Case Number: 1600259/2021

EMPLOYMENT TRIBUNALS

Claimant: **Ms H Chaudhry-Green**

Respondent: **Home Office Shares Services**

Heard at: **Cardiff; by video** **On: 28 September 2021**

Before: **Employment Judge R Harfield**

Representation:
Claimant: Mr Rahim (Solicitor)
Respondent: Mr Blitz (Counsel)

RESERVED COSTS JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant's application for a costs order and the respondent's counter application for a wasted costs order do not succeed. Both applications are dismissed.

REASONS

Background

1. The claimant left employment with the Home Office on 5 July 2020. Her claim form was presented on 26 February 2021 as a claim for holiday pay and a performance bonus said to be owed for the year 2019- 2020, which the claimant valued at approximately £800 and £500 respectively. The claimant set out in her claim form her alleged history of trying to secure payment for these sums dating back to August 2020 and said that promises were made for payment of the holiday pay and to investigate the performance bonus which she said had not been delivered upon. Acas conciliation took place between 30 December 2020 and 10 February 2021.

2. On service of the claim form on 30 March 2021 the Tribunal staff listed the claim for hearing on 28 September 2021 and issued standard directions, giving the claimant 4 weeks in which to send to the respondent "a document setting out how much s/he is claiming and how the amount has been calculated" and "copies of all supporting documents and evidence." The respondent then had 6 weeks in which to send their documents and evidence with a bundle to then be prepared. Witness statements were to be exchanged no later than 7 days before the hearing.

3. On 22 April 2021 the claimant's solicitor came on the record as acting. The claimant's solicitor emailed the respondent's solicitor saying (in response to an email I do not have) that the holiday pay claim was £863.97, that £578.65 had been received on 31 March 2021, and that the shortfall was presumed to be tax deductions. The email said that upon receipt of a full accounting the head of claim may be settled prior to a hearing. The email also said that the bonus award claim was £700 and attached various documents in that regard. The email also said "*Please be aware that I am instructed to prepare my client's disclosure bundle for service on 27 April 2021 pursuant to the case management orders made on 30 March 2021. Please confirm you will accept service by email. If you are not minded to do so, my client's disclosure will have to be posted tomorrow and therefore costs are to be imminently incurred. Alternatively, if the Respondent is minded to settle the claim, as indicated by the enclosed email correspondence, please let me know at the earliest to avoid said costs escalating."* A separate without prejudice communication was also sent proposing a Tomlin Order in which a full account would be provided of the holiday pay claim, £700 to be paid in respect of the bonus by 1pm on 23 April 2021 and the parties would waive any entitlement to claim costs.

4. On 23 April 2021 the respondent's legal representative sent a reply by email to say she was not in a position to respond or meet the terms of settlement that day but she was working with her client to resolve the issue and would be in touch shortly. The email explained technical problems with providing a payslip. The claimant's solicitor replied to ask for an expected time scale for resolution and asking if the respondent would accept service of documents by email. It was said this would give an opportunity to hopefully agree settlement terms prior to the disclosure deadline of 27 April 2021 and to defer the preparation of the disclosure bundle and avoid incurring those costs. The respondent's representative confirmed service could be by email and suggested that the parties agree to delay the deadline for disclosure by 1 month until 27 May 2021. The claimant's solicitor responded to state that he had already been instructed to start preparing the disclosure bundle for posting that day and that costs had already been incurred in that regard which his client would look to recover. He said the claimant was agreeable to the extension but that an

application would need to be made to the Tribunal and asked whether the respondent would be making such an application.

5. On 26 April 2021 the respondent's lawyer emailed the claimant's solicitor saying, further to discussions between the representatives, their client agreed to pay £700 in settlement of the remainder of the claim. A draft COT3 was enclosed. On 27 April 2021 the claimant's solicitor replied to acknowledge the offer and to say he was taking instructions.

