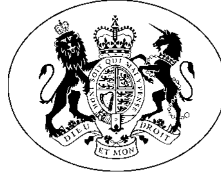
Case Number: 2200385/2020 **(V)**



EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A. Williams	**v**	**The Westbury Hotel Limited**

Heard at: London Central (by video) **On**: 26 March 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Ms M. Tutin, of Counsel

For the Respondent: Mr J. Mitchell, of Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The Respondent:
   a. has acted unreasonably in the way that the proceedings have been conducted by it, in particular by failing to disclose all relevant documents and by giving incomplete evidence to the Tribunal, and
   b. was in breach of the Tribunal's order by failing to disclose all relevant documents by the due date.

   and is ordered to pay to the Claimant a sum of **£6,718** in respect of the costs incurred by the Claimant.

2. The Tribunal does not consider that the Respondent's response had no reasonable prospect of success.

REASONS

Background and Issues

1. This case was heard on 16,17 and 18 November 2020. On 10 December 2020, the parties were sent my reserved judgment dealing with the liability issues. I found that the Claimant was unfairly dismissed by the Respondent and directed that the issues of compensation be determined at a separate remedies hearing.

2. The remedies hearing had initially been listed for 21 December 2020, however due to the closure of the Tribunal's offices on 18 December 2020 for health and safety reasons, the hearing had to be postponed.

3. On 7 January 2021, the Claimant's solicitors made an application for a costs order against the Respondent pursuant to Rules 76(1)(a)-(b) and 76(2) of the Employment Tribunals Rules of Procedure 2013 (the "ET Rules"). The costs order is sought on the grounds that the Respondent and/or its representatives have acted unreasonably in the way that the proceedings have been conducted, its response had no reasonable prospect of success, and/or it is in breach of an order.

4. On 15 January 2021, the Respondent's solicitors wrote to the Tribunal disputing that there were grounds to award costs and asking the matter to be dealt with at the remedies hearing.

5. The remedies hearing took place on 26 March 2021. Ms M. Tutin appeared for the Claimant and Mr J. Mitchell for the Respondent. They both made cogent and helpful submissions to the Tribunal, for which I am grateful.

6. I have given my oral judgment on the remedy issues at the end of the hearing. I have decided to reserve my judgment on the costs order application. This judgment deals only with the costs order application. The judgment on the remedy issues will be sent to the parties separately.

7. The Claimant submits that the Respondent and/or its representatives have acted unreasonably in failing to comply with its disclosure obligations throughout the proceedings, and their unreasonable conduct has caused the Claimant to incur considerable expense, which could have been avoided. The Claimant argues that if the Respondent had provided proper disclosure, and the documents, which were disclosed by the Respondent only during the liability hearing, (the "Non-Disclosed Documents") had been disclosed pursuant to the Tribunal's case management orders in advance of the liability hearing, the liability hearing would not have been required. He says, that is because those documents were key evidence, which led the Tribunal to find that the Claimant's conduct was not the real reason for his dismissal. Therefore, had the Non-Disclosed Documents been made available to the Claimant in advance of the liability hearing, it would have been clear that the Respondent's case on liability had no reasonable prospect of success.

8. The Claimant submits that the failure is even more egregious given that the Claimant's solicitors specifically sought disclosure of various categories of documents, (and the Non-Disclosed Documents clearly fall within a category of the documents requested), but were told by the Respondent's solicitors that the Respondent was "*not in control/possession of any documents requested*".

9. The Claimant further argues that the Respondent unreasonable conduct was further aggravated by the Respondent's witnesses' failure to provide a complete and honest recollection of events in their written witness statements and when giving oral evidence.

10. Further and in the alternative, the Claimant submits that the Respondent has acted unreasonably by pursuing a defence with no reasonable prospect of success. He argues that based on the content of the Non-Disclosed Documents and the admissions made by the Respondent's witnesses on cross-examination, the Respondent knew or ought to have known that there was no reasonable prospect of the defence on the liability issues

succeeding, because these matters were or should have been known to the Respondent and his representatives in advance of the liability hearing.

11. While the Claimant accepts that the Tribunal found that he had contributed to his dismissal by culpable conduct to the order of 30%, this, he says, is a matter which pertains to remedy, rather than liability.

