EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss F Saiyed		London United Busways Limited

Heard at: London Central **On**: 20 May 2021

Before: Employment Judge Stout
Ms Zofia Darmas
Mr Frederick Benson

Representations
For the claimant: Mr Ben Amunwa
For the respondent: Mr Graham Vials

REMEDY JUDGMENT AND COSTS ORDER JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Respondent is to pay to the Claimant in respect of her unfair dismissal claim a basic award of £1,575 and a compensatory award of £9,383.92, i.e. a total of £10,958.92.

(2) The Respondent is to pay to the Claimant £13,507.50 in respect of her costs of these proceedings.

REASONS

Introduction

1. By a liability judgment sent to the parties on 7 December 2020, this Tribunal found:

   (1) The Respondent did not harass the Claimant in contravention of ss 26 and 40 of the Equality Act 2010 (EA 2010).
   (2) The Respondent did not victimise the Claimant in contravention of ss 27 and 39(2)(c) and/or (d) of the EA 2010.
   (3) The Claimant's constructive unfair dismissal claim under Part X of the Employment Rights Act 1996 (ERA 1996) is well-founded.
   (4) The Claimant's holiday pay claim is dismissed upon withdrawal.

2. This hearing was listed to determine remedy. The Claimant has also applied for costs against the Respondent under Rule 76 and we considered that application at this hearing too.

The type of hearing

3. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties. The form of remote hearing was V: fully video. A face to face hearing was not held because of the pandemic and partial closure of Victory House, and because all issues could be determined in a remote hearing.

4. The public was invited to observe via a notice on Courtserve.net. No members of the public joined. There were no connectivity issues.

5. The participants were told that it is an offence to record the proceedings.

6. The Claimant gave evidence in the form of two witness statements, and was cross-examined. She confirmed when giving evidence that she was not assisted by another party off camera.

REMEDY

The issues on remedy

7. At the outset of the hearing, and further during the hearing, the parties agreed that the following issues fell to be determined:-

   (1) At what rate of pay should the Claimant's compensation be calculated. Should it be £30,000 gross per annum (which is what the Claimant was earning in the Project Administrator and Data Co-Ordinator role) or the salary the Claimant was earning in the GSA role) or something else? (And if the latter, what was the Claimant's salary in the GSA role?)

   (2) The parties are agreed that the period for compensation starts on 1 September 2019. That is also the date when the Claimant obtained new employment in a hairdressing salon on minimum wage "zero hours" contract for 40 hours per week. For what period should the Claimant be compensated? (The Respondent had submitted that compensation should cease from 29 February 2020 as the Claimant had not disclosed evidence of income going beyond that date, but the Claimant subsequently disclosed P60s to April 2021 so that point was withdrawn). Has the Respondent showed that the Claimant has not taken reasonable steps to mitigate her loss such that her compensation should be reduced or ceased from a particular point?

   (3) Should the Claimant be compensated for loss of childcare vouchers and, if so, in what amount?

   (4) What should the Claimant be compensated for her loss of travel card access? £1,472 per annum (replacement cost according to the Respondent) or £7,528 per annum (Oyster card for employee plus nominee according to the Claimant)?

   (5) What reduction should be made for *Polkey*?

   (6) Should there be an uplift to reflect any unreasonable failure by the Respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

   (7) Should the Claimant be compensated for health benefits at £81.12 per annum or not?

   (8) How should the Claimant's loss of overtime be calculated?

   (9) What amount should be awarded for loss of statutory rights?

The facts

8. We have considered all the oral evidence and the documentary evidence in the bundles to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Relevant facts from the liability judgment

9. The following paragraphs of our findings of fact on liability appeared to us to be particularly relevant to the issues on remedy: paras 24, 46-49, 116, 131 and 171-178. They should be read together with this judgment.

Other evidence of jobs available at the Respondent

10. In the foregoing paragraphs of the Liability Judgment we had identified that around the time of the events in these proceedings there were possible alternative GSA roles at Edgware and Hounslow in addition to the Claimant's GSA role at Hounslow Heath which had been earmarked for a disabled employee who started in that role some months after the Claimant went off sick, possibly around the time of her resignation. There is also evidence in the trial bundle that as at 25 January 2019 the Respondent proposed to change the allocations team from 2 to 5 allocators and create a new post of senior allocations supervisor. The Claimant had previously done a role of Relief Allocation Supervisor and gave evidence at this hearing that she would in principle have been willing to do one of those roles if they were available. It is also relevant to record that following the Claimant's resignation Mr Sharma of the Respondent did not initially record her as a leaver but sought to persuade her to reconsider her resignation. Although paragraph 189 of the Liability Judgment had indicated that the parties should if they wished bring further evidence to this hearing in respect of alternative jobs that may have been available, the Respondent brought no further evidence to this hearing.

