EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Baptist	**v**	**Notting Hill Methodist Church**

Heard at: London Central (by video) **On**: 29 July 2021

Before: Employment Judge E Burns
Mr David Carter
Mr Martin Simon

Representation

For the Claimant: Pauline Lewis, Counsel

For the Respondent: Daniel Brown, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that neither party should be ordered to pay costs to the other.

REASONS

THE HEARING

1. The purpose of the hearing was to consider the applications made by each of the parties for costs.

2. The claimant's application was dated 11 June 2021 and was made under rules 76(1)(a) and 76(2) on the basis that the respondent had breached an order of the tribunal and acted unreasonably in the way the proceedings were conducted.

3. The Order said to be breached was the Case Management Order of the Tribunal dated 30th January 2020 for disclosure of the "*reports and minutes for the disciplinary proceedings in 2018 and 2019*".

4. The unreasonable conduct cited was:

"1. The Respondent has made a request for the Tribunal to have regard to the availability of Revd. Michael Long in attending the Tribunal for hearing the Tribunal's final judgment due to the anniversary of the Grenfell Tower on Monday 14th June. This is an offensive and unreasonable request in the circumstances of this case because an instrumental part of the Claimant's case was that she was harassed by the Respondent on grounds of race. One of her pleaded incidents of harassment was that Revd. Long failed to acknowledge that she did not have time to carry out a DBS check because the church was inundated with victims and their relatives following the Grenfell Tower. Revd. Long did not acknowledge that this was a reason for the delay in the Claimant carrying out the DBS check application.

2. The Respondent's counsel referred to the Claimant as "being silly" during cross examination.

3. The Respondent failed to disclose important and relevant documents during the preparation of these proceedings to the extent that the Claimant made an application to the Tribunal for an Unless Order to compel the Respondent to produce these documents. Even despite the Claimant's application, the Respondent still failed to produce the documents. However, on the day of the Final Hearing, he somehow did manage to produce some of them."

5. The amount sought by Ms Lewis was for 45% of the total costs she had incurred representing the claimant. The total amount was £11,831 plus VAT, with 45% being £5,323.95 plus VAT.

6. The respondent's application was dated 25 June 2021 and was made under rule 76(1)(a) on the basis that the claimant had acted unreasonably in the bringing of the proceedings and rule 76(1)(b) on the basis that the claim had no reasonable prospects of success.

7. The respondent relied on the fact that the tribunal panel had dismissed the claimant's claims in full and, in particular, our conclusion that the claimant had not established primary facts from which we could properly and fairly conclude that any difference in treatment of her was because of her race.

8. The amount sought by the respondent was counsel's fees for appearing at the final hearing, namely £6,000 plus VAT.

9. The costs hearing was a remote hearing conducted by video. We had a small bundle of relevant documents, and were able to refer to the bundle used at the final hearing where liability was determined. We heard submissions form both parties in support of their applications and in defence of the applications made against them.

10. The hearing was attended only by legal counsel. Neither party had prepared any witness evidence as to their means.

11. During the course of the hearing, it became apparent that the retainer between Ms Lewis and the claimant was a damages based agreement and that the respondent's legal fees were covered by legal expenses insurance. The panel invited the parties to make written submissions within 7 days as to the impact, if any, on our ability to make costs orders in such circumstances. We also requested copies of the relevant agreements. These were duly provided.

LAW

12. The tribunal rules enable a legally represented party in employment tribunal litigation to make an application for a cost order.

13. When considering whether or not to award costs, the relevant tests (known as the "threshold test") which the tribunal must apply are found in Rule 76 which says:

    (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 …. 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 ……..."

14. The tribunal must consider an application in three stages:

    - we must first decide whether the relevant threshold test is met
    - if we are satisfied the relevant threshold test has been met, we should then decide if we should exercise our discretion to award costs (the rules say "may" rather than "must")
    - we should then decide the amount of the costs to be awarded

    Each case depends on the facts and circumstances of the individual case.

15. Where a costs application is based on the merits of the case, we should take into account what the party knew or ought to have known about the merits of the case. Where a costs application is based on breach of an order or unreasonable conduct, we must consider whether, the threshold having been met, it is appropriate for a costs order to be made.

