly in our view, was not keen to pursue this point.

12 The respondent's representative firstly pointed out that any award for costs is intended to be compensatory and not punitive, a principle which we entirely accepted. He also pointed to the fact that the settlement figure had included an element in respect of aggravated damages and that it would not be proper to carry that forward through to a costs decision. We also agreed with that argument.

13 In relation to the macro question of whether the claimant was right to argue that there had been unreasonable conduct of the proceedings, Mr Sheppard relied upon the case of Radia v Jefferies International Ltd EAT/0007/18. That authority makes it clear that the test as to whether the defence (or the claim as the case may be) has a reasonable prospect of success or no reasonable prospect of success must be by reference to information known or reasonably available at the start of the proceedings. He submitted that the costs application could not and should not apply to any actions taken before the amended Response Form was submitted (i.e. the amended grounds which added the Section 7 Equality Act 2010 point).

14 The respondent's representative submitted that it was proper for us to look at the available evidence at that time and to take a practical approach as to what the respondent would and would not have known. He argued that at the point when the Response Form was put in the respondent would not have interviewed all potential witnesses and would have needed clearer instructions.

15 Mr Sheppard relied upon paragraph 223 of our liability reasons in which we accepted that there was an arguable Section 7 point. He argued that if the respondent had succeeded in that point, then it would have knocked out all of the discrimination claims based on the protected characteristic of gender reassignment. He also submitted that the respondent had a valid defence to the constructive unfair dismissal claim, specifically pointing to the fact that there was an affirmation argument because the claimant had given an extended period of notice and then sought to retract her notice. He further submitted that there was live argument as to whether the acts complained of as amounting to harassment and discrimination were part of a continuing course of conduct. In addition, he argued that it was proper for the respondent to look at whether the claimant's protected act had any causal connection with the alleged detrimental treatment of refusing to reinstate the claimant and/or allow her to retract her resignation.

16 In summary, the respondent's argument was that the final hearing would have been of a similar duration in any event and/or if there had been unreasonable conduct, an award of 80 or 90% of the costs would be excessive. The respondent's representative suggested that it should be no more than 50% of the costs, while acknowledging that was a matter for our discretion.

Discussion and conclusions

17 Firstly, we shall deal with the question of indemnity costs. It is very clear from the case of Howman (see above) that for indemnity costs to be awarded in the Employment Tribunal the conduct of the paying party must in some way take the situation away from that which pertains in the very limited number of Employment Tribunal cases where it is decided that there are grounds to make a cost order.

18 Both representatives agreed the relevant legal principle was as summarised by the Employment Judge (see above). Consequently, unlike the County Court where indemnity costs are awarded by reference to a threshold which is akin to that which pertains to ordinary costs applications in the Employment Tribunal, in our judgment there must have been something heinous or utterly unreasonable for an Employment Tribunal to consider awarding indemnity costs. The possibility of doing so was not, as we understand it, completely ruled out by Howman**,** but we thought it could be fairly described as theoretical. We simply did not accept that theoretical possibility applied to this case, and we wholly rejected the argument that costs should be awarded on an indemnity basis.

19 It is possibly convenient to next deal very shortly with the argument that any costs award should in some way be uplifted to reflect the fact that we had been minded to award aggravated damages in this case. We could not understand the legal basis of that submission and we thought it likely that the claimant's solicitor was keener to pursue it than the claimant's counsel. There is simply no legal merit in that proposition at all. The reality is the case has settled and a substantial sum for aggravated damages is included in the amount that the case has settled for. To award additional costs would be punitive and wrong in principle.

20 Having dealt with those preliminary points, we shall now with the macro costs point. There are number of things which we thought were significant. The first was that the claimant's representative was quite right to argue that the defence set out in the grounds of resistance was the same defence as was run in the hearing (with the exception of the amendment to add the Section 7 Equality Act 2010 point). There were also a number of features we thought significant. In paragraph 6 of the grounds of resistance, the respondent made reference to specific and detailed harassment allegations set out in paragraphs 10, 11,13, 17, 18, 22, 24, 25, 27, 29, 30, 34, 37, 41, 42, 43, 48, 49 and 51 of the particulars of claim. The respondent said that it could not categorically state whether the alleged incidents took place; that some of the alleged perpetrators were not identified at all; and that some were not identified sufficiently to enable the respondent to know for certain who they were. The respondent added that it would appear that some were not employees or workers of the respondent. Dealing with these points briefly, firstly it is right to say that the claimant set out in some considerable detail the alleged acts of harassment by employees of the respondent and contractors for the respondent. It is also right to say that the claimant did not provide the names of the alleged perpetrators but did provide a considerable amount of information. Furthermore, the respondent's witnesses who appeared at the hearing before us were all named in the Response Form and each of them confirmed that they accepted completely that the acts complained of had occurred. The real issue, as became clear at the hearing, was that the respondent had singularly failed to take any action in order to prevent truly unacceptable conduct occurring in the workplace. It did seem to us that there was strength in the argument that at the point when the Response Form was submitted, the respondent must have known that those allegations were not defensible as a matter of fact.