Travel card

11. As part of her contract with the Respondent the Claimant was entitled to a Zones 1-9 travel card for herself and another family member. Her contract provides that this benefit was discretionary and could be withdrawn at any time, but the Claimant said that 'everyone gets it'. Mr Benson, the Tribunal Wing Member, shared knowledge with the parties that it is normal for those working within the public transport industry to have concessionary transport as part of their benefits and that there was a long-standing industry agreement by which tax on that benefit was £10 per annum for first class travel and £5 per annum for second class travel.

Health benefit

12. The Claimant participated in a health insurance scheme available through the Respondent. She claimed £81.12 per year for this which she said represented the difference in cost between buying the same benefit privately, but she provided no evidence as to how she had arrived at this figure.

What the Claimant did after leaving

13. The Claimant's last day in the office was 20 February 2019 and she resigned on 7 June 2019, but she was paid at the £30k rate applicable to the Data Co-Ordinator role with Mr Bakshi up to and including the end of period she was paid in lieu of notice, ie. to 1 September 2019.

14. On 1 September 2019 she obtained work in a hairdressing salon, Headmasters, on a zero-hours contract and has remained there since working up to 40 or 50 hours per week on the minimum wage. She earned £8,079.28 net there in the year to 5 April 2020 and £15,464.75 net in the year to 5 April 2021.

15. She has not sought alternative employment as she does not feel ready to. Up until October 2019 she was sent job vacancy details by a friend at Metroline, but was not interested in applying for any jobs, or any other office jobs. She had not disclosed these emails. She feels deeply affected by her treatment by Mr Bakshi and the Respondent generally. She has not been able to contemplate working in an office. She had counselling from IAPT for a period up to July 2019 and said she has had more counselling since with her last session last month. She said that she still felt an adverse reaction when logging into Microsoft Teams as was necessary to access her son's schooling during lockdown. She has not, however, provided any medical evidence beyond that in the bundle (which finishes at 27 February 2019). She does not say that there was any mental health condition preventing her from seeking alternative work, it is rather that she feels scared and does not want to work in an office again because of her past experiences. It was put to her that she could have sought non-office-based employment, to which she asked 'like what', but then made clear that she did not want any other employment at the moment. She is keen though when she feels ready to seek employment that reflects her qualifications as a graduate and skilled employee and does not wish to remain in hairdressing long-term.

Conclusions

(1) At what rate of pay should the Claimant's compensation be calculated?

16. The principle is that the claim for loss of earnings within the compensatory award should be based on the amount the Claimant would have earned if she had remained employed, not her earnings prior to dismissal, if different (applying *Howells School v Gerrard* (UKEAT/0079/12). Applying the principle in *Gerrard* to this case given that the Claimant in fact was earning at the higher rate at the time of her constructive dismissal on 7 June 2018, we take that higher salary of £30,000 per year as our starting point.

(2) What reduction should be made for Polkey?

17. In our Liability Judgment we identified the *Polkey* issue as being:-

> 189. Applied to the facts of this case, we consider that the relevant question to ask ourselves is what would have happened had the Respondent not breached the implied term of trust and confidence, in other words, what would have happened if the Respondent had allowed her to remain in her old role beyond 19 February 2019 and not blocked her IT access and required her to return immediately to the Transformation team. The question is whether the Claimant would have ended up resigning in any event, either because Mr Bakshi was still in the business, or because the Respondent would still have placed Employee A in the Claimant's old role and had no other suitable alternative employment to offer the Claimant. As already noted, this will require consideration of whether there were other alternatives available either for the GSAs affected by the Park Royal redundancy situation (such as the Edgware role that had been advertised) or for the Claimant.
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> 190. We do not feel that it would be fair for us to determine the Polkey issue without giving both sides an opportunity to adduce evidence to address the issue as we have now framed it. This will therefore be an issue for the remedy hearing on 9 February 2021.

