EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms L Edwards		Pick Everard

Heard at: London Central (by video) **On**: 9 and 10 December 2021

Before: Employment Judge Stout
Ms Maria Pilfold
Mr Richard Miller

Representations
For the claimant: No appearance or representation
For the respondent: Richard Hignett (counsel)

JUDGMENT ON COSTS APPLICATION

The unanimous judgment of the Tribunal is that the Claimant must pay the Respondent £20,000 in respect of its costs of these proceedings. Payment must be made within 14 days of the date that this judgment is sent to the parties.

REASONS

Introduction

1. This is the unanimous judgment of the Tribunal. We gave judgment orally at the hearing and this is the corrected transcript, which constitutes the written reasons for our decision. As the Claimant was not present at the hearing, written reasons are provided by the Tribunal of its own motion.

2. Our liability judgment in this matter was sent to the parties on 25 May 2021 and the Respondent by application of 23 June 2021 applied for its costs of these proceedings on the grounds that the Claimant had conducted proceedings unreasonably. That application was made within the time limits stipulated in Rule 77 having been sent in on the last possible day of the 28 days having regard to the deemed dates of service in Rule 90.

The type of hearing

3. This has been a remote electronic hearing under Rule 46 and the public was invited to observe via a code notice on Court Serve.net, no members of the public joined. There were no connection issues. The participants were told that it is an offence to record the proceedings.

Claimant's application for a stay of proceedings

4. The Claimant had sought a stay. I had already refused that application on 19 July 2021 and the circumstances have not changed since that date. For the avoidance of doubt, we decided as a panel not to stay the proceedings for the same reasons I gave previously.

Whether to proceed with the hearing in the Claimant's absence

5. The Claimant did not attend the hearing. There had been no application to postpone. The clerk rang the Claimant on the mobile number she had provided, and also a number obtained from the Respondent. No one answered the telephone. The clerk also emailed the Claimant, but received no response. We were satisfied that the Claimant had received the notice of hearing, and had ample opportunity (which she had taken) to make submissions in writing. In those circumstances, we were satisfied that it was fair to continue with the hearing today notwithstanding the Claimant's absence.

Documents

6. For today's hearing we had the following documents before us:- a bundle prepared by the Respondent running of 459 pages, the Respondent's page-referenced costs application running to 14 pages, the Respondent's skeleton argument, the Claimant's bundle running to 65 pages, the Claimant's statement of response running to 41 pages and separately Counsel's fee note.

The Law

7. Rules 76, 78 and 84 of the Employment Tribunal Procedure Rules provide so far as relevant 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…
> (b) any claim or response had no reasonable prospect of success
> …
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
>
> **78.— The amount of a costs order**
> (1) A costs order may—
> (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
> (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;
> (c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;
> (d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or
> (e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.
> (2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).
> (3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.
>
> **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.

8. 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.

9. In deciding whether to make an award of costs the status of the litigant was a matter to be taken into account and a litigant in person is not to be judged by the standards of a legal professional: see *Vaughan v London Borough of Lewisham & Others* [2013] IRLR 713 at [25].However, we also take from *Vaughan* that if we do decide to take into account means we are not required to make an assessment only by reference to what the Claimant's means are at the point of time that we are deciding the application but we can have regard to what her financial prospects are at looking to the future.

10. In deciding whether the conduct of litigation is unreasonable, the Tribunal must bear in mind that in any given situation there may be more than one reasonable course to take: the Tribunal must not substitute its view for that of the litigant: *Solomon v University of Hunter and Hammond* (UKEAT/0258/18-19/DA) at [107].

11. Although we may take into account the ability to pay in both deciding whether or not to make a cost order and if so in what amount, we are not bound to do that if we decide not to take into account means we give reasons for so doing: *Jilley v Birmingham UK* (EAT/0584/06) at [44].

Our decision on whether the threshold for making a costs award is met

12. The Respondent's application in these proceedings is made on a number of grounds and we have grouped them in our judgment into five broad categories as follows:
    a. Unreasonable conduct of the proceedings prior to the hearing;
    b. Unreasonable conduct at the hearing;
    c. Producing a fabricated document;
    d. Bringing or pursuing claims that had no reasonable prospect of success; and
    e. Unreasonable conduct in relation to the cost application.