21 Furthermore, before resigning in circumstances amounting to a constructive unfair dismissal, the claimant had submitted a grievance and an appeal, both of which generated a substantial amount of documentation. The people who heard the grievance and appeal were witnesses (and named in the Response Form);the same comments apply to people who contributed evidence to those investigations.

Consequently, and unlike in some cases, at the time of submitting the Response, the respondent was well placed to take a view as to both the veracity of the claimant's allegations, and as to steps which had not been taken to prevent such things happening to the claimant. Consequently, it did appear to us that this aspect of the defence was unreasonable.

22 Another paragraph we wish to highlight is Paragraph 26 of the grounds of resistance where it is stated that the respondent denied that the alleged conduct constituted harassment because of the claimant's transgender reassignment or status and: "Further, alternatively, the respondent does not admit the alleged conduct had the purpose of effect of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or otherwise offensive environment … it was not reasonable for the claimant to regard the conduct as having that effect because she must expect some elements of surprise when she stood by colleagues and/or strangers who had little or no warning of her newly acquired or professed status".

23 It appeared to us that given the substance of the allegations, this argument was wholly unsustainable and rather unappealing. They were not allegations of conduct having the "effect" of harassing someone – they were very serious allegations of conduct with a purpose of being offensive, degrading and humiliating. Consequently, it was unreasonable for the respondent to deny such conduct met the statutory definition and/or that the claimant should have been "expecting it" or was unduly sensitive. Therefore, we concluded that this aspect of the defence was also unreasonable and the respondent should have known that at the relevant time.

24 As already noted the respondent argued the statutory defence in this case which we considered to be a totally unreasonable and unsustainable argument. However, it is fair to say that it is difficult to see how that would have increased the length of the hearing in any material way.

25 We did not think it unreasonable for the respondent to defend the constructive unfair dismissal claim by reference to the affirmation point. What was surprising to us was that the respondent was unable to tender a witness who could provide any explanation for why the claimant was not allowed to retract her resignation. This clearly was a live issue in the case, but in the hearing before us all of the potential decision makers denied that they had taken the decision. No witness covered this point in their witness statement, and a number of witnesses had to be questioned at some length about who had made the decision and what the reasons were. That factual lacuna went to our finding of liability on the victimisation claim, but also it did seem to us that it was unreasonable not to call a witness who could cover the point. The respondent's failure to do so extended the length of questioning by some amount.

26 We were mindful that we had to look at the respondent's state of knowledge when the Response was submitted (by reference to Radia) but, as can be seen from the above analysis, aspects of the Response were unreasonable by reference to that point in time, and continued to be so.

27 In summary we did consider that certain aspects of the defence were unreasonable and would have inevitably led to further case preparation being undertaken and potentially would have lengthened the hearing by some amount.

On the other hand, we had in mind that many of the allegations which (in the Response Form) the respondent said could not as a matter of law amount to unlawful harassment, were material to the constructive unfair dismissal claim and so would have had to be heard unless taken as agreed facts.

28 In summary we decided that there were grounds to award costs because the conduct of the proceedings was unreasonable to some extent. We exercised our discretion to award costs and we decided that the appropriate amount was 25% taking into account all of the factors I have mentioned and doing our best not to judge the matter with hindsight.

29 We shall very briefly turn to the micro costs application which had really fallen away in any event as a result of our decision above. We read through extensive amounts of email exchanges between the parties solicitors relating to disclosure and discovery. We noted that there was a hearing before Judge Dimbylow at which the claimant's request for disclosure was narrowed down considerably. This was a routine case management matter and properly merited a Case Management discussion which achieved progress when the extensive email exchange had not done. We noted that some of the exchanges between instructing solicitors were somewhat intemperate in nature but sadly, in our experience, that is not unusual. It is also right to say that although there were ultimately six preliminary hearings, none of the Judges who presided over them suggested that the hearings were unnecessary, or that at some point costs might be awarded. In summary, it seemed to us that the matters relied upon in respect of the micro costs application were simply part of the routine cut and thrust of litigation and it could not be said that any of the micro issues met the threshold for costs.

Employment Judge Hughes
20 April 2021