EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Sargeant**

Respondent: **North Yorkshire County Council**

Heard at: **Newcastle CFCTC** (CVP) **On:** **13 April 2022**

Before: Employment Judge Newburn

Appearances
For the Claimant: Not in attendance
For the Respondent: Not in attendance

JUDGMENT ON COSTS

1. The Respondent's application for costs is successful.

2. The Claimant is ordered to pay to the Respondent costs of £2,500.

REASONS

Introduction

3. Following a strike out of the Claimant's case on 18 January 2022, the Respondent made an application for costs in accordance with Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on 14 February 2022.

4. The form of the hearing for the Respondent's costs application has been the subject of correspondence. The Claimant confirmed it was her preference to have the matter decided on the paper, and the Respondent stated its preference was to attend a hearing in person.

5. Having considered the same, and with reference to the Overriding Objective, I felt it was in in the interests of justice and proportionality to deal with this application on the papers.

6. I made case management orders on 14 February 2022 to ensure both parties had the opportunity to make full representations regarding the Respondent's application.

The Proceedings

7. The history of the proceedings in this matter is lengthy, and I do not propose to set out a detailed account. I set out below an overview of the relevant details upon which I have made my judgment.

~~8.~~ By her ET1 of 10 January 2020, the Claimant brought claims of unfair dismissal and a request for a sum of £699, the basis of the claim for this sum was unclear.

9. A final hearing was listed for 11 May 2020, however due to the lockdown restrictions imposed as a result of the Coronavirus pandemic, the hearing was converted to a case management hearing by telephone.

10. At this hearing Employment Judge Aspden found the Claimant's claims to be unclear and made orders of 11 May 2020 that the Claimant must file further and better particulars.

11. The Respondent submits its costs in relation to Counsel's brief for this hearing amounted to £600.

12. Correspondence occurred between the parties regarding the further and better particulars however on 26 July 2020, the Respondent wrote to the Tribunal to request an Unless Order, as it did not believe that the Claimant had complied with the orders to provide further and better particulars.

13. On 22 September 2020, a further preliminary case management hearing was listed with the aim of considering compliance with the orders of 11 may 2020 and to determine if further orders were necessary.

14. At this hearing, Employment Judge Aspden concluded the Claimant had not complied with the orders of 11 May 2020 and made further orders of 2 October 2020. The Respondent submits the Claimant failed to comply with these orders, and that the claim was not clarified, however in the interests of proportionality, and saving time and costs, it decided it would address the issue during the final hearing.

15. The Respondent submits its costs in relation to Counsel's brief for the hearing were £600.

16. The final hearing was listed for 3 and 4 November 2020. On 1 November 2020 the Claimant made an application for postponement of the hearing on the basis that she was unable to obtain childcare for her son.

17. On 3 November 2020, the hearing was vacated as there was no available Judge to hear the claim. The hearing was relisted for 26 and 27 April 2021 by video hearing using the Cloud Video Platform (**CVP**), and a notice of hearing was sent to the parties on 18 November 2020.

18. That hearing came before me and on the morning of 26 April 2021 by CVP, the Claimant did not attend. The Tribunal contacted the Claimant, and she informed the Tribunal that she was not aware the hearing was taking place, and that she had not received the notice of hearing. She asked to postpone the hearing as she was not prepared.

19. The Claimant attended at the hearing to discuss her application to postpone. During the hearing, contrary to her earlier discussion with the Tribunal Clerk, she informed me that she had received the notice of hearing in November 2020 and that she had also made arrangements to ensure she was free for the 2 days of the hearing. She stated however that she had not received the CVP joining link, and therefore assumed the hearing would not be going ahead but had not contacted the Tribunal to discuss the matter. The Claimant stated she was not prepared and wished to postpone the hearing; after further discussion however, she confirmed that she had previously prepared for the hearing, as it had originally been listed for a final hearing in May 2020, and then again in November 2020.

20. During this discussion the Claimant was having technology issues and communication was continually interrupted. Given the technology issues, I adjourned the hearing until the following day giving the Claimant additional time to prepare and to resolve the technology problems.

21. On the second day of the hearing, a few hours into the hearing and about an hour into cross examination, the Claimant stated as part of her defence, that she had a medical condition. This condition had not been raised before with the Respondent, it was not referenced in the ET1, or at any prior hearing, and at the start of the hearing when we discussed whether reasonable adjustments were needed, it was not raised. Accordingly, however I took the opportunity at that time to determine if adjustments to the hearing were needed; the Claimant confirmed there were none. I advised the Claimant to take her time and to confirm to me if at any point during the hearing she found that she did require an adjustment.