12. Finally, as a further alternative ground, the Claimant submits that the Respondent is in breach of the order to disclose all relevant documents, and that is a significant breach, for which no explanation has been provided, and has resulted in a waste of costs for the Claimant and Tribunal.

13. The Claimant seeks a costs order of £20,000 (maximum the Tribunal can award under Rule 78(1)(a) of the ET Rules). He submitted a schedule of costs in the total amount of £23,784.

14. The Respondent denies that it has acted unreasonably in the conduct of the proceedings, or that its defence had no reasonable prospect of success, or that it was in breach of the Tribunal's orders.

15. It submits that regard should be given to the fact that the disclosure took place in May 2020 when the Presidential Guidance in Connection with the Conduct of Employment Tribunal Proceedings during COVID-19 Pandemic (the "Presidential Guidance") were in place, and the Respondent, its solicitors and the Tribunal system were impacted by the first lockdown. In those circumstance, the Respondent argues, many practitioners considered that all directions in accordance with the Presidential Guidance were arguably stayed. Further, it was Claimant's solicitors, who sought to extend the deadline for disclosure, and in the then prevailing circumstances the Respondent's solicitors' approach to disclosure was reasonable. In any event, any additional costs that might have arisen, are administrative costs which are not unreasonable, in the circumstances when the Respondent was closed for business and its witnesses no longer working for it.

16. The Respondent denies that it was in breach of its disclosure obligations or otherwise acted unreasonably by not disclosing the Non-Disclosed

Documents in advance of the liability hearing. It says that the Non-Disclosed Documents "*would not have been considered relevant to the claim before the solicitors*". It admits that these matters only came to light during the cross-examination of the Respondent's witnesses.

17. The Respondent's also disputes that a costs order can be properly made against it on the grounds of how its witnesses gave evidence to the Tribunal. It argues that when giving evidence they were no longer employees of the Respondent and the Respondent had no control over them. In any event, it submits, although in my liability judgment I found them to be evasive and questioned their credibility, I did not make a specific finding that they lied in their evidence. Further, it was their evidence that helped the Tribunal to make its findings and the decision, and they were willing to produce documents to assist the Tribunal. Therefore, the Respondent argues, the relevant standard for making a costs order on that basis is not met.

18. The Respondent further argues that the consequences of its witnesses' evasiveness and inconsistency in their evidence have already befallen the Respondent by it losing the case. As to the disclosure issues, the nature, gravity and the effects of those matters are relatively minor to merit a costs order.

19. Finally, with respect to the "no reasonable prospect of success" ground, the Respondent argues that it was entitled to put its case to the Tribunal for determination. It points out that the Claimant did not make any strike out application on the ground that the Respondent's defence had no reasonable prospect of success and this should be telling, because this was a factual dispute that required judicial determination. Further, it argues, the Respondent was successful in showing that the Claimant had contributed to his dismissal, which further supports the Respondent's argument that it was proper to place the matter before the Tribunal.

20. As to the quantum, the Respondent submits that there is no correlation between the sought sum of £20,000 and costs incurred as a result of the alleged unreasonable conduct. Therefore, it says, this appears to be an

attempt to punish the Respondent for seeking to defend its decision to dismiss the Claimant.

21. To determine the application, I need to answer the following questions:

(i) Has the Respondent acted unreasonably in the way it dealt with its disclosure obligations, in particular, by failing to disclose the Non-Disclosed Documents before the liability hearing?

(ii) Was the Respondent in breach of the Tribunal's order by not disclosing the Non-Disclosed Documents before the liability hearing?

(iii) Has the Respondent acted unreasonably in the way its witnesses gave evidence to the Tribunal?

(iv) Considering the matters and event which came to light because of the content of the Non-Disclosed Documents and the admissions made by the Respondent's witnesses at the hearing, did the Respondent's defence have no reasonable prospect of success?

(v) If I answer "yes" to one or more of the above questions, should I exercise my discretion and make a costs order against the Respondent, considering the nature, gravity and the effect of the conduct in question?

(vi) If I decide that a costs order is appropriate, how much costs should be awarded against the Respondent, considering causal connection between the conduct in question and costs incurred?