13. The first of those has a number of subsidiary arguments to it and our decision in relation to each of the arguments raised by the Respondent is as follows. Our conclusions are expressed having had careful regard to both the written and oral submissions of Mr Hignett and also the written submissions of the Claimant and the evidence that she has provided. In making our findings we have taken full account of the fact that the Claimant is a litigant person and that she is disabled as set out in our Liability Judgment. However, it is also relevant that she is a highly educated, intelligent and capable individual and thus a litigant in person with more personal resources than some others.

a. Unreasonable conduct of the proceedings prior to the hearing

14. The first point made by Mr Hignett relates to the sheer number of preliminary hearings that there had to be in this matter, a total of five over the course of the proceedings, when the norm is one. That number is in

part explained by the fact that a final merits hearing initially listed for July 2020 had to be postponed, but the number of hearings does also reflect what has happened between the parties and the correspondence in these proceedings about which we come on to deal in due course. The number of hearings is not in itself unreasonable conduct by the Claimant.

15. There are a number of points made by the Respondent relating to the Claimant's approach to disclosure. In this respect, we have placed significant reliance on the case management order of Employment Judge Joffe of 15 December 2020 which captures the position as it was at that time. What we see on looking through that order is that the picture at that point was mixed in the sense that Employment Judge Joffe noted that both parties needed to cooperate better, but nonetheless it is apparent that there had been some poor conduct by the Claimant in advance of that hearing. It is apparent from Employment Judge Joffe's Order that the Claimant had prior to that hearing made a large number of requests for disclosure which she did not ultimately pursue at the hearing and, looking at the volume of correspondence that was generated in relation to those requests, we do find that the Claimant acted unreasonably in making so many requests that ultimately she did not pursue. In so saying we take into account that the Claimant is a litigant in person, but in our judgment the volume of disclosure requests made by the Claimant which were pursued in correspondence, thus putting the Respondent to the expense of responding, but then not pursued at the hearing was outside the norm of conduct by a litigant in person. It is significant in this respect that Employment Judge Joffe observed that there had been no history of serious default by the Respondent in relation to its disclosure obligations and although she in the end ordered the Respondent to disclose a number documents at that hearing she did observe that this was as a result of a process of refining those requests that were pursued at the hearing and which had not been clearly articulated by the Claimant in her previous correspondence. Although she records that if there had been greater co-operation between the parties orders may not have been necessary, we do not read her decision as indicating that she considered the Respondent had been unreasonable in failing to provide disclosure prior to the hearing. We also observe that Employment Judge Joffe in that Order recorded that in a significant respect the Claimant's correspondence had not reflected the reality of the position. That is also part of the reason why we find the Claimant's conduct regarding applications for specific disclosure to have been unreasonable. So, we do find that in relation to her pursuit of some, but not all, of her disclosure applications the Claimant acted unreasonably.

16. Employment Judge Joffe in her Case Management Order of 15 December warned the Claimant about not making applications for unless orders without giving the Respondent an opportunity to respond. Despite that warning when the Respondent provided the disclosure on 8 January 2021 in response to Employment Judge Joffe's order the Claimant on the very same date made a further application for an unless order in respect of what she perceived to be defaults in the Respondents' disclosure provided

on that date. In other words, the Claimant did exactly what Employment Judge Joffe had just warned her that she should not do and that we find was clearly unreasonable conduct.

17. The Respondent makes more general complaints about the Claimant's correspondence and it is certainly the case that the Claimant has been a very prolific correspondent in relation to these proceedings and that her correspondence is frequently lengthy. It is also occasionally unjustifiably intemperate. By way of example at page 339 of the bundle for this hearing she wrote to the Respondent that *"your dirty litigation tactics, poor conduct and unprofessional attitude is no longer tolerable"*. On another occasion (p 391) she invited the Tribunal without apparent foundation to investigate the professional conduct of the Respondent's solicitor, and on another occasion on 1 July 2020 (p 388) she accused the Respondent of refusing to comply or failing to comply with disclosure obligations, an allegation that was without foundation as Employment Judge Joffe on 15 December confirmed. These are examples. Our overall view is that a significant proportion of the Claimant's correspondence in relation to the litigation has been unreasonable both in volume and tone. We do take into account that she is a litigant in person but the Claimant's conduct was outwith the norm that we would expect even for a litigant person and in our judgment taken as a whole a significant proportion of the Claimant's correspondence constituted unreasonable conduct of litigation.