22. The Claimant stated she had 2 reports regarding the diagnosis of her medical condition, and she provided one of those reports to the Tribunal as this was being raised as part of her defence. The report provided was an educational psychology report dated 21/9/2020 (the "**21/9/20 Report**"). The report explained that the Claimant was currently studying at Teesside university for her masters, and that "*it should be noted that this assessment and any recommendation made was undertaken for educational study purposes and is not necessarily appropriate for any other situation or environment. Study at higher levels places particular requirements on an individual and as such requirements are not typically duplicated elsewhere.*" The Claimant stated she had a further report, however no other report has been provided to the Tribunal.

23. Further to this discussion, cross examination continued. During cross examination, the Claimant became distressed with the Respondent's representative. The Claimant stated that she felt she had been made to feel uncomfortable about her medical condition by the Respondent's representative when she had responded to a question. The Respondent's representative confirmed he had not intended to make the Claimant feel uncomfortable about her medical condition and had not meant to offend or insult her at all. I did not find the Respondent's representative to have acted in an unprofessional manner or to have asked any unsuitable questions during cross examination, his conduct did not appear to have been an attempt to intentionally cause offence to the Claimant with respect to her medical condition and he confirmed that he had not intended that. Notwithstanding the intention, recognising that the Claimant was upset, I paused the hearing for a long adjournment running this over to incorporate lunch in order to give her a lengthy break.

24. Further to this long break the Claimant informed the Tribunal she felt she was unable to undergo any further cross examination. I made enquiries with the Claimant as to whether there was a way to assist her or whether there might be any reasonable adjustments that could be made, however after a further short break, she did not return to the hearing or contact the Tribunal regarding her decision not to return. Accordingly, the proceedings could not continue.

25. The Respondent submits the costs incurred in relation to counsel's fees for this hearing was £3,000.

26. As a result, I adjourned the hearing. I made case management orders dated 28 April 2021 confirming a telephone hearing would be listed with the aim of discussing what reasonable adjustments would be required to enable the Claimant to partake in the remainder of the final hearing, this being in the form of a Ground Rules Hearing. Those orders included directions for the Claimant to write to the Tribunal setting out what reasonable adjustments she required to assist her to fully participate in the Ground Rules Hearing and at the resumed final hearing, asking her to provide any medical evidence upon which she wished

to rely, and asking the parties to confirm if the suggested dates for the hearing were acceptable.

27. The Claimant did not respond to these orders.

28. I made further orders of 27 May 2021 stating the Claimant must provide the information set out in the orders of 28 April 2021.

29. The Claimant failed to comply with the order to confirm the reasonable adjustments she required, or to provide the medical evidence she wished to rely upon.

30. On 18 June 2021, the Ground Rules Hearing was listed for 90 minutes by telephone on 7 July 2021 and notice was sent to the parties with further orders stating a deadline by which the Claimant had to confirm the reasonable adjustments she required and provide any medical evidence she wished to rely upon regarding those adjustments.

31. The Claimant failed to comply with the orders.

32. On the morning of 6 July 2021, the day before the Ground Rules Hearing, the Claimant sent an email to the Tribunal stating that in accordance with her attached fit note of 5 July 2021, she was "*unable to attend or participate in any court proceedings until further notice*". The fit note attached confirmed the Claimant was not fit for work due to "*stress related problems*".

33. In line with the Employment Tribunals (England and Wales) Presidential Guidance – Seeking a Postponement of a hearing (2013), I made orders that by 3pm on 6 July 2021 the Claimant needed to confirm if her fit note regarding her attendance at work also affected her ability to also attend the telephone hearing and if so, to provide medical evidence confirming the same. Alongside this I further ordered that the Claimant comply with my orders of 28 April 2021 to confirm what reasonable adjustments she required and the medical evidence in support of the same.

34. The Claimant did not comply with the orders of 6 July 2021.

35. The Claimant did not attend the telephone hearing of 7 July 2021. As this hearing was to determine what reasonable adjustments the Claimant required, this hearing could not go ahead and was adjourned.

36. The Respondent submits it incurred counsel's costs in the sum of £600.

37. I made further case management orders of 12 July 2021 including an Unless Order stating the Claimant must confirm what reasonable adjustments she requires as requested in the orders of 28 April 2021. Additionally, I made orders that the Claimant provide evidence from her medical practitioner that in his/her

opinion the Claimant's medical condition prevented her from being able to attend the 90 minute telephone Ground Rules hearing of 7 July 2021, alongside an order that she either provided the medical evidence she wished to rely upon concerning her reasonable adjustments or confirm that she did not intend to provide this evidence.

38. The Claimant complied with the Unless Order, and she also provided a copy of the 21/9/20 Report again but did not provide the other medical report she had discussed. The Claimant did not comply with the order to provide the required medical evidence regarding her failure to attend the 7 July 2021 hearing.

39. On 3 August 2021, the Claimant was ordered to provide the medical evidence as detailed in the case management order of 12 July 2021. The Claimant did not comply with this order.