16. A factor relevant to the exercise of our discretion may be whether there has been any warning of a risk of costs, but such a warning is not a prerequisite to the making of an order; nor is it a prerequisite that the receiving party must have put the paying party on notice of any application.

17. Rule 84 is also relevant. It says:

*"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." (emphasis added)*

18. We emphasise the word "may" because the tribunal is permitted but not required to have regard to the means of the party against whom the order is made. A tribunal can make an award even if the paying party has no ability to pay, provided that we have considered means. We must do this even when the paying party does not raise the issue of means directly. We must say whether or not we have taken the paying party's means into account.

19. Costs are defined in Rule 74(1) which says: "Costs means fees, charges, disbursements or expenses *incurred* by or on behalf of the receiving party …" (emphasis added).

20. The reference in the above to "*incurred*" captures the indemnity principle which originates with the case of *Harold v Smith* [1960] 5 H. & N. 381. The principle is that a represented party in whose favour an order for costs is made may not recover more than he is liable to pay his own representative.

21. Notwithstanding the indemnity principle, a costs order can be made in favour of a party in circumstances where another body or individual has undertaken to meet their legal costs. The circumstances were considered and articulated by HHJ Slade, as she then was, in a tax appeal in the case of *HMRC v Gardiner* QB/2017/0193.

22. Having analysed the relevant case law authorities, HHJ Slade held that it is sufficient that a party has a contractual liability to pay the costs at issue, even if it is highly unlikely that they will be in fact be called upon to pay those costs. She also held that there is presumption between a client and their professional legal representative that the client will be liable to pay for the costs of that representation, but this can be rebutted by way of evidence.

23. Where a party has entered into a conditional fee agreement, damages based agreement or has had the benefit of legal expenses insurance, this will not necessarily be a barrier to making a costs award in their favour. Costs awards have been made in these circumstances (*Mardner v Gardner & Others* UKEAT/0483/13/DA, *Barry v University of Wales Trinity St David* 1603120/2013) providing the requisite liability is present.

24. The principle that costs are intended to be compensatory not punitive also means that where costs are claimed because a party has acted unreasonably in conducting a case or breached an order, the costs awarded

should be no more than is proportionate to the loss caused to the receiving party by its behaviour. In other words, the party is entitled to recover the cost of any extra work that had to be undertaken, but no more than that.

25. Finally, when determining the amount of costs to be awarded, the panel can choose between awarding costs on the standard or indemnity basis. These terms come form the Civil Procedure Rules, Rule 44.3 which says:

"(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party."

Relevant Background Facts

Claimant's Liability for Costs

26. The claimant's entered into a damages based agreement with her representative on 30 May 2019. The agreement states:

"9. If the tribunal makes a costs order for or against you

9.3 If Nottinghill Methodist Church acts unreasonably or vexatiously in defending your claim, you agree that I am entitled to charge you for my costs incurred in dealing with that unreasonable or vexatious conduct, calculated in accordance with paragraph 13 of this agreement. You agree that I may seek a costs order from the tribunal against Nottinghill Methodist Church to recover those costs. If I am unsuccessful in obtaining a costs order against Nottinghill Methodist Church, we agree that I will refund those costs to you (if you have already paid them) or no longer seek to recover them from you (if you are yet to pay them).

9.4 If the tribunal awards costs against Nottinghill Methodist Church and you have not yet paid me in respect of those costs you agree for those costs to be paid direct to me. If Nottinghill Methodist Church refuses to pay me direct, you agree to pay me those costs on receipt. If Nottinghill Methodist Church pays me direct in circumstances where you have already paid me in respect of those costs, I will refund those costs to you.

9.5 For the purpose of recovering costs from Nottinghill Methodist Church, my costs will be the amount ordered by the tribunal or calculated in accordance with any tribunal order

or direction. If the award includes payment of expenses that you are responsible for, [as long as I receive payment from Nottinghill Methodist Church, these will be repaid to you if you have already paid them or not charged to you.