Findings of Fact

22. In this judgment I shall set out my findings of fact in relation to the issues pertinent to the costs order application. My findings of fact and conclusions on the liability issues are set out in my liability judgment of 10 December 2020. I shall refer to those where necessary.

23. The Claimant presented his claim on 31 January 2020, and on 7 February 2020 the Tribunal sent the claim form to the Respondent together with the standard directions, which set the deadline for disclosure of documents as 20 March 2020.

24. On 19 March 2020, the Claimant's solicitors (Fox Williams LLP) wrote to the Respondent's solicitors (Nash & Co Solicitors LLP) seeking to agree an extension of the disclosure deadline to 20 April 2020 on the grounds that the Respondent's response had been received only on 13 March 2020, there was a pending application to postpone the hearing date, and in light of the Presidential Directions it was anticipated that the hearing date would be moved and the parties would need to agree new directions.

25. On 16 April 2020, the Respondent's solicitors replied agreeing to the extension.

26. On 20 April 2020, the Claimant's solicitors wrote again to the Claimant's solicitors referring to the announcement from the Presidents of the Employment Tribunals that any case management directions which were due to take place between 23 March and 26 June should no longer apply and informing the Respondent's solicitors that they would not be ready to exchange documents on that day.

27. On 22 April 2020, the Respondent's solicitors replied stating that the general consensus was that judges still expected the parties to comply with the directions as far as possible and suggesting that disclosure should take place before the case management telephone hearing listed for 19 May 2020.

28. On 7 May 2020, the Claimant's solicitors wrote to the Respondent's solicitors referring to the data subject access request (the "DSAR"), which the Claimant had made earlier, and in response to which the Respondent had disclosed certain documents. The DSAR was handled by another firm of solicitors, Druces LLP. The Claimant's solicitors enquired whether the documents disclosed pursuant to the DSAR would be included in the Respondent's list of documents. They also proposed to exchange disclosure lists on 13 May 2020.

29. On 07 May 2020, the Respondent's solicitors replied agreeing to the exchange date, but saying that there were not aware of the DSAR, and although they would now request the Respondent to provide the DSAR documents there would be insufficient time for them to review those and include in the Respondent's list of documents for the exchange on 13 May 2020. They suggested that the Claimant should add relevant documents to his list.

30. On 7 May 2020, the Claimant's solicitors replied expressing their surprise that the Respondent's solicitors were not aware of the DSAR documents and saying that although they would include relevant documents in the Claimant's list, it was the Respondent's obligation to review and disclose all documents relevant to the case. In particular they pointed out that it was "*inevitable that data relevant to the proceedings would have been discovered as a result of his DSAR and such data ought to have been provided to you for the purposes of disclosure*", and requested that the Respondent undertook "*a thorough search and that all documents are provided to you and disclosed where appropriate*."

31. In concluding, they expressed a concern that the Respondent was not complying with its disclosure obligations, which was prejudicial to the Claimant's prospect to have a fair hearing and sought the Respondent's solicitors' "*prompt assurances that your client understands its disclosure obligations and summarise the steps it has taken to search for and obtain relevant documents*", and reserved the right to draw this matter to the attention of the Tribunal at the preliminary hearing "*and to make an application for costs at the appropriate time"*.

32. On 13 May 2020, the parties exchanged their lists of documents. The Respondent's list did not include any DSAR documents. The Respondent's solicitors explained that by them not having time to review the DSAR documents. They stated that they would update the list to include the relevant DSAR documents once reviewed.

33. On 11 June 2020, following the exchange of the lists, the Respondent's solicitors requested copies of some documents from the Claimant's list. The Claimant's solicitors replied on 23 June 2020 providing the documents and again expressing concerns as to the adequacy of the disclosure exercise, because the requested documents had been disclosed to the Claimant pursuant to his DSAR.

34. On 24 June 2020, the Claimant's solicitors wrote again to the Respondent's solicitors referring to a document on the Respondent's list (an e-mail from Gustavo Rodrigues to Liliana Gutierrez dated 20 August 2019 with an attached incident report) and seeking disclosure of various categories of documents, including "*All security and/or incident reports and/or any other documented material relating to private events held in the restaurant by our client at any time during the entire period he was an employee of the Hotel*".