40. The Ground Rules Telephone Hearing went ahead on 25 August 2021.

41. During this hearing the Claimant stated that she had complied with the Case Management Orders of 12 July 2021 and had provided 2 medical reports in an email directly to the Respondent. The Tribunal and the Respondent both appeared to be in receipt of only 1 report.

42. The Claimant stated that she had sent the second report in an email directly to the Respondent. The Respondent confirmed it did not have another report, and the Tribunal also did not have a copy of the second report. I granted a short adjournment to permit the Claimant time to find the email sending that report in order to forward a copy of the same to the Tribunal and the Respondent so that I could see when that email was sent and give myself and the Respondent time to review a copy of the report. Unfortunately, the Claimant was unable to locate the email and the second report discussed. However, she confirmed she would be able to provide the email with the second report later in the week after she had been able to search properly.

43. Notwithstanding that we did not have the second report, the parties agreed on reasonable adjustments that would be made to enable to Claimant to fully partake in the final hearing. This included a discussion regarding the incident in which the Claimant was upset during cross examination, and an agreement on a method by which this could be avoided in the final hearing so that the Claimant felt comfortable taking part in the hearing.

44. The Claimant stated in this hearing that she wished to amend her claim to include a new claim of unauthorised deduction from wages. We discussed the fact that this application was substantially late, especially in light of the fact that the hearing was part heard and the relisted hearing was imminent. I explained she would need to make an application to amend her claim to include her new claim and detailed the test that would be applied to that application. I explained it was

imperative that if she did wish to make this application, she must take immediate action.

45. The Respondent discussed that it would be making an application for costs at the substantive hearing. I outlined the nature of costs in the Employment Tribunal for the Claimant and advised on where she could seek further help or information about the same.

46. I made case management orders on 27 August 2021, ordering that by 3 September 2021, the Claimant must either make an application to amend her claim or confirm she did not intend to do so. I made a further order that the Claimant comply with 12 July 2021 order to provide medical evidence relating to her non-attendance at the 7 July 2021 hearing; and an order that by 3 September 2021, the Claimant provide the 2 medical reports she stated she had provided to the Respondent alongside the emails accompanying the same which she had confirmed during the hearing she had available and was able to supply.

47. The Claimant did not comply with any of these orders. On 22 March 2022 (significantly after the deadline set in my 27 August 2021 orders) the Claimant sent an email to the Tribunal attaching an email which appears to have been sent to the Tribunal and Respondent on 21 July 2021. The Tribunal did not receive this email on 21 July 2021 and the Respondent asserted at the hearing of 25 August 2021 that it had not received this email. In the covering email of 22 March 2022, the Claimant attached the 21/9/2020 Report. This had already been provided and was not the second report which the Claimant referred to in the 25 August 2021 telephone hearing.

48. The Respondent submits that the costs incurred by the Respondent for Counsel for the Grounds Rules Hearing was £600.

49. On 13 September 2021 the Respondent made an application to strike out the Claimant's claim.

50. On 13 September 2021, the Claimant sent an email to the Tribunal and the Respondent with provision of a medical report she wished to make available to the Tribunal but not to the Respondent.

51. I made further orders in respect of this letter on 29 September 2021. I informed that Claimant that at the Ground Rules Hearing of 25 August 2021 it had been discussed and agreed that the Claimant would provide a copy of her medical report to the Respondent and the Tribunal. The Case Management Orders of 27 August 2021 reflected that agreement. Accordingly, I made and order that by 8 October 2021 the Claimant needed to confirm whether the wished to rely upon the medical report provided to the Tribunal or not and if not, she must write to the Tribunal copying in the Respondent to explain why she wished to depart from this Case Management Orders which had been drafted further to her agreement

during the Ground Rules Hearing. I further ordered the Claimant to provide a written response to the Respondent's application for strike out and confirmation as to whether she wanted a hearing regarding that application.

52. The Claimant did not comply with these orders.

53. On 14 September 2021, the Claimant sent an email to the Tribunal stating that she wished to amend her claim to add a further claim of breach of contract, which did not include the information requested in the order of 27 August 2021 and did not provide sufficient detail for the Respondent to make an adequate response. Notwithstanding that, the Respondent did prepare a response to the application to amend based on the information that was available on 27 September 2021.

54. The Respondent again highlighted to the Tribunal and the Claimant that it intended to make an application for costs.

55. I wrote to the parties on 19 October 2021 setting out that the Claimant had not complied my case management orders of 29 September 2021 and ordered that she complied. The Claimant complied with those orders on 28 October 2021.