18. At this hearing Mr Vials referred to *Hill v Great Tey Primary School Governors* [2013] ICR 691 at paragraph 24, which provides as follows:-

> 24. A "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand.

19. Mr Vials submitted that when considering *Polkey* we are limited to considering what would have happened if the employer had acted fairly in relation to the grievance process, and that we should assume that everything that happened before that did happen. His position was that we should consider *Polkey* on the basis that the Respondent would still have repudiated the Claimant's contract by blocking her IT access and requiring her to return to old role. He also invited us to go behind our findings in the Liability Judgment (at paragraph 131) that the Claimant had only reached a state of complete loss of trust in the Respondent from the point that she received the grievance outcome from Ms Fox and find that she had in fact reached that point much earlier. He also submitted that in considering *Polkey* we should assume not only that the Claimant would not be willing to work with Mr Bakshi again (a point that is clear), but that because Mr Bakshi was still working for the Respondent (and would not have been dismissed by the Respondent) we

should find that the Claimant would not have continued working for the Respondent at all, in any capacity. He further submitted that the Respondent had given 'unchallenged' evidence that there were no alternative roles available in the Respondent, an argument which is at odds with the Liability Judgment and the documents as set out in our findings of fact.

20. Mr Umunwa submitted that the approach set out in paragraph 189 of her Liability Judgment was correct so far as *Polkey* is concerned. He invited us to find that the Claimant would have continued in employment either in her old GSA role or in an alternative role. He submitted that there were several roles available and the Claimant was skilled enough, and highly enough regarded as an employee, to do any of them. He submitted that the appropriate rate of pay was £30k, however, on the basis that the Respondent had continued paying her at that higher rate even after she returned to her old role and then went off sick.

21. We consider that the appropriate approach in this case to *Polkey* is as set out in paragraph 189 of our original judgment. Although it could possibly be argued that we should unravel the position back to what would have happened if Mr Bakshi had not treated her in a way that was likely to damage trust and confidence between 11-15 February 2019 (since that could potentially be the 'unfair' conduct that we must imagine never happened for *Polkey* purposes, using for the moment the language of the *Great Tey* case), given that the Claimant was willing to return to work for the Respondent after that, we consider that the 'unfair' conduct we must imagine never happened is the unlawful conduct that happened after that point, i.e. the conduct that we found repudiated the contract and in response to which the Claimant did in fact ultimately resign. We have to consider what would have happened if the Respondent had acted 'fairly' from 19 June 2019 onwards. In other words, what would have happened if the Respondent had not blocked her IT access, had not refused to allow her to continue in the GSA role at least temporarily and had properly investigated her grievance. Had all those things happened, we find that the Claimant would not have lost trust and confidence in the Respondent, would not have resigned and would not have been so emotionally scarred that she would have felt unable to continue working for the Respondent or in any office. Those findings follow directly from our findings in the Liability Judgment.

22. Nonetheless, we accept Mr Vials' submission that this Respondent would not have dismissed Mr Bakshi if his conduct stopped as at 15 February 2019, as we must imagine for *Polkey* purposes. For non-discriminatory conduct over such a short period, the Respondent could fairly have decided merely to warn him. (And on this *Polkey* scenario the position of Ms Vivas would not have come to light, so the fact that he treated two employees badly would not have been considered.) Mr Bakshi would therefore have remained in the business at least until October 2019 when he was made redundant, and the Claimant would not have wanted to work with him. However, that is not the end of it because the Claimant was willing to work in the business if in a role away from him. That is clear from the fact she returned to her old role and our findings on Liability. It is also evidence that she repeated at this hearing and

we accept it. The Respondent is a large employer and if based on a different site the Claimant could largely have avoided any further contact with Mr Bakshi.

23. The evidence is that there were roles available: her own GSA role, another GSA role at Hounslow, another at Edgware and potentially new allocations roles, which were roles she had done on a relief basis previously and was thus capable of doing. Although we found as a fact that Employee A had ultimately filled the Claimant's role at Hounslow Heath, the Respondent has not produced any evidence to show that none of other roles was available, or that alternative employment could not have been found for either the Claimant or Employee A in this large company. In the absence of any evidence from the Respondent (despite the invitation to produce it), we find that on the hypothetical *Polkey* scenario, the Claimant's employment would have continued indefinitely (or, at least, well beyond the period with which we are concerned) in one of those alternative roles.