18. The Respondent complains about the Claimant acting unreasonably in relation to an exchange of witness statements by providing her witness statement with a password on it which she refused to provide until the Respondent sent her their statements. On this, we do not find the Claimant was unreasonable. Effectively what happened is that both sides refused to 'go first' with the witness statements and either both were being unreasonable or neither was unreasonable and in those circumstances we do not find that that was unreasonable conduct by the Claimant.

19. As to the Claimant's failure to agree a bundle with the Respondent, we have had more difficulty deciding whether or not this was unreasonable conduct. The Claimant's position was that the Respondent had not included all the documents that she wanted in the bundle and that the bundle the Respondent had produced was not organised how she wanted it to be. Having been told that at the start of the hearing we readily permitted her to use her own bundle bearing in mind her disability. However, as the hearing proceeded it became apparent that the Respondents' bundle did include all the documents that were required for the hearing, whereas the Claimant's bundle did not and moreover was organised in such a way that neither she nor her Counsel were able to use it effectively during the hearing. We can see that in retrospect this made it appear that her refusal to agree the bundles was unreasonable but we consider that to hold that she was unreasonable in refusing to agree it at the time would be to apply hindsight to the situation. The Claimant does have a disability and it was for that reason that we accepted that she should be permitted to use her own bundle and we consider that her

difficulties regarding agreeing the Respondents' bundle were probably related to her disability. Given that, and the fact that she is a litigant in person, we are not prepared to find that she acted unreasonably in not agreeing to use the Respondents' bundle prior to the hearing.

20. The Respondent further under the first category of unreasonable conduct points to the Claimant's twenty applications to the Tribunal between 27 September 2019 and the end of the liability hearing on 17 May 2021, which is an average of one application a month over that period. Our overview of that correspondence is that most of those applications were very extensive, that the vast majority were not pursued once they got to a hearing and most of them (saving those elements of the disclosure application before Employment Judge Joffe on 15 December 2021 already discussed) were unsuccessful. There were three particular examples that came before us at the hearing itself and which we dealt with or referred to in our Liability Judgment at paragraph 5.

21. They included the Claimant's application of 23 April 2021 to strike out the response on the basis that the Respondent had submitted falsified documents and her application of 28 April 2021 accusing the Respondent of altering its witness statements. Ultimately, neither of those applications were pursued. In relation to the first, however, the Claimant did not at the start of the hearing wholly withdraw her allegations but maintained that she had doubts about the authenticity of some of the Respondent's documents that she wished to raise in evidence in the course of the hearing. However, what became apparent by the time we had reached deliberating stage was that what had happened in relation to that application was that the Claimant (as we found at paragraph 34 of our Liability Judgment) had herself fabricated a document and it was when the Respondent made that allegation to the Claimant that the Claimant in retaliation (but without any foundation for it) made the applications that we have just referred to at the start of proceedings. In other words, this was a 'tit for tat' accusation against the Respondent. That would not have been unreasonable had there been any basis for it, but there was not. There was no evidence at all on which the Claimant could assert that the Respondent had been falsifying documents. In contrast, we did in fact find that the Claimant had falsified a document and it thus was clear to us by the time we came to deliberate that the Claimant had made the allegations against the Respondent in order to distract from her own document falsification or possibly in an effort to get the Respondent to drop that allegation. In those circumstances, we have no hesitation in concluding that the making of those two applications in relation to falsifying documents and alleged falsification of witness statements against the Respondent were unreasonable. Those applications had been set out at length in correspondence and did take up time at the start of the hearing.