56. The final hearing was listed for the resumed final hearing via CVP on 16 and 17 November 2021.

57. On 15 November 2021 at 15.22 the Claimant emailed the Tribunal to request a postponement because she had been contacted by Track and Trace, that she had developed symptoms of Covid-19 and that she had to go for a PCR test, which had been booked for 1.30 pm on 15 November 2021.

58. The information did not provide medical evidence that the Claimant was unable to attend at the video hearing to discuss her application to postpone. Given the history of the claim I felt that it was appropriate to seek to speak with the Claimant directly about her postponement application. Accordingly, I ordered that she attend on the morning of 16 November 2021 at the start of the video hearing so that this could be discussed.

59. On the morning of 16 November 2021, the Claimant did not attend the video hearing. The Tribunal contacted the Claimant on her mobile phone and she answered the call to say that she was going to hospital with symptoms of COVID-19.

60. I ordered that the hearing be adjourned to 2:00pm to give the Claimant an opportunity to get medical evidence to the Tribunal and details as to why she was unable to participate in the video hearing to discuss her application for postponement in order that I could consider her application.

61. In response to this, the Claimant provided the Tribunal with a print out of her GP records for 16 November 2021 which indicated that the Claimant had contacted

her GP at 9:47 regarding COVID-19 symptoms and was advised to attend at hospital. The Claimant drove to hospital and at 10:24 she received a negative COVID-19 test.

62. Having considered the evidence, I adjourned the hearing until the morning of 17 November 2021. As the information provided did not confirm whether the Claimant had been admitted from hospital and remained there or whether she was unable to attend at the video hearing on the 17th November, I gave further orders to obtain clarity and to give the Claimant the opportunity to attend the hearing. Those orders confirmed that, should the Claimant require a postponement for the second day of the hearing, she should make a further application and I explained what information I needed from the Claimant to enable me to consider her application.

63. On the morning of 17 November 2021, the Claimant emailed the Tribunal requesting a postponement of the adjourned hearing "*due to being ill with Covid 19 and not being released from* [hospital]". The Claimant also attached a screenshot of a text message from NHS Track and Trace indicating that she had informed track and trace she had tested positive for COVID-19.

64. The information provided by the Claimant was contradictory, as her GP print out indicated she had tested negative for COVID-19 at hospital. It was also not certain from the Claimant's message whether she had been admitted to hospital overnight and remained there or whether she would be able to discuss her application and the continued progress of her claim with the Tribunal.

65. As I did not have a clear understanding for the basis of the Claimant's application, and in an effort to understand it so that I could properly consider it, I adjourned the hearing until 11:45 and made an order that the Claimant provide a copy of her PCR test result, her admittance and discharge sheets from hospital, and medical evidence to explain why her medical condition prevented her from being able to participate in a hearing to discuss her application by video (with or without the camera) or by telephone. I confirmed that the hearing would reconvene at 11:45.

66. The Claimant called the Tribunal and confirmed she could attend the video hearing with her camera off. The hearing was reconvened with the Claimant in attendance with her camera off. The Claimant stated she would participate as far as she could, but she confirmed she would not answer any further cross examination from the Respondent. I thanked her for attending, and confirmed that she could take as many breaks as she needed and all the time she needed to in order to feel comfortable.

67. I explained to the Claimant the requirement for the medical evidence to be provided in cases where applications for postponement were so close to a hearing, and the orders I had sent her were to give her the opportunity to provide

this evidence to enable me to consider her application fully. The Claimant confirmed she understood. I confirmed I would still require the information I had requested in my orders. The Claimant confirmed that she would be able to provide her PCR result which she understood and confirmed showed the date and time upon which the PCR test was taken, she also confirmed she would provide evidence of her hospital admittance and discharge, and we set a timeframe for the same to be provided. The Claimant suggested a timeframe for the provision of this information, however in order to assist, I explained I would be ordering a longer deadline than she had suggested.

68. We were able to make some progress with some preliminary issues and dealt with the Claimant's application to amend, which was refused.

69. Given the events leading up to the hearing, and the Claimant's statement at the start of the day that she would not agree to be cross examined further, the hearing could not go ahead. Taking into account the full the history of the case and with the agreement of the parties, I made orders to have the remainder of the hearing take place on paper. In considering, the overriding objective, proportionality, and balancing the interests of justice, the parties, and other court users, the orders for the conduct of the remainder of the claim represented the most proportionate and reasonable way of achieving a fair hearing going forward.

70. The Respondent highlighted its position with respect to making an application for costs. I reminded the Claimant about the rules on costs in the Employment Tribunal.

71. The Respondent submits that it incurred costs for Counsel for 16 and 17 November 2021 hearing in the sum of £2,250.

72. I made orders of 22 November 2021 which set directions for the parties to follow to obtain the information required to conclude the hearing on the papers. The Respondent complied with all of these orders, including sending written closing submissions thereby having completed all steps required to defend the claim in this matter.