24. We then have to consider what salary the Claimant would have been paid for her continued employment. In our *Polkey* scenario we find that the Claimant would not have remained on £30k but would have reverted (as was indeed planned and agreed by her when she returned to her old role as noted in our Liability Judgment) to her GSA salary. It is possible that other roles would have had other salaries, but we have no evidence of those, so we assume they would have been at the GSA rate.

25. The Claimant's net annual salary in the GSA role was £17,825.67 per annum or £1,485.47 per month (arrived at by adding together the net figures for April 2018 to February 2019, dividing by 12 and multiplying by 13 as the Claimant was paid every 4 weeks and received 13 payslips per year). These figures include the overtime. It does not include the childcare vouchers, which we deal with separately below.

(3) The parties are agreed that the period for compensation starts on 1 September 2019. For what period should the Claimant be compensated? Has the Respondent showed that the Claimant has not taken reasonable steps to mitigate her loss?

26. Mr Vials submitted that the Claimant was seeking to maximise her loss by claiming for two years. He submitted that given her failure to mitigate her loss by seeking suitable alternative employment, her losses should be limited to 1 September 2019. Mr Vials submitted that the Claimant had acted unreasonably in failing to respond to of the Metroline options of jobs that might be available for the Claimant. Mr Vials described this as 'being headhunted'. Mr Vials submitted that the Claimant had provided no medical evidence to support her reasons for saying that she is unable to work, in particular that she does not feel able to work in an office environment. Mr Vials submitted that the Claimant had remained in the hairdressers in order to maximise her compensation from the Tribunal, but he did not put that to the Claimant. Mr Vials submitted that if she could work in a hairdressers she could work somewhere else.

27. Mr Amunwa submitted that the impact of the Respondent's unlawful conduct was such that it was reasonable for the Claimant to have suffered psychological difficulties as a result of the way she was treated, or that at least it was reasonable for her not to want to go straight back into a role in a transport company and to remain in the hairdressing role. He submitted that the Claimant had much to look forward to at the Respondent. He submitted that the Claimant also needed closure from these proceedings, and that this is a factor that weighs heavily on an individual's mind. Mr Amunwa submitted that the Claimant was not relying on a specific medical condition, but on her personal feelings, so did not need to provide medical evidence.

28. We find that the Claimant took a reasonable step to mitigate her loss in obtaining the hairdressing job. It was reasonable for her to want to do something different for a short period and to take a hairdressing job which goes some way towards mitigating her loss. However, the duty to take reasonable steps to mitigate loss does not stop when the loss has been only partially mitigated; the duty continues until either the loss is fully mitigated or all reasonable steps have been taken. The Claimant's obligation is to take reasonable steps to mitigate her loss whether she wants to or not. She may choose not to, but if she chooses not to then the Respondent is not responsible for the losses consequent on that choice.

29. Since taking the hairdressing job the Claimant has by her own admission not taken any steps to seek alternative work because she did not want to because of the impact of her experiences with the Respondent on her. The Claimant is a well-qualified, skilled employee who was highly praised by her previous managers. She does not contend that she had a medical condition that prevented her from seeking alternative employment. She is in our judgment very employable and there many jobs for which she might be suitable, both in and out of office environments.

30. Although the burden is on the Respondent to show that the Claimant has not taken reasonable steps to mitigate her loss, we are satisfied that the Respondent has discharged that burden in this case. In the face of a claimant who has simply not tried to mitigate part of her loss, it is not necessary for a respondent to come with evidence of jobs that might have been applied for. That is necessary where a Claimant has taken some steps to seek alternative employment, but the Respondent seeks to contend that insufficient steps were taken. That is not this case. The Claimant took the hairdressing role and did nothing thereafter. We do not doubt the reasons that she has given for not wanting to seek alternative employment, but those reasons represent her personal choice. We consider that if she was taking reasonable steps to mitigate her loss she would have started looking for alternative employment shortly after starting the hairdressing role and would on the balance of probabilities have found suitable alternative employment paying the equivalent of the GSA role (including benefits) by the end of February 2020.

(4) Should the Claimant be compensated for loss of childcare vouchers and, if so, in what amount?

31. We left the Claimant's childcare vouchers out of our calculation of her net pay above. It follows that there is £220 per payslip which was money the Claimant received in childcare vouchers which she has lost as a result of the termination of her employment. There is no need to consider the tax position, or what the Claimant's loss would have been if she had not participated in the voucher scheme, but had been paid that salary instead and paid tax on it. As a matter of fact she did not do that but participated in the childcare voucher scheme with its tax advantages. She was thus better off as she had £220 to spend on childcare which since termination of employment she will have had to pay out of her own pocket. Mr Vials submitted that there is an alternative scheme that the Claimant could have joined, information about which is available at Tax-Free Childcare government website, but he has not put this before us as evidence, nor did he question the Claimant about whether she could have accessed it. We do not therefore take it into account.

(5) What should the Claimant be compensated for her loss of travel card access? £1,472 per annum (replacement cost according to the Respondent) or £7,528 per annum (Oyster card for employee plus nominee according to the Claimant)?

32. Mr Vials does not dispute that the Claimant had this benefit, but he submits she has suffered no loss because she has not had to replace it with anything. Mr Amunwa submits that she had the benefit of not just one but two travel cards and she has given evidence of the financial value of such concessions, which was £3,764 per card for Zones 1-9. There is no evidence that the concessions were about to be withdrawn from her or would have been if she had continued in employment. We find therefore that as a result of her constructive dismissal the Claimant has lost a benefit which was worth to her the face value of the card, i.e. £3,764. We do not find, however, that it is just and equitable to compensate her for the loss of a card for a family member. That was not a benefit to her personally, but a perk for a family member. There is no evidence that she has lost anything personally as a result, since there is no evidence that the family member to whom she gave this card was dependent on her or that the Claimant has since losing that card had to pay for that family member's travel.

(6) Should there be an uplift to reflect any unreasonable failure by the Respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

33. Mr Vials submits that the Respondent should not be penalised for its conduct of the grievance process, which he submits was reasonable and 'went through the motions'. Mr Amunwa submitted based on paragraph 175 of our judgment that there was an unreasonable failure to follow the ACAS Code of Practice, in particular paragraph 4 which requires grievances to be dealt with fairly including by *"carry[ing] out any necessary investigations, to establish the facts of the case"*. In our judgment we found that:-

> 175. We further accept that the failure to uphold her grievance and the recommendation for mediation was also conduct likely seriously to damage, indeed

> destroy, the relationship of trust and confidence. There was no just and proper cause for this because of the significant failings in the investigation of the Claimant's grievance (i.e. in particular, the failure to interview witnesses named by the Claimant in her grievance, the failure to look at emails/messages between the Claimant and Mr Bakshi, and the failure properly to investigate her allegation about Mr Bakshi blocking her IT access) and recommending mediation notwithstanding the medical evidence presented by the Claimant and without obtaining Occupational Health or other independent medical advice.

34. That is a finding of unreasonable conduct of the grievance process. We consider, however, that, notwithstanding the egregious failures in the investigation we identified, a case such as this is not to be equated with a case where there has been a complete failure to follow a grievance procedure. The Respondent's failures were in the quality of the process rather than in the procedure itself. In our judgment, the appropriate uplift is therefore in the lower end of the range. We put it at 10%.

(7) Should the Claimant be compensated for Health benefits at £81.12 per annum or not?

35. Mr Vials submits that the Claimant has provided no evidence of the benefits she had, or any equivalent benefit elsewhere. Mr Amunwa accepted that criticism, but submitted that there was still a loss. However, the Claimant has not provided the evidence to put a figure on the loss that she has suffered. She has not shown us what health benefits she had or how she has not been able to obtain them for a similar price elsewhere since her dismissal. We make no award in this regard.

(8) How should the Claimant's loss of overtime be calculated?

36. We have rolled this up with the salary.

(9) Loss of statutory rights

37. Mr Vials submitted that based on *Dugdale v Cartlidge* UKEAT/0508/06, loss of statutory rights should not exceed £260. However, Mr Amunwa referred to *Countrywide Estate Agents v Turner* UKEAT/0208/13/LA at para 27 where the EAT observed regarding a much higher basic award:

> 27. I agree with Mr Hodson that the Employment Judge made the award to compensate the Claimant for the fact that he no longer had any protection for unfair dismissal for the first two years of any new employment. The award of two weeks' gross pay capped at the statutory maximum is entirely within the discretion of the Employment Judge and cannot be described as perverse. The decision of Lady Smith in Superdrug Stores plc v Ms J Corbett (UKEATS/0013/06/MT 12 September 2006) is distinguishable on the basis that in that case the Employment Tribunal made an award at what was then ten times the basic net salary. That is a long way from two weeks gross pay.