22. We add to the above that the third application that was before us at the start of the hearing was related to an alleged GDPR breach which again had been made by the Claimant at length in correspondence but was not pursued. It should not have been made in the first place because as ought

to be apparent to an educated litigant in person such as the Claimant, breaches of the GDPR are not a matter for this Tribunal. So, the overall pattern in relation to the Claimant's conduct of the proceedings prior to the hearing is we find one in which there has been unreasonable conduct in relation to some, but not all, elements of the conduct of proceedings.

b. Unreasonable conduct at the hearing

23. We then move on to the second ground of application by the Respondent, the conduct of the hearing. The Respondent argued that the Claimant had made during the course of the hearing numerous unwarranted allegations about the Respondent having failed to disclose various documents. In relation to that we acknowledge that the Claimant did during the hearing have a somewhat stock response of saying when there was no documentary evidence to support what she was saying that the Respondent had not disclosed that documentary evidence. While that was not helpful conduct, we are not prepared to find that it was unreasonable given that she is a litigant in person and unfortunately that is the sort of response that we see relatively frequently in the Tribunal.

24. The Respondent then argued that the Claimant made numerous allegations against the Respondents' witnesses which had no foundation. In relation to those, although we did in our Liability Judgment find against the Claimant in relation to those allegations, we do not find the Claimant acted unreasonably in making those allegations. The Claimant's unfounded allegations against other witnesses were part of what led us to conclude that the Claimant was an unreliable witness (see in particular paragraphs 123 and 146 of the Liability Judgment), but we did not find that the Claimant had deliberately lied about these matters. The fact that someone is an unreliable witness, even a wholly unreliable witness, does not necessarily mean that they are acting unreasonably and we do not find that the Claimant was in this case.

25. The Claimant did, however, make one very unreasonable allegation against Miss Hardwick-Smith that she was lying, and we dealt with that at paragraph 107 of the judgment. What was significant about that allegation was that the Claimant persisted in saying that Miss Hardwick-Smith had been lying about not having initially received an image of something from the Claimant when the Claimant herself had at the time apparently accepted that in her own email and forwarded a further copy of the missing image to Miss Hardwick-Smith. Persisting in accusing Miss Hardwick-Smith of lying in those circumstances was in our judgment unreasonable.

26. The Respondent argues that the Claimant unreasonably impugned the character of Mr Hughes-Jones and Miss Hardwick-Smith. Although ultimately we dismissed the Claimant's claims and essentially vindicated to some extent the character of Mr Hughes-Jones and Miss Hardwick-Smith, it is almost inevitable in litigation of this sort that the allegations made will impugn the character of the person against whom they are

made. That was unfortunately the nature of the claims that needed to be decided and it was not unreasonable for the Claimant to make those allegations, they were an inherent part of her case.

27. We do, however, find that the Claimant acted unreasonably in relation to her response to questions during the hearing and we captured much about what we thought about that in the Liability Judgment. We have in mind in particular at paragraph 18 where we noted as follows:

> However, on reflection we did not consider that what the Claimant told us about how she was feeling during cross-examination accounted for the aspects of her behaviour that we have found to be relevant to the issues, specifically the sarcastic comments, and her anger and looking away from the camera. This is because for most of her cross-examination she did not behave like someone in pain, but took action to prolong cross examination, complaining about Mr Hignett's questions, seeking to ask him questions (even after we had explained that that was not the function of cross-examination), refusing to answer questions on a document (the Associate job description) even after we had ruled that the questions were relevant and at one point when Mr Hignett said he would leave the matter of the NHS material on dyslexia for closing submissions she demanded that this be dealt with and repeated at length the evidence she had given in her witness statement about it.

28. Then at paragraphs 15 and 19 we recorded some of the sarcastic comments that the Claimant made in the course of the hearing. See also paragraphs 88-90 and 146. At paragraph 112 we recorded one particular exchange (one of many where she refused to answer questions) as follows:

> When it was put to the Claimant in cross-examination that she had felt she was entitled to the role of Associate and when she did not get it she behaved badly from this point onwards, she did not at first answer. When the Judge asked Mr Hignett to wait for the Claimant's answer, she said "look at how I was treated before you judge me". When it was pointed out that still was not an answer to the question, the Claimant said that she was "not confirming or denying". Mr Hignett put to her that she had become "disengaged and not interested". She responded "no comment". We find that the Claimant in in her answers to these questions acknowledged that she had, in general terms, behaved badly with the Respondent because of her disappointment with the Associate recruitment process.