6. That same day, 27 April 2021 (which was the deadline for filing the ET3), the respondent filed their ET3 response form, copying in the claimant's solicitor into the email. The response form said at box 6.1 that the claim was not defended. It then said "*The Respondent does not accept the entirety of the facts, as set out in the Claimant's Particulars of Claim (served on the Respondent's solicitors on 27 April 2021 by email). In response to the claims set out in the Claimants' ET1 however: 1. The Claimant received payment for holiday pay on 31 March 2021, subject to deductions made on the basis of tax and national insurance owed; 2. The Respondent accepts that a sum of £700.00 is owed to the Claimant as a result of a performance bonus awarded to her, and awaits confirmation that payment of this money is accepted as a remedy to this ground of claim*."

7. Also that same day, 27 April 2021, the claimant filed further particulars of claim asserting that the holiday pay owed was £863.97 of which only £578.65 had been paid. The claimant also noted that the shortfall was believed to be tax deductions but she had not received a payslip to confirm this. The particulars claimed a £700 performance bonus. The claimant's disclosure was also provided to the respondent.

8. On 30 April 2021 the respondent's representative chased up the position. The claimant's representative responded to state the COT3 terms were not acceptable, as the claimant was only prepared to withdraw her claim on receipt of the settlement payment (due to the previous delays) and issue was also taken in relation to settling future claims. The email said the claimant also sought her costs to date in the sum of £1155.00 plus VAT. The email said the respondent had been put on notice of the claim for costs from the outset but failed to act promptly in the circumstances and that the claimant was incurring costs as a result of the Tribunal Orders that could not have been avoided. It was noted that the claimant had left disclosure to the last day to give time to settle.

9. On 5 May 2021 the respondent's representative responded on the issues raised about the COT3 and said "*as we have previously discussed, the employment tribunal is a costs-free jurisdiction. I note that you previously made an offer to settle the matter at 3pm, 22 April 2021, seeking payment*

of the performance bonus by my client by 1pm, 23 April 2021. This offer was wholly unrealistic – my client is a central government department, and the necessary authorisations are required to take place before any such payment is made. You have not made any representations during this time settling out the need for such expediency, nor provided reasons as to why costs are thought to be appropriate in this case with reference to the criteria for awarding costs under rule 76(1) of the ET rules." The claimant's representative responded to state there had not been discussion about the Tribunal being a cost-free jurisdiction and asserting that the claimant's offer was not wholly unrealistic. It referred to the payments due being 9 months overdue and that the claimant's own requests had on numerous occasions not been given the recognition and importance they deserved. It was said the respondent had acted unreasonably in all of the circumstances and allowed the situation to escalate to where it is now. It was also said that in the interests of reaching a settlement the claimant would agree to cap her claim for costs at the figure previously stated in the revised COT3 on the basis that the matter was concluded that week. That same day the claimant's solicitor confirmed the claimant had received the tax breakdown for the holiday pay payment and suggested further amendments to the draft COT3 in that regard.

10. On 6 May 2021 the respondent's representative confirmed that the amendments to the COT3 were agreed. In relation to costs it was observed that the respondent's conduct prior to proceedings being commenced did not have any bearing on whether costs were payable in the case. It was pointed out that the respondent had agreed to pay the performance bonus on 26 April 2021 having received the settlement offer on 22 April 2021 and had made active efforts to meet the claimant's concerns about other aspects of her claim. It was said the respondent was keen to settle the matter without recourse to the Tribunal and so offered an ex-gratia payment of £1000 in full and final settlement of the matter, inclusive of costs (so a £300 contribution to costs). A response was requested by 13 May 2021.

11. On 7 May 2021 the claimant's solicitor responded to state it was not agreed that the conduct of the parties only fell to be considered once proceedings have commenced, and that the respondent's conduct remained unchanged from August 2020. It was said that "*your client is in an untenable position and plainly has no defence."* It was said that only after the claimant instructed a solicitor that things had progressed.

12. On 12 May 2021 the respondent's representative referred to an EAT decision in Davidson v Calder (Publishers) Ltd and the Calder Educational Trust relating to conduct occurring before the institution of proceedings. It was said that any application by the claimant for an award of costs was

misconceived and that the respondents would seek their costs for attending a hearing to deal with the issue. It was said an offer had been made to contribute to the claimant's fees in recognition of the delay causing inconvenience to the claimant but that there was no requirement for her to instruct legal representatives in the case which was not legally complex or high value. The email asked for details of the claimant's bank for payment of the performance bonus by 17 May 2021.