35. They also sought an explanation as to why those documents were not on the Respondent's list, and again raised concerns about the Respondent's compliance with its disclosure obligations and sought a confirmation that the Respondent's solicitors had advised the Respondent "*of its disclosure obligations and the sanctions in the event it is found to have breached them*".

36. Through July 2020, there were further email exchanges between the parties' solicitors in relation to disclosure of the requested categories of documents, during which it was agreed that the Respondent's solicitors would send all such documents by 14 August 2020.

37. On 6 August 2020, the Claimant's solicitors wrote to the Respondent's solicitors reminding them of the agreed deadline and asking to confirm that they did not anticipate any issue with complying with it. They warned that they would seek an appropriate order from the Tribunal if the Respondent failed to comply.

38. Having received no reply and no documents, on 18 August 2020, the Claimant's solicitors wrote to the Respondent's solicitors again in the following terms (my underlining):

You have missed the extended deadline of 14 August 2020 for providing the disclosure documents we requested on 24 June. It is disappointing that you have neither warned us that you would fail to meet this deadline nor provided an explanation as to why you have missed a deadline for which you gave us assurances you would definitely meet.

The failure by you and the Respondent to provide us with these crucial disclosure documents is now causing significant prejudice to the Claimant and risks affecting the Tribunal hearing itself. The trial bundle has to be submitted by 7 September and witness statements exchanged by 5 October. The trial bundle is now due in 20 days and we have not yet received all the relevant documents.

We have on several occasions expressed our concern about the way disclosure, and the case in general, has been conducted by your firm and the Respondent. Our client has clearly been, and continues to be, prejudiced by your conduct and as a consequence has been unable to properly prepare his case. This is unacceptable and he reserves his right to draw this unreasonable conduct to the Tribunal in due course.

If we do not have a full response from you and disclosure of the documents by close of business tomorrow we intend to apply to the Tribunal immediately and without further notice to you for an order for specific disclosure. If this is necessary we will also be seeking a costs order.

39. On 19 August 2020, the Respondent's solicitors replied saying that they were "*still taking instructions from my client in relation to this*" and "*hoping to have a further call*" with the client, following which they would update the Claimant's solicitors.

40. On 26 August 2020, the Claimant's solicitors wrote to the Respondent's solicitors again in the following terms (my underlining):

Specific disclosure

We note that we have not yet heard from you in relation to the specific disclosure documents which we requested from you on 24 June 2020 and which you gave us an assurance would be provided by 14 August 2020.

When the documents were not provided (without warning or apology) as promised, we chased for an update on 18 August 2020. You replied on 19 August 2020 to say that you were hoping to have a call with your client. You have not contacted us since with either an update or the documents which we have requested and your client should have easily been capable of producing in the period of two months since we made our request.

> *This is completely unacceptable and as set out in our e-mail of 18 August 2020, given the tight timetable, the repeated failure of you and your client to provide us with these crucial disclosure documents continues to cause real prejudice to the Claimant and risks affecting the Tribunal hearing. The Respondent's conduct is wholly unreasonable.*
>
> *If we do not have a full response from you and disclosure of the documents by 4pm on 28 August 2020 we will have no option but to apply to the Tribunal immediately and without further notice to you for an order for specific disclosure. If this is necessary we will also be seeking a costs order.*

41. On 28 August 2020, the Respondent's solicitors replied confirming that the Respondent was "*not in control/possession of any of the documents requested*".

42. On 11 September 2020, the Respondent's solicitors wrote to the Claimant's solicitors asking for copies of certain documents on the Claimant's list.

43. On 17 September 2020, the Claimant's solicitors replied, providing copies of the requested documents, and again expressing their surprise that those documents had been requested as those were the Respondent's documents. They again raised concerns about significant deficiencies in how the Respondent's disclosure had been done and reserved the right to raise the matter with the Tribunal.

44. On the first day of the liability hearing during the cross-examination, Mr Dominici, a witness for the Respondent, in responding to Ms Tutin's question about the reason for him suspending the Claimant, said that he had been suspended himself by the Respondent. That led to further enquiries and disclosure of the Non-Disclosed Documents, which content was highly relevant to the central issues in the case. In fact, the content of the Non-Disclosed Documents, together with the admissions the Respondent's witnesses had to make in light of those documents, were fatal to the Respondent's defence on liability. My detailed findings and conclusions on these matters are set out in paragraphs 57 to 68 and 122 to 150 of my liability judgment.