29. See also paragraph 133. And then again at paragraph 134 the Claimant again refused to answer questions and did so making the sarcastic comment that something that really went to the heart of her claim was *"trivia from three years ago"*.

30. We find that the Claimant's conduct during cross examination was unreasonable and went well outside the norm of what we expect from a litigant in person, even somebody suffering from a disability such as the Claimant does. So, in relation to the Claimant's conduct at the hearing we do again find that some elements of it were unreasonable.

c. Producing a fabricated document

31. The third ground relates to the fabricated document. We note that the Claimant in her response to the costs application maintains that the document was not fabricated and that the Tribunal did not find it was fabricated. However, as is clear from paragraph 34 of our judgment we did find that the document had been fabricated by her between 12 March 2019 and 21 March 2019 and we gave full and detailed reasons for so finding. We do find that it was unreasonable conduct to have fabricated that letter and to have sought to rely on it in these proceedings and to have given untruthful evidence about it.

d. Bringing or pursuing claims that had no reasonable prospect of success

32. The fourth ground concerns the bringing or pursuit of claims that have no reasonable prospect of success and in this regard although we have ultimately found that the Claimant's claims did not succeed, and indeed in some cases they were very weak, we remind ourselves that we must not apply hindsight to the test of what it is reasonable to do in terms of bringing claims to the Tribunal particularly where somebody is a litigant in person. The Claimant's claims were not successful and some elements of the case were unreasonably pursued as we have already found, but overall we do not consider that she unreasonably pursued claims that had no reasonable prospect of success. This is principally because nobody appears to have warned the Claimant about the merits of her claim. The Respondent did not send her any warnings about that, there was no application for a strike out or deposit order and no judge made a deposit order or other observations about the claim of their own motion. In the absence of such warnings we do not find that the fact that the Claimant did not obtain legal advice on the merits of her claims (as she says in her response to this application: p 244) of the bundle to be unreasonable. A litigant in person is not bound to obtain legal advice. While they might be acting unreasonably if they do not when specifically warned that their claims are weak, in this case that did not happen and therefore we are not prepared to find that it was unreasonable conduct to pursue the claims.

33. We also do not accept the Respondent's argument that it was unreasonable conduct for her to have failed to adduce evidence as to why time should be extended in relation to her discrimination claims. There may well not have been very much to say about that. The reality in cases such as this is that they tend to turn on whether or not there are continuing acts of discrimination and if there are not the claims fail and if there are they succeed. There is not much more to be said about time limits and given that at the point of preparing her witness statement she was acting in person we do not find that it was unreasonable conduct for her to fail to adduce evidence on that element of her claim.

e. Unreasonable conduct in relation to the costs application

34. The final ground concerns alleged unreasonable conduct in relation to the cost application itself. On this, we reject the Respondents' argument. The Claimant has responded to the cost application at some length. She may

not have agreed to settle it, but that is not unreasonable given that costs do not follow the event in the Tribunal and there was no certainty a costs order would be made. It is not suggested that she refused any reasonable offers in relation to settlement of the cost application and she is in our judgment entitled to defend that application and has not acted unreasonably in relation to it.

Conclusion on whether the threshold for making a costs award has been met

35. So, for all those reasons, we find that there has been unreasonable conduct by the Claimant in respect of some aspects of the proceedings.

Exercise of discretion

36. We then turn to consider whether we should exercise our discretion to make an award of costs in the Respondents' favour. We have decided that we should exercise our discretion and we take into account in this regard that although there was not any specific warning by the Respondent about the merits of her claim, there were warnings by the Respondent about the Tribunal's power to award costs and the possibility of it making applications for costs in the event that her unreasonable conduct of the correspondence prior to the hearing continued. There were also references in a number of letters to her conduct pushing up costs such that the Claimant was we find fully notice that the Tribunal might award costs that her conduct was increasing them and that the Respondent might make an application for costs. We have in mind in particular the following letters: that of 10 December 2020 from the Respondent at page 451 of the bundle, that of 11 January 2021 at page 452 of the bundle, that of 21 January 2021 at page 340 of the bundle, that of 11 February 2021 at page 456 of the bundle and that of 23 April 2021 at page 458 of the bundle. Although the latter two related to elements of the claim about which we have found that the Claimant was not acting unreasonably, nonetheless the point is that the Claimant was on notice that costs might be awarded against her because the Respondent had pointed this out.