73. My orders of 22 November 2021 also included orders regarding the Respondent's costs application as well as the orders agreed by the Claimant at the hearing on 17 November 2021 that by 1 December 2021, she would provide:

    73.1. her PCR test result showing the result, as well as the time and date this was communicated to her;

    73.2. evidence of the date and time she was admitted to hospital on 16 November 2021;

    73.3. evidence of the date and time she was discharged from hospital thereafter.

74. The Claimant did not comply with the orders.

75. The Tribunal issued a Strike Out Warning to the Claimant on 3 December 2021 as she had not complied with the above directions at paragraphs 73.1 -73.3 above and her claim had not been actively pursued.

76. The Claimant responded to the Tribunal on 17 December 2021 advising that her GP had still not received a hospital discharge letter. She also attached a fit note from her GP dated 23 November 2021 (the day after the hearing on 22 November 2021) which stated that she had "*post Covid fatigue*".

77. On 20 December 2021 the Tribunal wrote to the Claimant advising that her email of 17 December 2021 did not explain why she had failed to provide her PCR result as ordered at 1.1 of the Tribunal Order sent to the parties on 25 November 2021. The Claimant was asked to explain why and was asked to respond by 4 January 2022.

78. The Claimant responded later that day advising that a copy of her COVID-19 test results had already been forwarded, and she attached them again. The attachment was not confirmation of the Claimant's PCR results as she had agreed to provide and as had been ordered. The attached document was a copy of confirmation from the Claimant that she had informed NHS Track and Trace that she had tested positive for COVID-19.

79. The Tribunal issued a further Strike Out Warning to the Claimant on 21 December 2021. The Claimant was informed that her response of 20 December 2021 did not satisfy the requirements of the order and unless she did so by 30 December 2021 her claims would be struck out.

80. The Claimant responded to the Tribunal on 30 December 2021 advising that she had already supplied information in respect of Points 1.1 and 1.2 of the Orders dated 25 November 2021, and that in relation to Point 3.1 she was still waiting for a discharge letter from Ward 3 at James Cook Hospital.

81. On 18 January 2022 the Claimant's claim was struck out for failing to comply with Tribunal orders.

82. On 14 February 2022 the Respondent made a costs application. The Respondent provided a summary of the costs incurred by the Respondent for Counsel which totals £9,150, as well as a summary of the internal costs incurred by the Respondent which totals £16,438.24

Respondent's submissions

83. In summary, the Respondent asserts that the Claimant's conduct was unreasonable for the following reasons:

83.1. Under Rule 76(1)(c) of the Employment Tribunals Rules of Procedure 2013 ("**the Rules**"), hearings were postponed/adjourned on the Claimant's application with fewer than 7 days before the relevant hearing;

83.2. Under Rule 76(2) the Claimant has been in breach of multiple Tribunal orders and hearings have been postponed/adjourned on her application;

83.3. Under Rule 76(1)(a) the Claimant's behaviour was unreasonable because she breached numerous Tribunal orders, failed to clarify her claim, and repeatedly made late applications for postponements resulting in wasted time and costs for all parties and the public purse.

84. The Respondent highlights that it had made clear to the Claimant on a number of occasions that as a result of the way in which she was conducting the litigation, it intended to make a costs application in this matter and it could not therefore be said that she was unaware that a costs order against her was possible.

85. The Respondent avers that at the time the Claimant's claim was struck out it had been forced to incur the costs of defending the entire litigation.

86. The Respondent submits that where its costs are considered in excess of defending a typical claim of this nature, the additional costs have been directly occasioned by the Claimant's actions in this matter.

87. The Respondent submits as the Claimant's claim was struck out as a result of the Claimant failing to comply with Tribunal orders, all costs should be recoverable, however, it seeks summary assessment and an order limited to £20,000.

Claimant's submissions

88. The Claimant submits that the delays in this matter were caused by the conduct of the Respondent's Representative during cross-examination. The Claimant submits this was in breach of the Equality Act 2010 and stated that this resulted in the case being *"prolonged causing costs to rise through no fault of* [hers]." The Claimant stated that the Respondent's Representative's "*disgusting comments regarding her* [medical condition]" caused her to lose confidence and require mental health counselling.

89. In her email of 25 January 2022, the Claimant indicated that she did not feel the Respondent's costs were reasonable but did not expand further on that point.

90. The Claimant was given the opportunity to submit evidence as to her means and she provided documents to the Tribunal accordingly which included bank statements, confirmation of her outgoings, details regarding her application for

carer's allowance, and details of benefits received. However, in addition to the provision of these documents she also submitted that this information did not accurately reflect her means.