13. The claimant's solicitor responded to refer to a first instance decision in Amber Construction Ltd v HSE relating to the potential to award pre-issue costs where there had been unreasonable conduct or a response that has no reasonable prospect of success in the actual proceedings themselves. The unreasonable conduct here was said to be time delays of over 8 months to make payment, failing to keep proper records of the claimant's pay said to cause the non-payment, relying on excuses of covid pressures as a reason for non payment, and failing to treat the matter seriously and obtain resolution. It was said the respondent's ET3 was abusive as it completely disregarded the claimant's fully particularised claim and was selective in its response. The email said that the claimant's solicitors were instructed to receive payment on behalf of the claimant.

14. On 17 May 2021 the claimant rejected the offer of £1000 and made a counter offer of £700 for the performance bonus and £1000 plus VAT in respect of costs. The offer was said to be open for acceptance until 4pm on 19 May 2021. On 20 May 2021 the claimant's solicitor noted that there had not been a response and offered to extend the acceptance period to 4pm on 21 May 2021. The respondent's representative confirmed she was taking instructions. On 21 May 2021 the respondent repeated their position that they did not consider costs were applicable in the case. It was said that the £700 performance bonus had been paid directly to the claimant and asked for confirmation that the claimant had received this. The claimant was given until 26 May 2021 to confirm whether she accepted the previous costs contribution offer of £300.

15. The claimant's solicitor responded to say he would be away until 1 June 2021 and was unlikely to be able to respond until 4 June 2021. The email maintained the claimant's position in relation to entitlement to costs and objected to the fact the claimant had been paid directly when instructions had been given that the claimant's solicitor would receive any funds. It was said that making such an interim payment had undermined settlement negotiations and was improper given both parties were represented and a settlement impending. It was said an application was contemplated for wasted costs and that the claimant's costs were now at £1582.50 plus VAT. The claimant's previous offer was withdrawn.

16. The ET3 response from was formally served by the Tribunal on 23 May 2021 and at my direction the parties were asked to confirm within 14 days how they wished to proceed and were asked whether they were able to agree the wording of a consent Judgment or whether the claimant was in a position to withdraw the claim (which presupposed the parties were able to agree settlement terms). At that point in time the Tribunal did not know what had been going on between the parties.

17. On 3 June 2021 the claimant's solicitor stated that the respondent had no defence in their ET3 which warranted a costs application in itself as the matter should not have reached the Tribunal in the first instance. It was said the respondent had been given opportunities to settle to avoid accruing costs. It was further said that the respondent had accepted the principle that costs were payable by offering £300 and therefore it was now just a matter of assessing their quantum. It was said paying £700 direct to the claimant was misconduct and there were options for a wasted costs order and costs thrown away.

18. On 4 June 2021 the respondent informed the Tribunal that the parties had been unable to agree a consent order and the hearing would still be needed.

19. On 8 September 2021 the claimant's solicitor sent a costs application to the Tribunal asking for the application to be dealt with urgently on the papers and saying the hearing may not be necessary because the claim had settled. The application was referred to a Judge on 15 September 2021 and on 20 September the Tribunal responded to the parties to state that Judge Sharp had requested the respondent's comments and also was seeking confirmation from the claimant that the claim itself had been withdrawn and could be dismissed. The claimant's solicitor then confirmed that in fact the claim was not being withdrawn because Judgment was needed at the hearing on 28 September 2021.

20. On 20 September 2021 the representatives had a without prejudice telephone conversation. I do not have either party's attendance note of that discussion. Following this the claimant's solicitor wrote to propose the sum of £1500 plus VAT in settlement of the costs application which it was said had to be paid by 22 September 2021. A COT3 was to be agreed. On 21 September 2021 the respondent's representative said that she was still waiting for approval of £1800. The email said "*as discussed yesterday, my client cannot guarantee payment by 22 September /48 hours, so the agreement in this regard has to be drafted in standard terms i.e., 14 days after withdrawal. If this is not acceptable please let me know asap as that will effectively close settlement negotiations*."