37. In any event, even if there had been no such warnings, we would have found that this was an appropriate case for a costs award to be made. The conduct that we have found to be unreasonable has in our judgment infected many aspects of the preparation of this case in these proceedings and it is not insignificant in its nature and extent.

38. For all these reasons it is in our judgment appropriate to make an award of costs.

The Claimant's financial means

39. We have considered carefully whether or not we should take the Claimant's means into account both in deciding whether or not to make an award for costs and if so what amount. Normally we would do so and, indeed, in many cases even where somebody does not provide detailed evidence as to their means we might take a general view as to their level of means and take that into account. However, in this case, we are not in that position.

40. The Claimant was ordered by the Judge on 19 July 2021 that if she wished her means to be taken into account in relation to this cost application, she should provide necessary evidence by 24 August 2021 by completing the County Court Form N56. The Claimant did not do that by 31 August 2021. She has on 5 December 2021 produced and sent to the Respondent an incomplete form N56 that contains no detail of her bank accounts or savings, no details of her income or outgoings. It simply states on it that she is unemployed. Apart from that, the only other information we have is that the Claimant has put in paragaraph 41 of her statement for the purposes of this hearing that she has no personal property assets, that *"there are no overriding interests which could override a first registered disposition"* (a sentence we do not understand) and that further to her GP letter of 24 August 2021 she was referred to neurology at Bucks hospital and that the costs associated with ongoing/life-long medical treatment in hospital are currently unknown. She also says she may be eligible for benefits to contribute towards medical treatment not readily available on the NHS, but she is not in a position to make an application and she says that her ability to earn in the future will be vastly reduced. However, there is no evidence backing up any of that, there is no medical evidence to support it and no detail is provided.

41. The Claimant is, we know from the materials put before us at the full merits hearing, a First Class graduate who is very well qualified in her field, who has a solid employment history from 2008 and subsequent to her leaving the Respondent in July 2019 she had by September 2019 already obtained another job with a different employer at a higher salary of over £100,000 (that is what she put at page 5 of her ET1). By the time of the hearing in May 2021 we understood from her witness statement at paragraph 163 she was still in employment. In those circumstances, even if the Claimant is currently unemployed (which we do not accept as we have no evidence as to when that unemployment started or what happened with her previous job or what efforts she has been making to find alternative employment), what we are faced with is somebody who has for a number of years been a very high earning employee and even if she is not earning currently it may well be that she is still a relatively wealthy individual. We simply cannot tell from the information in front of us. This is not a case in which we can make any sensible assumption based on material before us as to whether she is somebody who is relatively well off or not relatively well off and in those circumstances it seems inappropriate to make any attempt to take account of her means as the evidence she has provided us with is inadequate.

The amount of the costs award

42. We then adjourned to enable the Respondent to consider how it wished to invite us to approach determination of the amount of the costs award. The Respondent's Statement of Costs for the proceedings as a whole totals £134,313.24. The Respondent initially indicated it wished to seek Detailed Assessment in the County Court. Consideration was then given to seeking Detailed Assessment from the Tribunal, but ultimately the Respondent decided to invite us to make an order under Rule 78(1)(a) and order the Claimant to pay a specified amount, not exceeding £20,000.

43. We have approached this part of the decision as follows:-

44. First of all we have considered the full Statement of Costs that the Respondent has submitted, and we have applied a summary assessment process to that. We have considered with reference to the guideline rates as published in the 2021 Senior Costs Office Guidance whether or not the costs claimed are reasonable in their amount and proportionate to the claim in this case bearing in mind its nature and complexity and the length of the trial.

45. We have excluded from the total costs claimed the costs that relate to the cost application itself as we did not find the Claimant had been unreasonable in relation to the cost application. That leaves us with a total of £101,000 being claimed.