Relevant Legal Principles

91. Rule 76(1) of the Rules provides as follows:

"*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; or

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

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

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

92. Rule 77 of the Rules states:

"*<u>Procedure</u>*

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

93. Rule 78 of the Rules states:

"*<u>The amount of a costs order</u>*

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). under 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 subparagraphs (b) to (e) of paragraph (1) may exceed £20,000."

94. Rule 84 of the Rules states:

"*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."*

95. Milan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN sets out a structured approach to be taken in relation to an application for costs where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise at paragraphs 52:

"*There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court.*"

96. In Gee v Shell UK Ltd [2003] IRLR 82 the Court of Appeal reiterated that costs in the Employment Tribunal are the exception rather than the rule.

97. In AQ Ltd v Holden UKEAT/0021/12/CEA His Honour Judge Richardson stated that a Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. Tribunals must bear this in mind when assessing the threshold tests. Even if the threshold tests for an order for costs are met, the Tribunal must exercise its discretion having regard to all the circumstances and it is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help or advice.

98. However, the Respondent highlights paragraph 33 of Holden in which Judge Richardson says:

> "*This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.*"

99. Similarly, the Respondent highlighted Vaughan v London Borough of Lewisham & Ors (No. 2) [2013] IRLR 713, in which the EAT declined to interfere with a substantial costs order against an unrepresented party. Underhill J observed that *"the basis on which the costs threshold was crossed was not any conduct which could readily be attributed to the appellant's lack of experience as a litigant".*

100. In McPherson v BNP Paribas [2004] EWCA Civ 569 Mummery LJ stated:

> "*[40] … The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred.*"

101. Dyer v Secretary of State for Employment UKEAT/0183/83 ; Whether conduct is unreasonable is a matter of fact for the tribunal to decide. Unreasonableness has its ordinary meaning.

102. In Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420, CA Lord Justice Mummery said that

> *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had." That case also decided that although there was no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that did not mean that causation is irrelevant.*"

103. In Lodwick v Southwark London Borough Council 2004 ICR 884, CA, the Court of Appeal determined that at both stages of the Tribunal's discretion to make a costs award, the fundamental principle that costs awards are compensatory not punitive, must be observed.

104. Paragraph 37 of Arrowsmith v Nottingham Trent University [2012] ICR 159 states**:**

> "...[*T]he tribunal had regard to Ms Arrowsmith's means, although ... it was not in fact obliged to do so... Ms Arrowsmith's ability to pay was apparently extremely limited... and the tribunal had regard to that by making an order for the payment of a sum that, in comparison with the likely amount of costs that Nottingham would recover on an assessment, was probably little more than a token contribution... The fact that her ability to pay was so limited did not, however, require the tribunal to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.*"

105. Henderson v Merthyr Tydfil Urban Council [1900] 1 QBD 434; Wiggins Alloys Ltd v Jenkins [1981] IRLR 275 confirm that costs of legal work for in-house lawyers can be recoverable from the other side. This was also confirmed by the EAT in Ladak v DRC Locums Ltd UKEAT/0488/13.

Discussion and Conclusions

106. Applying to 3 stage test I must consider the following issues:

    106.1. Has the Claimant behaved in the manner proscribed by the Rules?

106.2. If so, I must consider whether to exercise my discretion as to whether or not it is appropriate to make a costs order, (and I may take into account the Claimant's ability to pay in making that decision).

106.3. If I determine that a costs order should be made, I must decide what amount should be paid or whether the matter should be referred for assessment, (again I may take into account the Claimant's ability to pay).

Has the Claimant behaved in the manner proscribed by the rules?

107. As I have detailed in my findings above, throughout the proceedings the Claimant made several requests for postponements of hearings, usually either the day before the hearing or on the day of the hearing, and she has failed to comply with several case management orders, either on time, or at all. These actions have resulted in adjournments or delays in hearings and thus increased costs to the Respondent.

108. The Claimant's request for a postponement on the morning of the 26 April 2021 hearing was rejected. The basis of the application was that she was not prepared because she stated that she had not received confirmation of the hearing date; however, she confirmed to me in the hearing that she did have knowledge of the hearing and she had arranged her time to ensure she had childcare to be free for the two days in question. The time involved in reviewing the application resulted in delays to the timetable of the hearing. By this stage, there had already been two preliminary hearings in this matter before Employment Judge Aspden who had made considerable efforts to clarify the Claimant's claim, making careful case management orders which were discussed with the Claimant in detail. Despite which, the Claimant had failed to comply with those orders. Accordingly, the claim was unclear because of the Claimant's failure to comply with orders and the additional delay caused by an application to postpone, which was not well founded, determined that the final hearing was extremely unlikely to conclude within the allotted two day hearing time, notwithstanding the later events in that hearing. Whilst the Claimant avers that all delays stemmed from the action of the Respondent's Representative in cross examination, I do not find that to be the case, the Claimant's previous actions had already caused a significant departure from timetable for the hearing.