21. The claimant's solicitor agreed the 14 day payment period but said it was subject to an indemnity for costs that may be incurred by the claimant if she ended up having to pursue payment of the costs award. The respondent's lawyer said that she did not have instructions on this point, and it was not possible to get those instructions within the timescales they were working to. The claimant's solicitor responded to state that the indemnity clause was needed because the claimant was being asked to withdraw her claim on the promise of a future payment the claimant had no faith would be paid promptly. It was said the claimant's willingness to withdraw her claim was subject to receiving the payment and not the other way around. It was said: "*The only way I see this concluding via a COT3 is if you can get the £1500 paid by tomorrow and the balance £300 paid within 14 days. We can incorporate this into the COT3 and my client will withdraw the claim. I believe this to be more than reasonable and await a further revision reflecting this."* The respondent's lawyer emailed to say that her client could not agree to the terms being sought.

22. On 21 September 2021 the respondent sent their response to the claimant's costs application and made their own counter application for wasted costs against the claimant's solicitor.

23. At the hearing I issued Judgment in the substantive claim as agreed by the parties, amounting to a declaration. I heard submissions in relation to the costs application and reserved my decision in writing. I had before me a costs bundle prepared by the parties, an updated version of the respondent's letter of 21 September 2021 (dated in itself 27 September 2021), and the claimant's schedule of costs.

The legal principles

24. Under Rule 76 of the Employment Tribunal Rules of Procedure the Tribunal may make a costs 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.

25. Consideration under Rule 76 is a two stage test. The Tribunal must ask itself whether a party's conduct falls within Rule 76(1)(a) and if so go on to consider whether it is appropriate to exercise its discretion in favour of awarding costs. "Unreasonable" is to be given its ordinary English meaning and is not to be interpreted as if it meant something similar to

vexatious (Dyer v Secretary of State for employment EAT 183/83). It may be appropriate to consider factors such as the nature, gravity and effect of a party's conduct, albeit it is also important to look at the whole picture and identify the conduct in question, what was unreasonable about it and what effect it had. Costs in the employment tribunal are still the exception rather than the rule (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420).

26. Under Rule 80 a wasted costs order may be made against a representative in favour of any party where that party has incurred costs –

    (a) As a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

    (b) Which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay."

27. There is a 3 stage test (Ratcliffe Duce and Gammer v L Binns (t/a Parc Ferme) EAT 0100/08 applying the Court of Appeal in Ridehalgh v Horsefield 1994 3 All ER 848):

    (a) Has the legal representative acted improperly, unreasonably or negligently?

    (b) If so, did such conduct cause the applicant to incur unnecessary costs?

    (c) If so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any party of the relevant costs?

28. In the context of Rule 80 "improper" covers but is not confined to conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. "Unreasonable" describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case and "negligent" is to be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

29. A legal representative should not be held to have acted improperly, unreasonably or negligently simply because he or she acts on behalf of a party whose claim or defence is doomed to fail. It is the duty of advocates to present their client's case even though they may think that it is hopeless and even though they may have advised their client that it is.

The claimant's costs application

30. The claimant's costs application was set out in the document accompanying the email of 8 September 2021. It was not clear to me, however, which of the matters set out were set out as being relevant background as opposed to actual allegations of unreasonable (or other qualifying) conduct. Mr Rahim therefore identified to me in oral submissions that the complaints were:

    (a) The respondent delayed in responding to the request of 22 April 2021 to accept service of disclosure by email by which time the claimant's solicitor had started to prepare the disclosure bundle for posting;

    (b) The respondent knew they were not going to defend the claim and left it to the last minute to file their ET3 on 27 April 2021. It is alleged that 5 days earlier the respondent could have accepted service of disclosure by email and then used the time available for settlement talks and that the claimant's solicitor was put to unnecessary work;

    (c) The ET3 did not respond to the further particulars of claim, just the original claim form;

    (d) The ET3 did not accept the claimant's version of events but failed to set out the respondent's own version of events;

    (e) Paying the £700 direct to the claimant undermined the settlement negotiations, was disruptive and abusive conduct because it settled the case whilst at the same time the respondent was asking for a remedy hearing. It was done to evade the issue of costs and left the conclusion of the proceedings in limbo;

.