9.6 I will also seek to recover from Nottinghill Methodist Church the costs and expenses incurred in making any application pursuant to paragraph 0 and you agree that paragraph 0 will also apply to those costs and expenses. However, you further agree that you will be ultimately responsible for the costs and expenses so incurred, in which case my costs will be calculated in accordance with paragraph 13."

13 Calculation of our costs

13.1 If you are ordered to pay costs or I am entitled to claim costs from you under the terms of this agreement, those costs will be calculated in accordance with the information on my charges that was provided to you in my client care letter dated 30th May 2019."

Respondent's Liability for Costs

27. The respondent's legal costs have been funded by a legal Expenses Insurance Policy.

28. The policy defines "Costs and Expenses" as meaning

> *"(1) All reasonable and necessary costs chargeable by the appointed representative and agreed by [the LEI provider] in accordance with the [LEI Provider's] Standard Terms of Appointment;*
>
> *(2) The costs incurred by opponents in civil cases if the insured person has been ordered to pay them or the insured person pays them with the agreement of [the LEI Provider]."*

29. It says in the section on Special Conditions:

"4 (b) An insured person must take every step to recover costs and expenses and court attendances and jury service expenses that [the LEI Provider has] to pay and must pay us any amounts that are recovered."

30. The respondent did not provide us with a copy of any other retainer agreement.

Conduct of the Litigation

31. Standard case management orders were issued in this case when the claim was served which provided for disclosure on 6 January 2020.

Disclosure and Preparation of Bundle

32. The respondent sent an (incomplete) list of documents to the claimant on 6 January 2020. The claimant sent the respondent an email on 6 January

2020 saying she was unable to comply with this deadline. She provided her list of documents on 14 January 2020.

33. Compliance with the orders was discussed at a case management hearing held on 30 January 2020 before Employment Judge Goodman. Employment Judge Goodman ordered that disclosure of documents should be completed by 28 February 2020. Her order specifically referred to disclosure including the reports and minutes for the disciplinary proceedings in 2018 and 2019.

34. The respondent did not meet this revised deadline. Ms Lewis wrote a short email to the respondent's representee to ask for missing documents on 2 March 2020. When she had not received a reply by 18 March 2020, she sent an email to the tribunal asking for an unless order.

35. The respondent's representatives sent an updated list of documents to the claimant on 18 March 2020. They also wrote to the tribunal on 18 March 2020 to say that the claimant had raised claims that were *prima facie* out of time and had requested historical documents which required additional searches. The letter apologised for the delay in complying with the duty of disclosure and confirmed that the documents had now been sent to the claimant. It also said:

"*The Claimant's representative has made no further efforts to contact DAS Law since [her email of 2 March 2021]. Had she done so she would have been made aware that the requested documents had been received by DAS Law and were in the process of being processed before being sent to the Claimant's representative."*

36. Ms Lewis wrote the respondent's representative following the disclosure of the additional documents to ask for disclosure of further correspondence between the respondent and the organisation that did its DBS checks. This culminated in an exchange of emails on 29 and 30 March 2020:

37. Ms Lewis wrote on 29 March 2020:

"I agree that the reason given for dismissal was failure to carry out a DBS check in 2019. However, my instructions are that:

1. A DBS check was already undertaken in 2018
2. Your client had no right or reason to request another one because the DBS agency already had all the required information from my client.
3. It follows that her dismissal was baseless because she had already completed a DBS check.

What you have not disclosed is correspondence between your client and the DBS agency, nor have you disclosed any evidence to support your decision that a further DBS needed to be done, when one had already been done.

If your client is not able to disclose documents to support their contention that a further DBS was necessary, when one had already been done, I will

be seeking an order for disclosure from the Tribunal for your client to disclose this correspondence and/or an order for the DBS agency to disclose that correspondence under Rule 31 of the Employment Tribunal Rules (Schedule 1).”

38. The respondent’s representative wrote on 30 March 2020:

“Unfortunately, you are quite frankly wrong in the detail of your email.

The disclosure already provided does include correspondence between my client and the company contracted to carry out the check, Due Diligence Checking Limited, which quite clearly sets out that the check commenced in 2018 was not completed.