45. I shall further add that when the matter came to light at the liability hearing, the Respondent's solicitors were able to find and provide the Non-Disclosed Document very promptly, perhaps surprisingly promptly, given their earlier confirmation that their client was not "in control/possession" of any such documents.

The Law

46. Rule 76 provides:

76 (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

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

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

47. The amount of a cost order a tribunal can make is set out in Rule 78

78.— The amount of a costs order

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

48. The following key propositions relevant to costs orders may be derived from the case law.

49. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order (*Oni v Unison ICR D17*).

50. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (*AQ Ltd v Holden [2012] IRLR 648*).

51. The meaning of the term "vexation" was given by Lord Bingham LCJ in *AG v Barker [2000] 1 FLR 759*:

    > "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" (*Scott v Russell 2013 EWCA Civ 1432, CA*)

52. "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious" (*Dyer v Secretary of State for Employment EAT 183/83*).

53. In determining whether to make a costs order for unreasonable conduct, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (*McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA*)

54. Giving false evidence to the Tribunal, while not necessarily must result in a costs order, is a relevant factor to consider in assessing the party's conduct (*Arrowsmith v Nottingham Trent University 2012 ICR 159, CA*).

55. In assessing a party's conduct, the Tribunal can look at it as a whole, to determine whether it amounts to unreasonable conduct (*Sahota v Dudley Metropolitan Borough Council EAT 0821/03*)

56. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In *Yerrakalva v Barnley MBC [2012] ICR 420* Mummery LJ said:

> "*41. 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. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

Conclusions

57. Looking at the history of the events related to disclosure, when taken together with my findings as to the true reason of the Claimant's dismissal and how the Tribunal came to that conclusion, in my judgment, it clearly paints the picture of the Respondent deliberately withholding the Non-Disclosed Documents and trying its best to steer its witnesses' evidence well clear of those critical events and matters.

58. If it were not for Mr Dominici's "slip of the tongue" these matters might not have come before the Tribunal at all, and the Tribunal would have had to make its decision based on incomplete and indeed misleading evidence of the Respondent's witnesses, both of whom were well (and indeed uniquely) aware of those critical events and matters.

59. I firmly reject the Respondent's arguments that the Non-Disclosed Documents were not relevant, and therefore it was proper for them not to

be disclosed before the liability hearing. On the contrary, I found them to be key documentary evidence to the central issue in the case, namely the reason for the Claimant's dismissal. They could only be considered as "not relevant" if one were to accept the Respondent's case on its face value. However, the liability hearing has shown that it was advanced on a false evidential basis, and quickly crumbled when the Non-Disclosed Documents came to light.

60. I do not accept that the lockdown, the closure of the Respondent for business or the Presidential Directions could in any way excuse or mitigate the Respondent's failure to disclose those documents. Not only they were properly disclosable on the ordinary disclosure rules, but their disclosure was specifically and repeatedly requested by the Claimant's solicitors. It was not until the Respondent's solicitors were warned that a specific disclosure order would be sought, they came back confirming that such documents were not in the Respondent control or possession, which was untrue. I find the Non-Disclosed Documents were within the categories of documents, in respect to which disclosure was sought by the Claimant in his solicitor's letter of 24 June 2020, and which the Respondent's solicitors undertook to provide by 14 August 2020.

61. The Non-Disclosed Documents were either created by or addressed to the Respondent's witnesses. Therefore, I find that it is beyond any reasonable belief that these documents and the events and matters recorded in them would not have been mentioned during the preparation of the Respondent's pleadings and its witnesses' written statements.

62. Furthermore, it appears that the Respondent's solicitors were advising the Respondent on how to run the Claimant's disciplinary process (see paragraph 126 in my liability judgment). It appears highly improbable that they would not have been aware of such events and matters resulting in the Claimant's disciplinary process. Yet none of those events and matters were mentioned in the Respondent's witness statements. I shall leave it at that, as I do not have sufficient evidence to make conclusive findings as to what has gone on between the Respondent and its solicitors. However, it is worth

reminding the Respondent's solicitors that as well as to their client they also owe certain duties to the Tribunal.