46. That £101,000 is, we are satisfied, the amount of costs that the Respondent has in fact incurred as verified by the signed statement of costs. The previous estimate of £80,000 that the Claimant was given by the Respondent in June 2021 was just that, an estimate, and what we are looking at now are the actual figures.

47. The Respondent's solicitors are based in Leicester. Leicester is in National Two for the purposes of the Senior Costs Office Guidance. The National Two rates at present are a Grade A fee earner £225, Grade B fee earner £218 and Grade C £177 and Grade D £126. The Claimant in her bundle of documents has got out of date figures. The Respondent is claiming £310 for its Grade A fee earner (above the guideline) and £190 for its Grade C fee earner (above the guideline) and £110 for its Grade D fee earner (below the guideline).

48. We consider that this litigation was substantial and complex. It involved both discrimination and equal pay claims, an eight day hearing and multiple detailed applications and allegations made by the Claimant. In those circumstances we do consider it appropriate to allow the Respondent to claim slightly above the guideline rates. However, we consider that the Respondent has claimed at more than is reasonable. We would allow a 10% extra on the guideline rates rather than approximately 20% as is the position of the rates claimed by the Respondent. That means that the amounts claimed for the Grade A fee earner should be

reduced by approximately 10% but that only brings the figures down by about £2,000.

49. We have considered separately whether or not the rates claimed for the hearing for both Counsel and solicitors are reasonable. We note that solicitors did not actually attend for very much of the hearing and the Claimant has misunderstood the position in that regard. We find that the attendances of the solicitors at the hearing were reasonable.

50. So far as Counsel's fees are concerned, they come in total to £23,500 for the hearing and including other work done on the case to £30,000. We note that the Claimant also instructed counsel from the same Chambers and so she has been able to provide some comparative figures in her submissions. She indicates that she was told that No 5 Chambers would charge for its most expensive junior counsel between £20,000 and £25,000 for an eight day hearing including preparation. She herself was quoted a total of £13,150 for junior counsel attending an eight day hearing plus prehearing review.

51. We note that Mr Hignett's fees for the hearing were £23,500 and were thus within the normal range of what No 5 Chambers quoted the Claimant so it seems to us that given the substantial nature of this work and its complexity that those are reasonable. It is also reasonable given that the number of applications and other matters that were raised by the Claimant in correspondence that there should have been additional work by Counsel on the case and that therefore the total fees claimed by Counsel of approximately £30,000 are reasonable given the nature of this litigation.

52. So that means the overall costs when we have considered what is reasonable and unreasonable applying this summary assessment process still stand at about £99,000.

53. We have considered whether that figure is proportionate to the nature of the litigation, and we accept that it is. We see that the Claimant has suggested a figure of £20,000 for a three day trial outside of London, but in our experience that would be an unrealistically low figure even for a trial of three days and it would not even cover Counsel's fees at the rates that the Claimant indicated No 5 Chambers would charge for senior junior Counsel.

54. We are satisfied that for a trial of this nature and this length and this complexity that £99,000 as a total figure is not an unreasonable or disproportionate amount of cost to have incurred.

55. We then have to consider what proportion of that the Claimant should pay given the unreasonable conduct that we have found. We have decided that the appropriate proportion of costs to award against the Claimant is one third of the total costs. We arrive at one third in part because that seems to us to be likely to reflect very roughly the increase in the Respondent's costs that have likely resulted from the Claimant's

unreasonable conduct. Even if it is higher than any directly caused increase in costs, in our judgment it is appropriate because it reflects the seriousness of the elements of unreasonable conduct which we found which may not have sounded in specific costing increases for the Respondent, such as fabricating the document, and her unreasonable conduct during cross examination. We have to arrive at a figure. It is rough and ready, but it is unanimously what we consider to be appropriate in this case to reflect the unreasonable conduct that we found.

56. One third of £99,000 is £33,000. That exceeds the cap of £20,000 which is all that we can award under the Rules on summary assessment. We therefore order the Claimant to pay the Respondent £20,000 by way of costs in these proceedings.

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Employment Judge Stout

7 January 2021

JUDGMENT SENT TO THE PARTIES ON

7 January 2022

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FOR THE TRIBUNAL OFFICE