    (f) The respondent did not communicate with the claimant between 10 June and 8 September to bring the case to a conclusion;

    (g) On 20 September the claimant offered £1800 in full and final settlement and the respondent did not give instructions in time which meant the hearing had to go ahead. By that time there had been an offer of £1500 and the difference was VAT. The respondent only had to pay £300 more to settle the proceedings and avoid the hearing;

    (h) The respondent has accepted the principle of paying costs and the question of quantum was being negotiated on, and so on principle are payable;

(i) The ET3 is incomplete, did not disclose an arguable case, and therefore the response had no reasonable prospects of success.

31. I do not agree that the respondent's response had no reasonable prospect of success or that it was unreasonably incomplete. The ET3 response form stated that the respondent did not defend the claim. It said that the holiday pay had been paid and made an offer of £700 in respect of the bonus that it accepted in principle was payable. It is therefore inapt and inappropriate to describe such an ET3 response from as having "no reasonable prospect of success." The ET3 response form set out very clearly and properly what the respondent's position was on the actual substance of the claimant's claim and sought to resolve the claim.

32. I do not find that the respondent acted vexatiously, abusively, disruptively, or unreasonably in not responding until 23 April to confirm that they would accept service by email. It was only one day after the request was made (albeit chased up by Mr Rahim following an earlier email response). The alleged delay did not unnecessarily incur costs on the claimant's behalf as the disclosure bundle was not prepared until 27 April 2020 in any event. The claimant's position in relation to seeking confirmation of service by email was also, in my experience, unusually formal. It is standard practice in my experience for legal representatives in employment tribunal proceedings to use email by default without requiring formal permission. Were a party, after the event, to object to service by email and require paper postal copies, the Tribunal (if indeed it were ever put to the trouble of having to review the matter) would also no doubt retrospective grant any technically required extension of time. But as I have said, I have never known legally represented parties to take such a stance in employment tribunal proceedings where the overriding objective in itself seeks to avoid unnecessary formality.

33. I do not consider that the respondent acted vexatiously, abusively, disruptively or unreasonably in not filing their ET3 response from until the day it was due. It was not late. It was filed in accordance with the Tribunal deadline and was copied to the claimant's solicitor (which avoided the otherwise inevitable delay in the Tribunal processing the ET3 and forwarding it on).

34. The whole flavour of the claimant's submissions on the above two points seems to relate to a complaint that the respondent was delaying resolving the dispute and caused the claimant unnecessary costs. However, even taking account of the claimant's frustrations as to how long it had taken to reach this point in time, I do not consider that it was unreasonable conduct for the respondent to not be in a position to agree the terms set out in the email of 22 April 2021 within 24 hours (or less). Moreover, the claimant set out her position on 22 April 2021. The respondent responded on 26 April

2021 with an agreement to pay the £700 and a draft COT3. That was a reasonable timescale. Indeed, I note that 24 and 25 April 2021 were the weekend, so in fact the respondent set out their substantive position within 2 working days.

35. It was not the respondent's fault that the Tribunal orders had the timescales that they did. They were simply standard directions, and indeed ones that presuppose the proceedings are going to be disputed. The claimant was not required to file further particulars of claim. What had been ordered was a schedule of loss and disclosure. It was as much within the claimant's solicitor's gift as it was in the respondent's to have proposed and acted upon a pragmatic way forward to allow the parties more time to settle the claim without being put to unnecessary or disproportionate work. The hearing was not listed until the September. They could have themselves emailed the Tribunal seeking an extension of time or proposing some new directions that were remedy focused. The Tribunal regularly and sympathetically deals with those kinds of requests, provided the final hearing date is not compromised. From the respondent's perspective as at 26 April 2021 they had on the face of it offered pretty much what the claimant had been seeking as at 22 April 2021. I think it likely and understandable that they thought at that point in time they were close to resolving the matter. By 6 May 2021 the amendments the claimant sought to the draft COT3 had been agreed. In truth the sticking point within the short period from 22 April to 30 April 2021 and thereafter became the claimant's quest for recovery of legal costs which jumped from no order as to costs on 22 April 2021 to a claim for £1155.00 plus VAT by 30 April 2021. But they were not costs incurred, in my judgement, through any unreasonable conduct on the part of the respondent in the conduct of the proceedings as opposed to being the claimant's choice (which she was perfectly at liberty to make) to instruct a legal representative to advise and assist her and the decisions made such as to file further particulars of claim, and to comply with the disclosure stage as opposed to another course of action (albeit those two steps would not account for £1155 plus VAT in legal costs in any event).