38. There is no mandatory or upper figure for loss of statutory rights. *Dugdale* is now an old case. In our judgment, £350 is the appropriate figure for a claimant with this length of service.

Conclusion on remedy

39. It follows that the total award is as follows:

    a. Basic award **- £1,575**
    b. Compensatory award – 6 months' loss at £8,912.83 for the GSA role salary, minus £749 x 6 average monthly net pay for Headmasters = £4,494, so net salary loss is £4,418.83
    c. **Plus** (£220 x 13)/2 for 6 months' childcare vouchers = £1,430
    d. **Plus** £3,764 / 2 for the travel card - £1,882
    e. **Plus** pension loss of £450
    f. **Plus** £350 loss of statutory rights
    g. **Totals** £8,530.83
    h. **10% uplift = £9,383.92**

40. This is below the £30,000 tax-free threshold for sums paid on termination of employment so we do not need to gross up.

COSTS

Submissions

41. Mr Amunwa had provided a detailed Skeleton Argument, bundle and two statements of costs in support of the Claimant's costs application. He relied on his written submissions, which he elaborated orally. He drew the Tribunal's attention to page 352 of the bundle which contains an email written by Mr Edward Nuttman, Partner at the Respondent's solicitors, to David Bushnell, Head of HR and Jawala Sharma. The Respondent waived privilege in respect of this document at trial. He submitted that the email demonstrates that the Respondent was not taking its disclosure responsibilities seriously and was heedless of the consequences of such misconduct.

42. Mr Amunwa reminded us that the Respondent had promised a statement from IT for the trial explaining what had happened, but this did not materialise and instead privilege was waived in relation to some solicitor emails. The breaches were serious, they cut to the heart of the litigation process and have the potential to undermine the fairness of the trial. There has been no apology. If the documents were retained the position might have been different. The Claimant was locked out of the information systems, did not have documents she needed. The Claimant's witness (Mr Akintoye) provided information on data retention. He sought costs on the indemnity basis.

43. Mr Amunwa was asked whether he would put a figure on the percentage costs attributable to the disclosure issue, but he did not feel able to do so. He submitted that the unreasonable conduct had gone to the fairness of the whole proceedings and we would not know what would have happened had the documents not been deleted. He speculated that the parties might have resolved their differences before trial.

44. Mr Vials relied on his written submissions, but also submitted that the Claimant's disclosure obligations had fallen short of the mark. He said that whenever there is litigation there are always issues of disclosure. The Claimant had today failed to disclose medical records, and offers of alternative employment and had disclosed some late evidence just before trial of WhatsApp messages and text messages. Mr Vials also pointed out that the Claimant did not succeed on all her claims and submitted that the discrimination claims were the main elements of her claims. He submitted that in any event the costs were very high, but he did not have a statement of the Respondent's costs that we could compare. He submitted that the time spent on disclosure was not significant. The hearing was the same length it would otherwise have been. He submitted there was no real additional time incurred, for example in relation to the non-production of a witness statement that had saved time and costs as it had not had to be read or dealt with.

The law

45. Rule 76 provides as follows:-

> **76.— When a costs order or a preparation time order may or shall be made**
> (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…
> (c) a hearing has been postponed or adjourned on the application of a party made less
> than 7 days before the date on which the relevant hearing begins.
>
> (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.
>
> **84. Ability to pay**
> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

46. There is no requirement that a costs order reflect the amount that is specifically attributable to the unreasonable conduct (*McPherson v BNP Paribas* [2004] EWCA Civ 569, [2004] ICR 1398). However, the tribunal must identify the conduct, what was unreasonable about it and the effects it had: these are all relevant factors in determining whether costs should be awarded and the amount: *Yerrakalva v Barnsley MBC* [2011] EWCA Civ 1255, [2012] ICR 420.

Conclusion

47. Our findings in relation to the Respondent's disclosure failings were set out at paragraphs 10-22 of our Liability Judgment. Mr Amunwa is right also to remind us of Mr Nuttman's email which states:

> "I am concerned that IT have deleted Rosie's emails. We helped with the GDPR implementation at RATP and employee documents were supposed to be kept for 6 years. So I'm not sure what happened? **This is now the second case I have come across recently where documents cannot be found because they have been deleted after an individual left their employment**. I'm not sure whether a different policy was introduced? Or who introduced it? but it will leave the business exposed. Not least here, where it will look like we didn't do anything in an investigation, or instead, have deliberately withheld documents. Can we 1. Check why It are deleting them (and stop that practice if necessary) and 2. Check whether there is a backup?" [emphasis added]

48. That email indicates that, at least so far as Mr Nuttman is concerned, the Respondent had previously been advised against deleting documents that were needed for litigation, but had nonetheless done so again in this case. We already found at paragraph 19 of the Liability Judgment that there had been a corporate failure by the Respondent to take reasonable care to comply with its

disclosure obligations. The email from Mr Nuttman suggests that this happened despite previous advice. This is unreasonable conduct of the most serious kind. It had a significant effect on the trial. There were many documents that we would normally have expected to have available to the Tribunal that we did not have. We concluded that we had to draw adverse inferences in respect of evidence where documents had been deleted in order to ensure fairness in the trial. It follows that our jurisdiction to make a costs order under Rule 76 arises.

49. We have then considered whether we should exercise our discretion to make a costs order and, if so, in what amount.

50. To decide that we have considered what the consequences of that unreasonable conduct were. It is very difficult to say. Clearly, there was more correspondence about disclosure than there would have been if the Respondent had not deleted so many documents. Some of this (perhaps, most) is in the Claimant's application bundle. However, that correspondence represents a small fraction of the costs that have been incurred, most of which would probably have been incurred in any event if the matter had gone to trial. But, that last 'if' is a significant one: if documents had not been deleted, the position might have been quite different. The lost documents might have provided more support for the Respondent's case, or more support for the Claimant's case. Had they been available, the parties might have resolved their differences earlier. There may never have been a trial at all or its outcome might have been quite different. We will never know.

51. We have considered Mr Vials' argument that awarding costs would be a double penalty for the Respondent because we drew adverse inferences at trial, but we reject that argument. We had to draw adverse inferences in order to ensure the trial was fair. That is not a penalty against the Respondent, it is what was necessary to ensure that justice was done in the absence of the documents. Nor do we consider it a reason for not awarding costs that the Claimant did not succeed on all her claims. A party does not even have to win in Tribunal for a costs order to be made in their favour. This is not a 'costs follow the event' jurisdiction. In any event, it is not correct in our judgment that the unfair dismissal claim was the smaller element of the Claimant's claim. Although the harassment claims took up space in the List of Issues that is because the same claims were articulated in three different ways. The bulk of the factual allegations related to the constructive unfair dismissal (and every act of alleged harassment was also relied on for the unfair dismissal case). The Claimant succeeded on the main part of her case in our judgment, and certainly on the part that took up most of the Tribunal's time. It is correct that the Claimant has not complied fully with her disclosure obligations in relation to this hearing, and that she provided some disclosure late for the liability hearing, but that is not in itself a reason not to make a costs award.

52. In our judgment, it is here appropriate to make a costs award to reflect the seriousness of the unreasonable conduct and the significant impact that had on the trial and, potentially, on the parties' costs.

53. We then consider the amount of the award. We accept that this is a case for an award on the indemnity basis because it is 'outside the norm' for a party to delete documents on the scale we have seen in this case. However, it makes no difference to our approach to assessment in this case because we consider that the statements of costs are, in general terms, reasonably incurred and reasonable in amount and proportionate to this case given the nature of the issues, the length of the hearing and the number of witnesses. The statements of costs presented are, in our experience, 'perfectly ordinary' for this sort of case.

54. We do not, though, consider that it is appropriate to award the Claimant all of her costs. Although we are not bound to identify a direct causal link between the unreasonable conduct and the costs incurred, we consider that it is not fair or appropriate to make an award of costs that is wholly unrelated to the additional costs incurred as a result of the unreasonable conduct. Doing our best to assess that given the difficulties in doing so identified above, we conclude that the Claimant should not recover her costs of the remedy hearing because there has been no unreasonable conduct by the Respondent directly related to this hearing. So far as the Claimant's other costs are concerned, we consider that the appropriate award is 50% of her costs. This reflects the additional costs of dealing with the disclosure failures and the possibility that the parties might not have reached trial at all had those failures not happened.

55. It follows that we order the Respondent to pay the Claimant £13,507.50 in costs.

Employment Judge Stout

Date: 25th May 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

25th May 2021...

FOR THE TRIBUNAL OFFICE