Your client had not therefore completed a DBS check as she now alleges. There is also ample evidence that your client has been aware of this position throughout the process, including prior to her dismissal.

I take it this will now bring this matter to a close.”

39. Ms Lewis did not make any applications for additional disclosure.

40. The bundle index was finalised on 5 August 2020. This was later than envisaged in the case management order. The respondent’s representatives emailed the bundle to the claimant’s representatives on 6 August 2020. It was complete save for the two documents disclosed on the first day of the hearing on 7 June 2021. It incorporated the correspondence between the respondent and the company dealing with the 2018 DBS check, the lengthy letter from Rev Long to the claimant dated 18 January 2019 giving an explanation as to why a new DBS check was required and the investigation notes dated 10 March 2019.

41. At the start of the hearing on 7 June 2021, counsel for the respondent informed the panel that the respondent had some late additions to the bundle, namely the minutes of the 2019 disciplinary hearing and an additional one page letter. These had not previously been sent to Ms Lewis.

42. The respondent has subsequently explained why these two documents were not disclosed earlier. In the case of the disciplinary minutes, this was because the respondent did not realise that Reverend Joseph, who came from a neighbouring parish, personally held a copy of the minutes. In the case of the letter at page 156A, it is believed that there was a photocopying error.

Witness Statements

43. There was a delay in the exchange of witness statements. Statements were not exchanged until 4 March 2021. The correspondence suggests that neither party was at particular fault and they were happy to agree a delay in circumstances when the hearing was not due to take place until June 2021.

Both sides mentioned having difficulties associated with the COVID-19 pandemic.

44. Neither party sent the other any costs warning letters, nor made any applications for a strike out or deposit orders. The respondent did prepare a written application for a strike out, which the tribunal panel received with the bundle and witness evidence on the first day of the hearing. Mr Brown indicated that he did not wish to pursue the application at the start of the hearing on 7 June 2021.

The Hearing

45. During the claimant's cross examination, the respondent's counsel, Mr Brown, suggested to the claimant that she was "*being silly*" in relation to an answer she gave. Ms Lewis did not interject to object. None of the members of the panel interjected either.

46. The hearing overran and so the parties were asked about availability to attend for an additional day to enable an oral judgment to be delivered. The dates 11 and 14 June 2021 were suggested to the parties. Mr Brown emailed the tribunal panel saying:

"The Respondent is able to attend for judgment either tomorrow or on Monday. However, Monday 14 June marks the fourth anniversary of the Grenfell Tower fire and so tomorrow would be preferred."

Ms Lewis responded saying:

"I can confirm that my client and I are available for judgment tomorrow and Monday morning ….

I am unhappy about the Respondent's reference to the anniversary of the Grenfell Tower fire when this national disaster has played a key part in the Claimant's case.

This is regrettable."

Means of the Parties

47. We were not provided with any evidence as to the means of the parties. We were told that the claimant had not worked since leaving the respondent and relies on social security benefits. Although we did not have any documentary proof of this, we accepted this was correct as it was consistent with what she had indicated for the purposes of the liability hearing.

DECISION ON CLAIMANT'S APPLICATION

48. We are satisfied that we have the power to award the claimant costs notwithstanding that she has not actually incurred any costs.

49. Applying the test from *HMRC v Gardiner* QB/2017/0193 and on reviewing the terms of the agreement entered into between her and her legal representative, she has the requisite potential contractual liability.

50. Mr Brown accepts that the respondent breached the order for disclosure made on 30 January 2021 in two respects:

    (a) there was a delay (from 28 February to 18 March 2021) in sending some of the documents to the claimant

    (b) two documents were not disclosed until the first day of the hearing.

51. We note that the documents that were sent late were sent after Ms Lewis had chased the respondent's representative and written to apply for an unless order. This did appear to be necessary to nudge the respondent into action, but only involved writing a short email and letter.

52. The threshold test under Rule 76(2) is met. We have decided not to exercise our discretion and make a costs award in favour of the claimant under this rule.

53. Save with respect to the two documents disclosed on the first day of the hearing, all relevant documents had been provided by 18 March 2021. The delay was relatively short and had no bearing on the rest of the progress of the litigation. The respondent provided a reasonable explanation for the delay. It is understandable that it took longer to locate documents relating to allegations that dated back in time.

54. There were other delays in complying with the case management orders as a whole, which again, did not prevent the final hearing proceeding. Both sides were responsible for the delays.

55. With regard to the two documents that were not disclosed until the day of the hearing, neither of these documents contained evidence that was significant. The panel's view is that the late disclosure had no impact on the fairness of the hearing.

56. Ms Lewis effectively relies on the same facts as the basis of the application made under rule 76(1)(a) for unreasonable conduct, but adds two extra matters.

57. We find nothing unreasonable about the way Mr Brown conducted the cross examination of the claimant. His comment that the claimant was being silly was made perfectly politely and was prompted by a very bizarre interpretation being given to a document by the claimant. He made the comment once. As noted above the claimant's counsel did not interject and complain at the time nor did the panel feel it necessary to do so.

58. Similarly, there was nothing unreasonable about the reference in Mr Brown's email to 14 June being the anniversary of the Grenfell Tower disaster. The reference was made simply to point out, with a genuine reason, that Rev

Long was understandably likely to be busy on that day and would prefer if the oral judgment could be given on a different day.

59. We do not consider the claimant has demonstrated that the respondent's behaviour meets the test of unreasonable conduct for the purposes of rule 76(1)(a). It is therefore not necessary for us to consider whether or not to exercise our discretion to award costs under this rule.

60. Finally, for the sake of completeness, we record how we would have assessed the amount of costs payable, had we made a decision to award costs to the claimant under either rule.

61. As noted above, costs are meant to be compensatory rather than punitive. They are meant to compensate the receiving party for the avoidable work that they have had to do because of the other party's conduct.

62. We found Ms Lewis's submission that 45% of the costs would have been avoided had the respondent complied with its disclosure obligations on time absolutely remarkable and entirely without justification. In our judgment, the only extra work that Ms Lewis had to do because of the respondent's conduct was to write two short emails. If we had decided to exercise our discretion in favour of the claimant, the most we would have awarded would have been the costs incurred for that work.

DECISION ON RESPONDENT'S APPLICATION

63. We are satisfied that we have the power to award the respondent costs, notwithstanding the fact that it has not incurred any legal costs, save for the policy excess under its LEI policy.

64. Applying the test from *HMRC v Gardiner* QB/2017/0193 and on reviewing the terms of the terms of the LEI policy, we are satisfied that the respondent is obliged to seek to recover costs where they may be available and is under a legal obligation to pay them to their representative if it does so.

65. The respondent's application under Rule 76 (1)(a) that the claim had no prospects of success or that they were so low that it was unreasonable to pursue it, was made with the benefit of hindsight, at the time when the respondent knew the claim had been won in full.

66. It does not follow that because a claimant loses a case, that this was an obvious outcome from the start. Except in the most obvious cases, assessing the merits in a case at the start is very difficult. It becomes easier to assess the position as the litigation proceeds and more information is gathered. In this case, the respondent says that the claimant ought to have realised her claim was hopeless at the point when the bundle had been finalised and she was in possession of the respondent's witness statements.

67. The panel disagrees with the respondent's assessment in this case. In our judgment, this was a case where it was necessary, in the interests of justice, to hear live evidence and have the evidence of both parties tested in tribunal. Although we found in favour of the respondent, the claimant raised

legitimate questions in our minds as to whether she had been treated fairly and/or been subjected to discrimination. It was not until we had heard from both sides and the evidence was tested, that we were able to reach a conclusion.

68. For this reason, in our judgment the threshold test under Rule 76(1)(a) has not been met in this case. It is therefore not necessary for us to consider whether to exercise our discretion to award costs.

69. Finally, for the sake of completeness, we record our observations on the amount of costs payable and the claimant's means, had we made a decision to award costs to the respondent.

70. We are satisfied that the amount sought was reasonable in all the circumstances, being the final hearing fee of counsel. However, we would have taken the claimant's means into account, which would have led us not to make an award against her.

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Employment Judge E Burns
1 October 2021

Sent to the parties on: 04/10/2021

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For the Tribunals Office