109. The Claimant did not provide the medical evidence which she was ordered to provide with respect her request to postpone the 7 July 2021 Ground Rules Hearing. The Claimant was given specific details regarding the medical evidence that was required in my orders, it was discussed with her at the Ground Rules Hearing on 25 August 2021 and detailed in my Case Summary in my Case Management Orders for that hearing. The evidence requested was not complex and had been clearly discussed with the Claimant. The Claimant is intelligent and well-educated, she is currently studying for her masters and should have been able to comply with this order, it did not require specialist legal knowledge to

understand. The Claimant did not attend the hearing, and this resulted in an adjournment and failed to provide the requisite medical evidence in relation to the same.

110. The Claimant made an application to postpone the November 2021 hearing, and again failed to provide the necessary medical evidence upon which she was relying with regards to that application notwithstanding clear orders directing that she do so. The medical evidence required from the Claimant was clearly detailed to her and at the hearing on the morning of 17 November 2021 she had agreed she would supply the same. The Claimant confirmed to me in that hearing that she fully understood the information I required from her and had even suggested she would provide it within a much tighter time frame than I suggested and subsequently ordered. The Claimant thereafter provided various other documents, however none of the documents she provided complied with the order which had been clearly set out and agreed by the Claimant. I do not accept that the Claimant was unable to comply with this order or could have been in any way confused about what I had asked.

111. Further to this, the Claimant had failed to comply with my orders relating to her late application to amend her claim. I had explained to the Claimant in the hearing on 25 August 2021 that it was imperative this application be made promptly. As a result of the application being provided outside of the time frame detailed in my order, the application had to be considered at the outset of the final hearing. Additionally, because the information the Claimant provided about the application did not comply with my orders, the application was unclear which resulted in further delays to the timetable of the case.

112. Accordingly, the re-listed final two day hearing of the claim was delayed and ultimately adjourned because of the Claimant's actions.

113. The Claimant submits that this case could have been dealt with within the initial time frame, were it not for the Respondent's Representative making "*disgusting comments"* about her medical condition, and that all costs and delays were no fault of hers. I do not accept this to be the case.

114. The Respondent's Representative did not make any derisory comments about the Claimant's medical condition. I accept that the Respondent's Representative's observation about an answer provided by the Claimant to a question raised in cross examination upset the Claimant because she had felt it had been intended as a negative comment about her medical condition, however the incident was discussed on the day itself and subsequently at the Ground Rules Hearing; the Claimant was assured that the Respondent's Representative did not intend to offend the Claimant and his response to her question did not relate to her medical condition. I did not find the Respondent's Representative to have acted in an unprofessional manner.

115. This is not to say that I did not accept that the Claimant was upset during the hearing; it was clear that the Claimant had been genuinely upset and accordingly, arrangements were made to ensure the matter was discussed and dealt with appropriately. The Claimant's feelings on the matter were subsequently discussed at a Ground Rules Hearing. At that hearing, the Claimant did not state that she could not continue with the final hearing because of her feelings regarding the incident during cross examination; instead the parties cooperated and agreed on steps to be adhered to in the final re-listed hearing to enable the Claimant to feel re-assured as to how that hearing would proceed in order to enable her to participate fully, and also to feel there were ways in which she could communicate to the Tribunal if she felt upset at that hearing in any way.

116. I do not accept that all the delays in this matter stemmed from the incident during cross examination and none were the fault of the Claimant as submitted by the Claimant. The Claimant had, before the hearing in April 2021 already breached case management orders and failed to clarify her claim and made last minute requests to postpone both listings of the final hearing.

117. As I have identified, the Claimant is intelligent and many of the orders that she failed to comply with throughout the proceedings were not complex and had been clearly discussed with her during the hearings. For example, her failure to comply with orders to provide medical evidence, submit her application to amend on time, or provide dates of availability on time, could not be said to be attributable to her distress during cross examination.

118. I have found that hearings have been postponed and adjourned further to late applications by the Claimant, and the Claimant has failed to comply with Tribunal orders resulting in delays and escalated costs, therefore Rule 76(1)(c) and Rule 76(2) of the Rules are engaged in this matter.

119. Furthermore, I am asked to consider if the Claimant's behaviour was unreasonable and therefore engages Rule 76(1)(a) of the Rules.

120. Having reviewed the effects of the breached orders and requests for postponements in isolation and noting that they resulted in delays and escalated costs, I also have to consider the whole picture of what happened in the case. In doing so I find that the Claimant's behaviour was unreasonable. The Claimant established a pattern of noncompliance with orders; those orders were often not complex, many had been discussed and agreed with her during hearings, and many of the orders had been repeated and additional time had been provided to the Claimant to comply. The Claimant made late applications to postpone every listing of her final hearing in these proceedings; the first of which was refused, and thereafter she failed to provide the required medical evidence to support the other applications in breach of Tribunal orders.