36. I have already found that the content of the ET3 response form was satisfactory. Moreover, there was no requirement on the part of the respondent to respond to the claimant's voluntary further particulars of claim.

37. As a matter of strict professional conduct as regulated legal professionals, I do consider that the respondent should have paid the £700 via the claimant's solicitors in accordance with their instructions. I do not agree that those instructions only related to a payment of the bonus plus legal costs. However, I do not consider that this amounted to unreasonable, vexatious, abusive or disruptive conduct of the proceedings themselves

(as opposed to legal professional duties). The respondent's representative did not seek to hide what they were doing. They told the claimant's solicitor the payment had been made and asked him to check the claimant had received it. They maintained their previous offer of a £300 contribution towards legal costs. It was therefore not something underhand to disrupt the process in that sense. Procedurally it also caused no adverse consequences and therefore did not disrupt or abuse the Tribunal process. The claimant was at liberty to make clear it was only accepted as an interim payment and that she wished (for example) to continue with the claim to obtain a declaration and/or that it did not extinguish a claim for costs that she still wished to pursue. All it could really do is narrow the field. Even if I am incorrect and it could be said the respondent's actions in paying the £700 direct was unreasonable conduct of the proceedings, I would decline to exercise my discretion in any event to make any award of costs for the reasons already given. I would add that I cannot see that the claimant ever clearly said to the respondent that she was seeking a declaration from the Tribunal, which may have, for example, allowed the parties to agree the terms of a Consent Judgment.

38. I do not consider that the respondent acted vexatiously, abusively, disruptively or otherwise unreasonably in not communicating with the claimant in the period June to September 2021. The parties had not been able to agree terms, so the listed hearing was awaited. There was at that time an impasse with the respondent offering a £300 contribution towards costs and the claimant seeking latterly £1582.50 plus VAT. If the claimant wanted to make a fresh offer she was at much at liberty to do so as the respondent was. The claimant had no absolute entitlement to her legal costs being repaid to her or a contribution made by the respondent but seemed to approach these proceedings as if that entitlement was an absolute. Costs are the exception not the norm. The respondent was reasonably entitled to take the view that they did not consider there were grounds for the claimant to seek to recover her costs and equally reasonably entitled to make an offer of a contribution on commercial grounds, or indeed on an ex gratia basis to go some way to acknowledge the delay the claimant had historically faced, even if that was not a matter that could be directly put before the Tribunal in a formal costs application under Rule 76. I do not consider that the respondent making an offer of a contribution to the claimant's costs amounted to an acceptance that costs are payable subject to their quantification by the Tribunal or that it meant that the claimant was entitled to recover all of her costs. That flies in the face of parties being sensibly able to try to resolve disputes, or to make commercial offers in settlement to resolve disputes and does not accord with how the respondent communicated the position to the claimant's solicitor.

39. I also do not consider that the final collapse of the settlement discussions between the parties amounted to unreasonable, vexatious, abusive, or disruptive conduct of the proceedings themselves by the respondent. It seems likely to me that the respondent's representative contacted the claimant's solicitor as a last attempt to broker a deal to try to avoid the cost of instructing counsel for the final hearing and other associated preparation costs. It also seems to me that it is likely the potential settlement fell apart because the claimant was seeking £1800 (on top of the sums already paid) with £1500 paid within 1 day and a further £300 paid within 14 days and the respondent was not prepared to agree those terms, particularly those relating to the timing of the payment or an indemnity relating to the timing of payment.