63. Just looking at the failure to disclose the Non-Disclosed Documents, I find this is a glaring example of unreasonable conduct. In fact, I do not see how on these facts I can come to any different conclusion.

64. This was also a clear breach of the Tribunal's orders to disclose all relevant documents, and that would have been known to the Respondent's solicitors. In the circumstances, in my judgment, such breach by itself justifies making a costs order. I reject the Respondent's submission that it was "*administrative*" and "*relatively minor*".

65. This unreasonable conduct was further compounded by the Respondent's witnesses' evidence, both what went, or to be more precise, what did not go, into their written witness statements and how they were answering questions on cross-examination. My findings on that are in my liability judgment at paragraphs 130 to 131. While it is true that I did not make a specific finding that they lied to the Tribunal, they certainly did not tell "the whole truth" to the Tribunal, as they had sworn to do.

66. Although by itself the conduct of the Respondent's witnesses at the hearing is not, in my judgment, sufficient for me to find that the Respondent conduct of the proceedings was unreasonable, taking it together with the failure to disclose highly relevant documents further supports my conclusion that the Respondent's conduct, taken as a whole, was unreasonable.

67. I reject the Respondent's submission that because the two witnesses were no longer in the Respondent's employment and it had no control over them, it could not be held responsible for their conduct. They were the Respondent's witnesses, whose evidence the Respondent put forward in support of its case. Whether they were employed by the Respondent or not and what degree of control the Respondent had over them, in my judgement, is irrelevant.

68. I am equally unpersuaded by the Respondent's argument that because its witnesses evidence led to further enquiry and disclosure of the Non-Disclosed Documents and eventually to the Respondent losing the case, this should be taken as the Respondent acting reasonably and assisting the Tribunal. The discovered matters and events should have been covered in the Respondent's witnesses' written statements, and the Non-Disclosed Documents should have disclosed before the liability hearing. The "assistance" only came when the Respondent had no other option but to disclose the documents and its witnesses had to answer questions about those matters and events.

69. I also do not see on what proper basis it could be said that because the Respondent's witnesses' oral evidence caused the Respondent to fail to meet the burden of proof to show the reason for the dismissal, thus losing the case, their conduct may no longer be the ground for awarding costs against the Respondent, because, it is said, it has already suffered "the consequences of the conduct of the witnesses". There is nothing in Rule 76 of the ET Rules to suggest that. Further, if this were true, in my judgment, this would go against the whole purpose of the Rule. If vexatious, abusive, disruptive or otherwise unreasonable conduct, which causes a party responsible for such conduct to lose its case, cannot then lead to a costs order against that party, because such conduct has already caused the party to lose its case, it would be a very rare circumstance indeed when a Tribunal could make a costs order. This cannot be right or intended by Rule 76.

70. It follows that my answer to the questions (i) and (ii) in paragraph 21 above is "Yes". Although I find that the way the Respondent's witnesses gave evidence to the Tribunal by itself was not "unreasonable conduct" for the purposes of Rule 76, it is a relevant consideration in assessing the Respondent's conduct of these proceedings as a whole, which I find was unreasonable.

71. These findings are sufficient for me to move on and consider the nature, gravity and effect of the conduct and decide whether I should exercise my

discretion and make a costs order. However, before doing that, I shall briefly deal with the question whether the Respondent's response had no reasonable prospect of success.

72. I accept that the Respondent's case on all remedy issues, including contributory fault, is properly arguable and all evidence pertaining to those issues were needed to be examined and determined by the Tribunal. However, I find that the Respondent's case on liability (as it was pleaded by the Respondent), considering the content of the Non-Disclosed Documents and the admissions the Respondent's witnesses had to make at the liability hearing had no reasonable prospect of success. The Respondent's case was that it was the Claimant's conduct that caused the Respondent to dismiss him, and that was the decision of the Respondent's management, and Mr Cola had nothing to do with that decision. The Non-Disclosed Documents and the Respondent's witnesses' admissions on cross-examination, clearly showed that the opposite was true. I find that the Respondent's case on liability would only have had a reasonable prospect of success if the Respondent had been able to keep those matters concealed from the Tribunal, which would have been unreasonable and improper.

73. Therefore, I find that if the Respondent had disclosed the Non-Disclosed Documents before the liability hearing (as it should have done) and the matters and events recorded in those documents were properly dealt with in the Respondent's witness statements, its liability case was in the "strike out territory". The reason that no such application was made by the Claimant is because he was kept in the dark by the Respondent as to the existence of those documents and the events described in them.

74. However, considering the Respondent's case as a whole, I cannot say that its "*response*" had no reasonable prospect of success. Even if the liability were admitted, I find that the Respondent had reasonable grounds to argue that the Claimant should not be awarded any compensation under the *Polkey* principles or due to his culpable conduct. Therefore, I do not

consider that the Respondent's "*response*", taken as a whole, had no reasonable prospect of success.

75. Returning to the Respondent's unreasonable conduct issue and considering its nature, gravity and effect, I have no hesitation in finding that it is proper for me to make a costs order against the Respondent. I find that the Respondent's failure to disclose the Non-Disclosed Documents, and the Respondent's presenting its evidence in the way that they did not refer and deal with the matters and events described in those documents, was a deliberate attempt to run its liability case on a false evidential basis.

76. Such conduct was not only unreasonable, but it was also calculated to achieve a particular and unjust result. It clearly caused the Claimant to incur unnecessary costs and prolonged the proceedings. I find no mitigating factors, especially bearing in mind that the Respondent has been professionally represented throughout these proceedings and its solicitors have been repeatedly warned that the Respondent must comply with its disclosure obligations.

77. Turning to the issue of how much the Respondent should be ordered to pay the Claimant towards his costs.

78. I accept that if the Respondent had not acted unreasonably certain costs would have been avoided and the liability hearing could have been shortened. However, I do not consider that all of the issues, which had been dealt with at the liability hearing could have been properly dispensed with. Even if the Respondent had admitted liability, the parties' witnesses would have still needed to be examined and the CCTV footage played to determine the *Polkey* and the contributory fault issues.

79. However, I find that certain costs would have been avoided if the Respondent had acted properly, including costs of the Claimant's solicitors having to repeatedly seek disclosure of documents, costs associated with the Claimant having to prepare and run its case based on how the Respondent put its liability defence and without knowing of the existence and the content of the Non-Disclosed Documents. I assess that 1/3rd of the

relevant incurred costs was caused by the Respondent's unreasonable conduct.

80. Having considered the Claimant's costs schedule and the invoices in the bundle, I assess costs attributable to the Respondent's unreasonable conduct in the amount of **£6,718** and order the Respondent to pay that sum to the Claimant in respect of his costs. In making my assessment I applied the following principles:

    a. Counsel's fees related to the remedies hearing (page 207 in the bundle) are excluded;
    b. Counsel's fees related to a period before 14 August 2020 (the agreed deadline for the disclosure of additional documents) are excluded (pages 202, 203 in the bundle),
    c. 1/3rd of Counsel's fees for the preparation of the Claimant's witness statements (pages 204, 205 of the bundle) are included - £345,
    d. 1/3rd of Counsel's fees for the liability hearing (page 206 of the bundle) are included - £3,000,
    e. All Counsel's fees for the preparation of the costs application (page 210 of the bundle) are included - £1,050,
    f. 1/3rd of the Claimant's solicitor's fees (pages 208, 209 of the bundle) are included - £2,323.

    Total: £6,718.

81. For completeness I should say that I reject the Respondent's submission that there are no evidence of the Claimant actually incurring the claimed costs. The Respondent suggests that because the principal solicitor dealing with the case is the Claimant's brother the Claimant might not have been charged any legal fees.

82. Firstly, the Statement of Costs does not contain any fees for Mr Sean Williams (the Claimant's brother). Further, there are copies of the Counsel's and the solicitors' invoices to the Claimant in the bundle (pages 202 - 210). Finally, if it is suggested that the Claimant's solicitors presented to the Tribunal the Claimant's Costs Schedule and invoices, where in fact no such

costs had been charged to the Claimant, this would be serious misconduct on their part. Considering their conduct during these proceedings, which I find nothing but proper and helpful to the Tribunal, I have absolutely no reasons to think that they would be disposed to do that.

Employment Judge P Klimov
London Central Region

Dated : 30 March 2021

Sent to the parties on:

19th April 2021

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For the Tribunals Office

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