121. Whilst I take into account the Claimant's circumstances, including those raised in her submissions and throughout the history of these proceedings, which includes the fact that she is representing herself in this matter, I do not find that this provides adequate excuse for her behaviour.

122. Accordingly, I find that Claimant's conduct in these proceedings to have been unreasonable and accordingly Rule 76(1)(a) of the Rules has also engaged.

The Exercise of Discretion

123. Having found that the Claimant did conduct the proceedings unreasonably, and her actions resulted in delays and adjournments in this matter I now must move on to consider whether to exercise my discretion as to whether or not it is appropriate to make a costs order.

124. I have considered that it would be appropriate to do so in this case. I have taken into account the Claimant's submissions as well as the difficulties on parties who represent themselves in litigation. I discuss below my consideration of the Claimant's ability to pay a costs order which I have also taken into account when considering whether to exercise my discretion to make a costs order. I also bear in mind that costs are the exception in Employment Tribunals and that all people should be free to pursue justice without the overbearing consideration of concern regarding costs. However, I am also mindful and weigh in the balance that fact that the Claimant received numerous warnings regarding costs in this matter, and that her actions caused delays which not only put a strain on the Respondent but also on other court users and their access to justice.

125. As referred to in the Tribunal's overriding objective, Tribunals are required to deal with a case fairly and justly, and justice involves justice to both sides. The Respondent has incurred sums in excess of the costs one would normally find in defending proceedings of this type.

The Claimant's ability to pay Rule 84

126. I may, when considering my discretion to award costs and what costs to order, take into account the Claimant's means.

127. The Claimant has provided financial documents evidencing her means upon which the Respondent has highlighted those documents demonstrate that the Claimant's income is comfortably in excess of her outgoings and demonstrates expenditure on a number of luxury items. The Claimant has however suggested in her submissions that these documents do not accurately reflect her means as she is becoming, or is now acting, as a full-time carer for her daughter. I take the Claimant's comment as a suggestion that she does not wish for me to draw the same inference from her disclosed financial documents as has been submitted by the Respondent.

128. Whilst I do not need to pay any mind to the Claimant's means to pay a costs order, and certainly the Claimant's submissions make that somewhat more difficult to do; I take note of the fact that the Claimant is intelligent and well-educated with experience in the teaching profession. I believe she is able to obtain gainful employment in the future.

Amount of costs

129. Having considered the Claimant's means as detailed above. I have considered the amount of costs requested by the Respondent. Whilst I agree that the sums claimed are in excess of what I would usually expect to find in cases involving defending a claim of this type, I believe that the Claimant's behaviour will have resulted in additional costs to the Respondent.

130. I remind, myself that there is no necessity for a direct causative link between the costs awarded and the unreasonable conduct. I am also mindful that the Claimant was entitled to bring a claim to the Employment Tribunal to be heard, and inevitably there would have been some element of the Respondent having to bear an element of costs in defending such a claim, and that costs may invariably be increased where a party is representing themselves.

131. I am asked to take make a summary assessment of costs,

132. Looking at the Respondent's costs. I consider the Respondent could reasonably have been expected to have instructed counsel to attend at a final hearing as well as the Ground Rules Hearing, and both preliminary hearings. Counsel's fees for those hearings amount to £3,000 for a two-day final hearing, £1,200 for both preliminary hearings, and £600 for the Ground Rules Hearing. Counsel's total fees were £9,1250. Accordingly, the remaining £4,350 of counsel's fees were in excess of that which I would anticipate a claim of this nature would take and therefore provide a very rough guide as to the additional sums in this matter that were incurred as a result of the Claimant's behaviour.

133. With respect to the Respondent's representative. The Respondent has provided a document it describes as "*a summary of internal costs*". This summary states that the total time spent by the Respondent's in-house team amounted to 287.13 hours work in total on this matter split between two fee earners to which they attribute hourly rates of £56 and £58, with the total sum amounting to £16,438.24.

134. 287.13 hours represents over 41 days of work being claimed. This seems to be an excessive amount of time even considering the history of this case. Of course, I cannot assess if all of this time relates to "legal work" and I remind myself that the exercise at hand is a summary assessment only. Therefore, I take note that counsel attended all hearings in this matter, and I assess the additional time spent on legal work occasioned by the Claimant's behaviour would have

amounted to around a further two full days work, this being 14 hours for the Respondent this amounting to a £812.

Costs sum

135. Having taken account of all the matters referred to in my decision above, I consider that I will exercise my discretion to make a costs order against the Claimant in the sum of £2,500.

136. Accordingly, I order the Claimant to pay a contribution to the Respondent's costs in the sum of £2,500.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 23 May 2022