40. The claimant's solicitor says that his understanding of the phone call was that the respondent could pay £1500 by that date. The respondent's counsel disagreed. I did not receive sworn witness evidence from the two lawyers who had the seemingly two phone calls on 20 September and likewise neither party put an attendance note before me as to what was allegedly said. On what I do have before me I do not consider it likely the respondent guaranteed any payment by 22 September 2021 (although it is likewise possible there was a misunderstanding between the parties in that regard in the phone call). I reach this conclusion because the email of 21 September 2021 timed at 10:26 says *"As discussed yesterday, my client cannot guarantee payment by 22 September / 48 hours, so the agreement in this regard has to be drafted in standard terms i.e., 14 days after withdrawal. If this is not acceptable please let me know asap as that will effectively close settlement negotiations."* The draft COT3 also refers to a payment period of 14 days. Whilst I do appreciate the claimant's sensitivity to matters of timing and her endemic mistrust of the respondent's commitments, 14 days is a standard and reasonable payment period.

41. That the respondent would not agree to the claimant's settlement terms (whether in amount or timing or a combination of both) does not of itself mean that the conduct of the proceedings themselves were unreasonable. I do not consider that the respondent was obliged to give the claimant any sum by way of reimbursement of or a contribution to legal costs. It is then not unreasonable conduct to walk away from "without prejudice save as to costs" settlement negotiations and not unreasonable to refuse an additional £300 or to refuse the kind of payment terms being put forward. It is always a risk in settlement negotiations that one party could walk away. It is part of a legal advisor's job to warn their client of this and advise them of the risks when deciding how far to push their own negotiating position as well as providing general cost/benefit advice given cost recovery is not the norm and bearing in mind legal costs incurred can often quite quickly outstrip the value of the claim. It is most certainly a

shame that the parties were ultimately unable to find common ground having come so far and given the limited scope of the claim in question. It is also a shame that the costs incurred by both parties have ended up to a large extent being the costs of arguing about costs rather than the limited substantive issues. The issues of substance appear to have been agreed by 6 May 2021. The claimant also lost an offer that would have given her some legal costs contribution rather than none, but that does not in my judgement render the respondent's conduct of the proceedings as being unreasonable, or vexatious or abusive or disruptive. It was a litigation strategy risk that ultimately did not pay dividends.

42. The claimant's cost application is therefore dismissed.

The respondent's counter wasted costs application

43. The respondent's counter wasted costs application is brought against the claimant's solicitor. There is no costs application brought by the respondent against the claimant in person. Indeed, the respondent's position is that they consider the claimant as much a victim of her legal advisor as they are.

44. In short it was said that the claimant's solicitor was not trying to resolve costs or avoid litigation or act proportionally but instead was gun-ho and proceeded on a mistaken premise that the claimant had an entitlement to recover her legal costs. It was said the claimant's solicitor started from the mistaken position that the respondent was obliged to pay costs and then used the fact that the respondent did agree to form the basis of an allegation of unreasonable conduct. It was said that the claimant's solicitor then escalated the costs being demanded in an ill founded and unrealistic manner and frustrated the respondent's legitimate efforts to settle the dispute.

45. The claimant's solicitor's position was that he was acted in accordance with the claimant's instructions and that under the case law principles summarised above he should not be held responsible simply because a client chooses to pursue a hopeless case, or an argument doomed to fail. He said that the claimant's costs by the end were over £2000 and therefore an offer of £1500 plus VAT was a reasonable offer to make. He said he had given his client appropriate cost/benefit advice.

46. I do consider that the claimant's strategy in terms of the recovery of costs was over ambitious and as it turned out pushed the risk of the respondent pulling out to such an extent that it did ultimately back-fire. The claimant's solicitor is an officer of the court with duties to the court/Tribunal. If he tells me that he was acting in accordance with his client's instructions and he had given his client appropriate cost/benefit advice then I accept that

assertion. I therefore do not find that the claimant's legal representative has acted improperly, unreasonably or negligently and accept his assertion he was acting in pursuance of his client's instructions.

47. The respondent's counter application for wasted costs against the claimant's solicitor is therefore dismissed.

_____

Employment Judge R Harfield
Dated: 23 November 2021

JUDGMENT SENT TO THE PARTIES ON 23 November 2021

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche