EMPLOYMENT TRIBUNALS

Claimants: Mrs A Brady

Respondent: LGH Hotels Management Limited

Heard at: Manchester on the papers **On:** 4 and 5 July 2022

Before: Employment Judge Holmes

Representatives
For the claimant: Written representations
For the respondent: Written representations

JUDGMENT ON COSTS APPLICATION

It is the judgment of the Tribunal that:

1. The claimant's application for costs is well founded, as the respondent conducted the proceedings unreasonably in seeking to withdraw an admission that it was the employer of the claimant , proposing to amend its response to deny that it was the employer, and objecting to the claimant's application to re-instate Goldie Hotels(1) Ltd as a respondent.

2. The respondent is ordered to pay the claimant's costs, summarily assessed in the sum of **£4098.70**.

REASONS

Background and the history of the claims up until the final hearing on 1 & 2 December 2020.

1. By claim forms presented on 13 May 2019 (Mrs Brady) and 2 June 2019 (Mrs Jones) the claimants brought claims of unfair dismissal, and indirect sex discrimination. Mrs Brady , who was at the time legally represented, also complained that there had been a TUPE transfer, that her dismissal was automatically unfair by reason of that transfer, and that there had been a failure to consult in respect of that transfer. Mrs Jones made similar claims. Additionally, Mrs Brady brought a claim of associative disability discrimination.

2. The respondents to Mrs Brady's claims were:

   LGH Hotels Management Limited
   Hallmark Hotels Limited
   Topland Hotels
   Lapithus Hotels Limited
   Goldie (1) Hotels Limited

   Mrs Jones named as respondents to her claims:

   LGH Hotels Management Limited
   Goldie (1) Hotels Limited
   Lapithus Hotels Management Limited
   Goldie (2) Hotels Limited
   Hallmark Hotels Limited
   Topland Group Plc

3. A response was filed to Mrs Brady's claims on 1 July 2019, by Messrs Weightmans LLP, who filed it on behalf of all five respondents.

4. On 23 September 2019 Messrs Weightmans filed a response to Mrs Jones' claims, again acting for all six respondents.

5. Those responses set out the history of the interrelationships between the various respondents. For clarity , the Tribunal will refer to the respondents by name, rather than their numbers as respondents, as this is not consistent across the claims.

6. In summary, LGH had acquired the share capital of Goldie Hotels (1) Limited (hereinafter referred to as "Goldie") . Lapithus was simply a previous name of LGH. Topland previously owned all the share capital in Hallmark and Goldie Hotels (1). LGH bought all the share capital in both Hallmark and Goldie Hotels (1) in , it was alleged, December 2018. Goldie Hotels (2) was, and may well still be, owned by Hallmark.

7. In response to the claimants' claims based upon TUPE, the respondent contended that here was no relevant TUPE transfer because there had merely been an acquisition of share capital by LGH in circumstances which did not constitute a relevant transfer.

8. The claims were combined, and preliminary hearing was held before Employment Judge T V Ryan on 19 February 2020. Mrs Brady was represented by Mr Fryer, solicitor, Mrs Jones was unrepresented , and Mr Foster of Weightmans represented all the respondents.

9. At that hearing the claimants withdrew their TUPE related claims, and agreed to the dismissal of all respondents except LGH. The claims accordingly proceeded solely against that company.

10. A judgement was issued on 19 February 2020, sent to the parties on 28 February 2020, whereby, by agreement, the respondents numbered 2 to 6 were dismissed from the proceedings, and the claimants' claims of failure to consult, and automatic unfair dismissal related to a TUPE transfer were dismissed upon withdrawal , as was Mrs Brady's claim of disability discrimination.

11. The claims thereafter proceeded against LGH, and came on for hearing on 1 and 2 December 2020. There was an agreed bundle before the Tribunal. The respondent called Sheena Birch and Melanie Ridgewell. They are both LGH employees. They managed the redundancy process, and Ms Ridgewell dismissed the claimants. She did so in letters which bore the logo of LGH, and were signed by her on behalf of that company.

12. In the course of exploring the events giving rise to the dismissals of the claimants, there was considerable examination of the history of the acquisition of Hallmark by LGH, and its connected acquisition of Goldie Hotels (1). The claimants may have been employed by Goldie Hotels (1), it emerged. Indeed, at pages 77 to 82 of the bundle there appeared a written statement of terms of employment for Mrs Brady, signed in January 2019, in which her employer is stated to be Goldie Hotels (1) Limited.

13. In the course of cross examination by Mrs Brady, Ms Ridgewell was asked whether as at the date of their dismissals, the claimants were employees of LGH. She initially said that they were, but later corrected this to say that they were not in fact , but were still employees of Goldie Hotels (1).

14. This alerted the attention of the Employment Judge to the issue of which company, as at the date of the dismissals, was the employer of the claimants. He had assumed, as appeared to be conceded, that LGH was, but Ms Ridgeway's evidence had cast doubt on this.

15. Given LGH's stance , accepted it seems by the claimants , that there had been no TUPE transfer, the Employment Judge became concerned that, if the claimants had been employed by Goldie Hotels (1), liability for their dismissals would lie with that company, and not LGH, even if those dismissals were actually carried out by LGH. That would certainly be the case in relation to the unfair dismissal claims, and probably also the sex discrimination clams, though that may be less clear cut.

16. LGH appeared now to want to deny liability on the basis that it was not the employer of the claimants. It had not expressly done so, although on close examination of the responses submitted, whilst no express admission is made that LGH was the employer of the claimants (the passive form of verbs is much in evidence), there is certainly no denial, and , it may be argued , an implicit acknowledgement that it was the employer of the claimants .

17. The upshot of this, however, was that the correct respondent to these claims may not have been before the Tribunal, at the time of the final hearing. That gave rise to a risk that the claimants , even if successful on the merits , would be left without a remedy.

18. The Employment Judge raised these matters with Mr Foster and he agreed that they required investigation, and that Goldie Hotels (1) may have to be re - joined as a respondent, though he questioned whether this would be permissible given the judgment dismissing them from the proceedings. This may give rise to issues of *res judicata .*

19. The Employment Judge recognised that, but these issues would have to be considered further once the claimants had opportunity to consider these issues, and what applications, if any, they wished to make.

20. There was no alternative, therefore but to postpone the hearing. If the claimants were to seek to re-join Goldie Hotels (1) , that company would have to be notified and would be entitled to be heard upon the issue. Whilst Mr Foster had previously been instructed by that company in the initial stages of the claims, the Employment Judge's understanding from a company search was that LGH had relinquished its shareholding in that company, which was now under new ownership and management. Mr Foster was to seek instructions, and revert back to the Tribunal. If he was not instructed , the Tribunal would notify the company directly. If there was to be an issue as to joinder of Goldie Hotels (1), a preliminary hearing would be necessary to determine it.

21. This led, therefore, to the postponement of the final hearing, whilst these matters were investigated, and any applications then made.

Subsequent steps following the postponement.

22. Following the postponement the claimant in this application re-instructed her solicitors. They made contact with the respondent's solicitors, who in turn confirmed that they were also now instructed by Goldie. On 11 December 2020 the claimant (acting in person still at that time) wrote to the Tribunal , duly copying in the respondent's solicitors, making application to reinstate Goldie as a respondent to the claims. Mrs Jones did likewise by email to the Tribunal of 16 December 2020.

23. On 23 December 2020 the respondents' (for Weightmans now acted for both LGH and Goldie) wrote to the Tribunal and the claimants. In that email they raised objection to the claimants' application to re-instate Goldie as a respondent, following the dismissal of their claims against that company, and citing the authority of ***Khan v Heywood and Middleton Primary Care Trust [2006] EWCA Civ 1087.*** Further , the respondent LGH sought permission to amend its response, attaching draft Further Amended Grounds of Resistance. In those Grounds, it was pleaded that Goldie had been the employer of the claimants, and that LGH had only carried out any functions in relation to their employments, including dismissing them, as agent for Goldie. It was to be

contended that as mere agents, and not the employer of the claimants, LGH had no liability to them for their dismissals or any acts of discrimination.

24. A preliminary hearing was listed for 19 March 2021 , to consider the applications by the claimants, and the respondents. The Employment Judge, however, reviewed the file in advance of the hearing. he noted the stance now taken (or to be taken, if permitted) by the respondent, and Goldie. He accordingly caused the Tribunal to write to the parties on 17 March 2021 . In that letter the respondent's attention was drawn to the position that was now being taken, and how it would need permission to amend its response to withdraw the admission that had previously been made. It was pointed out that, whatever the procedural niceties, the Tribunal could make any orders by consent, and the parties were invited to consider whether the preliminary hearing was necessary, or whether the Tribunal could now re-listed the postponed final hearing.

25. By email of 17 March 2021 the respondent withdrew its opposition to the claimant's application, and for permission to further amend its response.

26. There ensued attempts to re-list the final hearing. On 13 December 2021 the Employment Judge reviewed the file, and issued that day further orders. Those included a formal order re-instating Goldie as a respondent, and, notwithstanding that the respondent had not sought to further amend its response, an order that it do so, expressly to admit or deny whether it was the employer of the claimants. Goldie was afforded 28 days in which to file a response.

27. An extension of time for the amended response was sought on 10 January 2022, and granted on 28 January 2022 until 31 January 2021. The final hearing was re-listed for 4 July 2022, for three days before the Employment Judge sitting alone.

28. It appears that the amended response was never filed. Mrs Jones' claims were, it seems, although there appears to be no confirmation of this on the file, settled in early 2021, and this claimant's claims were then settled , save for this costs application, the Tribunal being so notified on 28 February 2022.

The costs application and the response.

29. The claimant's costs application was made by letter of 10 May 2021. In it the claimant initially sets out the history of the matter, and then the basis for the application.

30. After reciting the claim form and the respondents named therein, the claimant points out how, prior to the preliminary hearing on 19 February 2020, the parties were each required to submit agendas to the Employment Tribunal for case management purposes. The first question in the agenda asks whether the names of the parties are correct. Mr Foster, solicitor for the respondents, entered 'LGH Hotels Management Limited' as his response to this question,

indicating that that company was the correct respondent. The Employment Judge had considered the agenda and, based on Mr Foster's assertion that LGH Hotels Management Limited was the correct respondent, invited both claimants at that time (Mrs Jones representing herself) to withdraw against the other four respondents against whom the claims had been issued. The claimant duly agreed to withdraw against the other respondents.

31. For nine months during 2020 the claims continued against the one remaining respondent, LGH Hotels Management Limited, and was listed for a full hearing over 3 days between 1 and 3 December 2020 Just prior to the start of the final hearing, Mrs Brady decided that she would not be able to instruct solicitors to represent her at the final hearing and therefore represented herself.

32. On the second day of the hearing the claimant telephoned to inform the solicitors of the problem that had arisen during the oral evidence of one of the respondent's witnesses, it became apparent that LGH Hotels Management Limited may not, in fact, have been the employer of the claimants and that, instead, the employer may have actually been Goldie Hotels (1) Limited ("Goldie"), one of the companies which had originally been sued but then withdrawn against. Employment Judge Holmes having identified the fact that, if that was correct, the claimants would not be able to have viable unfair dismissal claims against LGH Hotels Management Limited , since they were not their actual employer, had adjourned the hearing so that both parties could consider the matter and the Claimants could apply to have Goldie reinstate to the proceedings.

33. Having been reinstructed, the claimant's solicitors duly emailed Mark Foster of Weightmans on 2 December to inform of their interest . The claimant reminded Weightmans of the fact that the issue of the respondent being incorrect had only arisen because of the information that they had provided at the preliminary hearing in February 2020 and, on that basis, it was presumed that they would now simply consent to Goldie being reinstated as a respondent so the proceedings could continue as normal. Weightmans indicated that they would need to take instructions.

34. Instead , however, of consenting to Goldie being reinstated as a respondent, what ensued was that Weightmans wrote to the Tribunal on 23 December 2020 indicating that they objected to Goldie being reinstated and stating the fact that, as far as they were concerned, the Claimants had decided to withdraw against the other respondents "of their own volition". They pleaded various cases in support of their assertion that the claimants should be prevented from reissuing against Goldie Hotels (1) Limited as result of the principle of issue estoppel. The matter was listed for a further preliminary hearing on 19 March 2021 to determine whether or not the Claimants could reinstate their claims against Goldie, which had been withdrawn previously. Two days prior to that hearing, the Respondent changed their position and agreed to withdraw their objection to Goldie being reinstated as a respondent, so the preliminary hearing was cancelled.

35. Employment Judge Holmes had given the respondent's representative a very clear warning at the hearing in December 2020 that there would likely be costs implications if they wanted to change their defence and argue that LGH Hotels Management Limited was not the correct employer The claimant's solicitor also raised the issue of unnecessary costs being incurred in an email to Weightmans immediately after that hearing on 2 December 2020.

36. Despite these warnings, the respondent decided to continue to object to Goldie being reinstated and applied to change their grounds of resistance so that it would assert that LGH was not the correct employer. They maintained that stance for over 3 months, putting the claimant to the cost of researching res judicata and related case law, and advising Mrs Brady as to the legal position (which was extremely complex), and then preparing for the preliminary hearing in March. This included drafting a detailed skeleton argument with case law attached which was not needed.

37. In simple terms, all of this work could have been avoided if the respondent had simply agreed that Goldie could be reinstated at the hearing in December 2020 (or shortly after the hearing after Weightmans had taken instructions). Weightmans had provided misleading information (presumably inadvertently) to the Employment Tribunal prior to and at the preliminary hearing on 19 February 2020 when they asserted that the correct respondent for the proceedings was LGH. When it became apparent at the hearing in December 2020 that that assertion may be incorrect, instead of correcting their error Weightmans sought to use it to their client's advantage in order to deprive the claimants of any further recourse in respect of the unfair dismissal proceedings.

38. It was submitted that the manner in which the respondent conducted the proceedings in respect of this particular issue was unreasonable for the purposes of Rule 76 (1) (a) of the Employment Tribunals rules of procedure.

39. In response, the respondent's position is this. It was correct that Weightmans, on behalf of the respondent, submitted an Agenda for the purposes of the preliminary hearing. This recorded that LGH Hotels Management Limited was the correct name for the respondent. From reading the papers it appeared to Mr Foster that this was correct; all of the correspondence and paperwork in the matter referred to a redundancy process, leading to the claimants' dismissal, undertaken by the LGH Hotels Management Limited HR team. Mr Foster therefore understood LGH Hotels Management Limited to have been the employer. It transpired , the respondent contends , that LGH Hotels Management Limited was acting as agent for the employer, Goldie (1) Hotels Limited. Neither claimant submitted an Agenda, a matter to which it was said the respondent would return later. At the Preliminary hearing on 19 February 2020, EJ Ryan asked the parties who they understood to be the correct employer. On behalf of the respondent, Mr Foster said that he understood it to be LGH Hotels Management Limited. Mr Fryer, representing Mrs Brady, agreed and on behalf of Mrs Brady withdrew claims against all respondents other than LGH Hotels Management Limited. Mrs Jones, who was unrepresented, did the same, apparently following Mrs Brady's lead.

40. Their respective decisions to do so were made of their own volition, in Mrs Brady's case advised and represented by a qualified and specialist employment law solicitor-advocate. As a consequence of this the Tribunal issued a Judgment ordering that claims against all other respondents were dismissed. As explained above, it transpired that Mr Foster had identified the wrong respondent. Mr Foster does, of course, have to take some responsibility for that, but so must the claimants because:

    1. They were in possession of their employment contracts whereas, at that time, Weightmans/Mr Foster were not.

    2. These record the employer at the outset of their employment as being Goldie (1) Hotels Limited. This had not been produced at the time of the Preliminary Hearing, although one would have expected that Mrs Brady would have discussed these issues with Mr Fryer.

    3. One assumes that she will have explained to him that her employer had originally been Goldie (1) Hotels Limited.

    4. The claimants had chosen to issue proceedings against five different respondents and the issue must have been one to which they and Mr Fryer were alerted. Indeed, upon taking instructions and for the purposes of compliance and conflict-checking, it was incumbent upon Mr Fryer to identify his client's employer.

    5. This should also have been an issue that was in Mr Fryer's mind in preparing for the Preliminary Hearing. Whilst, as we have recorded above, he did not comply with the requirement to submit a Preliminary Hearing Agenda, as an experienced employment lawyer and Tribunal advocate Mr Fryer will have known the issues that were to be discussed.

    6. One assumes that he will have considered how, if Goldie (1) was not the employer at the date of dismissal, Mrs Brady had become employed by any other employer. This was a matter for both parties to consider. It is evident, with the benefit of hindsight that none of them, nor their respective legal representatives, did so sufficiently. The oversight was not limited to the conduct of Mr Foster.

    7. The obvious intervening factor, giving rise to a change of employer, might have been a TUPE transfer, but it was accepted by the claimants (in Mrs Brady's case, presumably on advice from Mr Fryer) that there had not been a TUPE transfer and all of the TUPE-based claims were withdrawn. The fact of the matter is that Mr Fryer had presented a claim on behalf of Mrs Brady naming 5 potential respondents. It was equally incumbent upon Mr Fryer/Mrs Brady to address their minds to this point, just as it was for the respondents and Mr Foster. We accept that Mr Foster and the respondent were, in part, responsible for the incorrect identification of the employer, but responsibility must lie equally with Mrs Brady/Mr Fryer.

41. Furthermore, and as has apparently been accepted, there was no intention on Mr Foster's nor the respondents' part to mislead the Tribunal or the claimants. Taking into account the above factors, there is no basis for concluding that Mr Foster and the respondents are any more culpable than the claimants for what transpired at the Preliminary Hearing. One might make a case to distinguish Mrs Jones, because she was an unrepresented party, but that cannot be said for Mrs Brady. Moving forwards to the substantive hearing on 1 to 2 December 2020, neither claimant was represented. Mr Fryer had come off the record a matter of days before that hearing but one assumes that since he remained on the record that he had been involved in the preparation of the bundle and his client's witness statement. He must therefore also have been familiar with all of the documents. On the second day of that hearing (2 December), in the course of cross-examination by one of the claimants, Ms Ridgewell (witness for the respondent) made statements that led Mr Foster and the Tribunal to question whether the correct respondent had been identified. It now appeared that the correct employer, and therefore the correct respondent, was Goldie. The matter was discussed and the hearing was adjourned.

42. As a consequence of the exchanges on 2 December 2020 the Tribunal wrote to the parties on 17 December 2020 summarising the issues that had arisen and making provision for the claimants to apply to reinstate Goldie (1) Hotels Ltd as a respondent. Both claimants made such an application. Instructions were sought from the respondent, and the conclusion was reached that the rules of the Employment Tribunal did not allow for the reinstatement of a respondent after a claim against it had been dismissed by the Tribunal upon its withdrawal by that claimant. Indeed, there are authorities that, in the respondent's view, demonstrated this to be the case. For this reason the respondent opposed the claimants' applications. The respondents were entitled to take such a position. Moreover, Mr Foster's primary duty as a solicitor was to assist the Tribunal in addressing the relevant law. In opposing the application, citing references to both the Employment Tribunal Rules and relevant case law, he was doing no more than that. The claimants' applications for the reinstatement of Goldie (1) Hotels Ltd as a respondent were listed for a hearing on 19 March 2021. Before that hearing, the respondents were able to settle the claim brought by Mrs Jones.

43. On 17 March 2021, two days before the scheduled preliminary hearing, the Tribunal wrote to the parties asking whether it really was necessary for that hearing to proceed. The respondents solicitor remained of the view that there are substantial arguments to the effect that that there was no legal basis on which Goldie might be reinstated, but they discussed the matter with the respondents and received instructions to withdraw their opposition to the remaining (Mrs Brady's) application. The respondent considered, in light of the Tribunal's correspondence, that this was the appropriate and proportionate approach to take. It is a fundamental principle of the costs regime in the Tribunal that costs do not follow the event. rule 76 makes provision in relation to costs. The only provision that would seem to apply to the circumstances of the

claimant's application is rule 76(1)(a), which provides that a Tribunal may make a costs order and shall consider whether to do so where it considers that:

a. a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or…

44. There is no basis upon which to conclude that either of the respondents or Mr Foster has acted vexatiously, abusively or disruptively. That leaves the question as to whether it can be said that they have acted unreasonably. We believe that the Tribunal should not reach such a conclusion.

45. The application for an award for costs is made only in respect of the period between 2 December 2020 and 17 March 2021. It appears from this that the claimant does not seek to assert that the events prior to, at and following (at least until 2 December) the preliminary hearing give rise to an award. The claim is made only in respect of the respondents' opposition to the application to reinstate Goldie . For the reasons set out above, the respondent was perfectly entitled to do so. Their actions simply do not meet the test for unreasonableness in this context. We refer the Tribunal again to our email communication dated 23 December 2020 (attached) in which we opposed the applications to reinstate Goldie (1).

46. The fact that the respondents elected to withdraw their opposition to Mrs Brady's application should not give rise to a liability for costs; it was a step that avoided further costs, albeit that there were clear and substantial legal arguments for maintaining opposition to the application.

47. In the event that the Tribunal decides that it would be appropriate to make a costs award, the respondent then asks that the following matters be taken into consideration arising from the schedule of costs that Mr Fryer provided:

    There can be no basis for an award for costs up to the point (11 December 2020) at which Mrs Brady made her application to reinstate Goldie .

    There is no basis on which the Tribunal can or should make an award for costs in respect of settlement negotiations, whether through ACAS or otherwise.

    There is a considerable amount of apparent repetition in connection with drafting and correspondence, but in any event the time engaged for a practitioner of Mr Fryer's experience appears to be excessive.

48. Finally, the respondent referred the Tribunal to Mr Fryer's correspondence dated 7 January 2021 in which he advised the Tribunal that he had been instructed to refer Mr Foster and Weightmans to the SRA. It is disappointing, if not misleading, the respondent contends, that in his letter making the formal costs application Mr Fryer has failed to notify the Tribunal that the SRA has elected to take no action upon the complaint. The respondent did not see how

the referral could in any way be considered relevant to the Tribunal's to deliberations in these proceedings, unless the outcome of that referral was also to be made known to the Tribunal. It left the Tribunal to reach its own conclusions upon Mr Fryer's failure to notify the Tribunal of the SRA's decision.

Discussion and findings.

49. The starting point , of course, has to be rule 76(1)(a) of the 2013 rules of procedure, which provides:

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; or

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

(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.

50. The Tribunal must therefore first determine whether there has been such conduct on the part of, in this instance, the respondent. That, however, itself gives rise to an issue, as neither party has stated which (there now being two) respondent the application relates to. The singular has been used in both the application and the response to it.

51. The Employment Judge's view is that LGH Hotels Management Limited is the respondent against which this application should proceed. Whilst Goldie Hotels (1) Limited was joined, and remains a respondent, as noted in the Case Management Orders sent to the parties on 13 December 2021, that company was in 2019, and up until December 2020 (according to filing at Companies House on 4 October 2021) has remained dormant company. It, therefore , cannot have instructed solicitors, or incurred any expenditure, so the conduct of the proceedings at issue must be that of the first, and constant respondent, LGH Hotels Management Limited.

52. Further, whilst much is made in the response to the application of the error made by Mr Foster, the respondent's solicitor, in initially accepting that the correct , and sole , respondent was LGH, this is not an application against the respondent's representative, it is against the respondent. It is therefore the respondent's conduct which must be examined, not just that of its solicitor. Further, the Tribunal will consider the conduct of the proceedings by the respondent as a whole, not just in isolation, in determining whether there has been conduct which falls within rule 37(1)(a).

53. That the claimant (in fact both claimants) was unsure which company employed her is apparent from the fact that initially she made claims against five respondents. Whilst the respondent makes much of the fact that the claimant did not complete an Agenda for the preliminary hearing, the Employment Judge sees little in that point. Until the respondents (who were all represented by the same solicitors, who submitted the response on behalf of all of them) pleaded to her claims, why should she have completed first box on the Agenda as to who was the correct respondent? As it was, as has been observed (see paras. 24 and 25 of the Tribunal's Reasons on the postponement orders, sent to the parties on 17 December 2020, and para. 7 of those sent to the parties on 13 December 2021) , the Grounds of Resistance were somewhat cryptic, in that there was no express admission that LGH was the employer of the claimant, although there were admissions that the dismissal was carried out by that company. At the preliminary hearing, however, the respondents' (note the plural) representative put the matter beyond and accepted that the correct respondent was LGH. The claimant relied upon that, as was entitled to do so. When a claimant is faced with an unequivocal admission by a live and solvent respondent that it was the employer, it will rarely be unreasonable of a claimant to act upon that. This is particularly so when, as here, there is a somewhat complex history of the corporate structures involved , as set out in paras. 2 and 3 of the Grounds of Resistance, and paras. 2 to 4 of Melanie Ridgewell's witness statement for the respondent.

54. It will be recalled as well that the issue of the correct respondent arose from the documentation in the bundle (pages 77 to 82), a statement of main terms of employment for the claimant, where the employer is stated to be Goldie Hotels (1) Ltd . That was a document that the claimant did have, as the respondent points out, but when Melanie Ridgewell gave evidence she was unclear whether the claimants were employees of that company or LGH.

55. The respondents too, however, had , or should have had, access to that document. That if anything should have alerted the respondents to the fact, as they subsequently wanted to plead, that Goldie Hotels (1) Ltd may have been the employer. The written statement is dated January 2019, and the claimant's employment ended on 22 February 2019. We now know (Companies House filings on 10 March 2020 and 6 January 2021) , however, that Goldie Hotels (1) Ltd. was from its incorporation on 24 April 2018 to 31 December 2019 a dormant company. It cannot have employed the claimants. Perhaps that is why the admission that LGH was the employer was made. Be that as it may, a highly pertinent factor is that, at the final hearing the respondent's own witness was unclear as to which company employed the claimant, giving rise to the postponement, and the claimants' need to consider re-joining Goldie, which she then sought to do.

56. The respondent – then the singular respondent LGH – had a choice. Did it maintain its (apparent) admission that it was in fact the employer of the claimant(s), or did it now seek to amend its response to deny that, and assert that Goldie Hotels (1) Ltd in fact was? It chose the latter. By email of 23 December 2019 the respondent and Goldie, by whom Weightmans were then

re-instructed, opposed the application that the claimant had by then made to re-join Goldie, and, made an application to amend the response to plead that LGH had not been the employer of the claimants, but Goldie had. It went on to seek to plead in proposed Further Amended Grounds of Resistance that LGH had been acting as Goldie's agent , merely communicating the decision to dismiss, but it was not the employer, and therefore could not be liable or the alleged unfair dismissal.

57. The response to the application rather overlooks that from an implicit admission in the original Grounds of Resistance document, confirmed at the first preliminary hearing, that LGH was the employer of the claimant, and hence potentially liable for her dismissal, the respondent then sought to deny that it was the employer, contending that Goldie Hotels (1) Ltd was, and denying that it was legally responsible for the claimant's employment at all. Then, rather than consenting to the claimant then being able to re-join a party to whose dismissal she had erroneously consented , the respondent sought to object to that course, potentially leaving the claimant with no respondent against which she could claim.

58. The respondent seeks to argue that the claimant's application only relates to the respondent's application to reinstate Goldie. The Employment Judge does not see it that way. It relates to the whole of the respondent's conduct in relation to the issue of the correct respondent from when it arose in the course of the hearing on 2 December 2020. The respondent not only opposed the application to reinstate Goldie, it also sought to amend its response to withdraw the admission that had been made the LGH was the employer of the claimant, and introduce a wholly new defence that it had no liability as it was merely acting as an agent.

59. In due course, however, the respondent backed down, and did not object to the claimant's application to re-join Goldie. It did not, however, pursue its application to amend the response, and there matters, procedurally , effectively lay until the Tribunal's orders of 13 December 2021.

60. The Employment Judge has no hesitation in finding that the respondent's conduct of the proceedings has been unreasonable. It initially quite clearly, all the way up until substantially through the final hearing, had accepted that it was the employer of the claimant, and potentially legally liable for her dismissal. Then its own witness cast doubt on that, and the hearing had to be postponed. Then, rather than carefully reviewing the position, and maintaining its prior admission, the respondent sought to carry out a *volte – face* , and deny that it was the employer. That would have been unreasonable in itself, but it was compounded by the respondent then , having placed the claimant in the position where she needed to re-join Goldie, in the event that the respondent's new response succeeded, it objected to that course of action, potentially leaving the claimant with no respondent against whom she could claim.

61. Whilst accepting that there may well have been good legal arguments as to the permissibility of re-instating a party against whom a claim had been

dismissed, there would be equally good arguments as to whether in these circumstances another party should be permitted to withdraw an admission that it was the employer. As it was , we now know that the dormant Goldie could not have been the claimants' employer. The respondent has made reference to Mr Foster merely seeking to assist the Tribunal in relation to the legal position as to re-instating dismissed claims, which may well be so, but rather misses the point that the claimant only needed to seek to have Goldie re-instated because of the respondent's intention to amend its response to withdraw the admission that it was her employer.The respondent did not have to object to the reinstatement of Goldie, it could have , as it later did, agreed, or at least been neutral.

62. The Employment Judge in these circumstances has no doubt that this was an opportunistic and calculated attempt by the respondent to take advantage of a defence that it did not think, or realise , that it had, in an attempt to deprive the claimant of any claims at all. That it did so in circumstances where , unless the accounts filed at Companies House are wrong, to put it neutrally, the proposed defence that Goldie , a dormant company, was in fact the real employer would have had no reasonable prospects of success, just compounds the unreasonableness of the respondent's conduct. It is not merely the respondent's opposition to the claimant's application to reinstate Goldie that was unreasonable conduct, it was also its attempt to withdraw its admission that it was in fact the employer of the claimant . It did not persist in that, as it never proceeded to seek to amend its response even when Goldie was joined. In short, it abandoned this unnecessary hare that it had set running for some three months.

63. The Employment Judge is therefore satisfied that the grounds for making a costs order have been established, and sees no reason not to make one. He takes the respondent's points about the claimant's responsibility for any of this, but these were , or should have been, matters within the knowledge of the respondent. In any event, were this simply to be about whether there was any doubt as to the identity of the employer, giving rise simply to the need for a postponement, that would be one thing. The unreasonableness, however comes after that. It is what the respondent did once that issue had arisen that is at issue. It was not then the claimant's, or her solicitor's , fault that the respondent then sought to exploit a situation predominantly of the respondent's own making.

64. Finally, the Employment Judge notes the reference to the claimant referring the respondent's solicitor to the SRA. The respondent invites the Tribunal to note that no outcome of any such referral has been presented to the Tribunal, upon which the Tribunal is invited to "draw its own conclusions". There are no conclusions to be drawn. Whether the SRA did or did not consider that the conduct of any particular solicitor merits any investigation or sanction is irrelevant to what the Tribunal has to determine, as the respondent points out. As previously mentioned, the application is against the respondent , not its legal representative. Whether the unreasonable conduct was on the part of the respondent or its solicitors, or both, is of no concern to the Tribunal, and

action, or the lack of it, on the part of the SRA , against any particular legal representative, is irrelevant to this application.

Assessment of the costs.

65. The costs claimed are set out in a three page schedule attached to the application of 10 May 2021. They total some £6,745.50. The claim covers the period from 2 December 2020, to 7 May 2021. Unfortunately, it is a little light on some basic information, which the Employment Judge has had to calculate for himself. Further, the respondent has made little comment upon the quantum of costs. In its opposition document, it makes only three points:

    - There can be no basis for an award for costs up to the point (11 December 2020) at which Mrs Brady made her application to reinstate Goldie (1).

    - There is no basis on which the Tribunal can or should make an award for costs in respect of settlement negotiations, whether through ACAS or otherwise.

    - There is a considerable amount of apparent repetition in connection with drafting and correspondence, but in any event the time engaged for a practitioner of Mr Fryer's experience appears to be excessive.

66. In terms of the fee earners involved, they are mostly Adrian Fryer, who the Tribunal takes to be a Grade A , Neil Gouldson, likewise, and Dan Pugh, who appears to be likely to be Grade D. The hourly rates claimed appear to be:

    Adrian Fryer - £295.00

    Neil Gouldson - £265.00

    Dan Pugh - £135.00

67. The claimant's solicitors are a Liverpool city centre firm (hence band "National 1"). The approved guideline hourly rates as from 1 October 2021 are:

    Grade A £261

    Grade D £126

    These rates, of course, are from October 2021, whereas the work was done between December 2020 and May 2021. Then previous published rates date back to 2010, with no intervening updates. The Employment Judge considers that it would be wrong to apply the new rates as the work pre-dates them by up to 22 months. Adjusting the 2010 rates , he considers that the appropriate guideline hourly rates would be:

Grade A - £257

Grade D – 125

68. The rates claimed exceed those rates, it is noted, and by some margin. Whilst the guideline rates are just that – guidelines, no basis has been laid for exceeding them, and they will be applied.

69. The next issue is the work done. The Employment Judge takes the respondent's point in relation to whether all the work in the schedule relates to the respondent's conduct. There is, of course, no requirement for a causative link to be established between the unreasonable conduct and the costs sought, a Tribunal should keep such matters in mind in ensuring proportionality (see ***McPherson v BNP Paribas (London Branch) [2004] ICR 1398*; *Salinas v Bear Stearns International Holdings Inc [2005] ICR 1117***).

70. In relation to the respondent's first point, the Employment Judge does not agree. The hearing should have concluded, or certainly not have been derailed by the respondent's witness not being clear which company employed the claimant , or that issue should have been properly researched by the respondent , which had made the admission, well before the hearing. Consequently , the costs incurred in the aftermath of that hearing , on 2 and 3 December 2020 , are recoverable.

71. Going down the schedule, those costs incurred on 17 and 18 December 2020 are similarly recoverable.

72. The Employment Judge agrees, however, that those costs incurred on 21 and 22 December 2020 , which all relate to settlement discussions are not directly linked to the unreasonable conduct, and are not recoverable.

73. Thereafter, the Employment Judge can see no reason why the ensuing entries for 6 January 2021 to 3 February 2021 should not be recoverable. The entries on 3 February, 5 February, and 10 February 2021, all of which are described as relating to "PCPs" ,the Employment Judge considers probably relate to a separate and discreet issue, namely the claimant's indirect sex discrimination claims. These are not costs in consequence of the respondent's unreasonable conduct.

74. The next entry on 10 February 2021, however, is, as it relates to research as to the liability of agents, which arises from the respondent's proposed amendment of the Grounds of Resistance to plead that LGH was only ever acting as agent for Goldie.The ensuing entries on 17 February 2021 relate to the same issues.

75. Thereafter, in early March, there ensue further entries relating to settlement discussions via ACAS, and directly with the respondent's solicitors. These too (up to and including 10 March 2021) are unrelated to the unreasonable conduct, and the Employment Judge does not intend to allow them.

76. The period from 16 March 2021 to 29 April 2021 then relates to the issues raised in respect of the application to re-join Goldie, the respondent's potential application to amend the response, and this costs application. All that appears to the Employment Judge to arise from the unreasonable conduct. Not all the work is, however, related directly, and the last four items on 29 April 2021 will not be allowed.

77. The Employment Judge has accordingly amended ,and annexed to this judgment , the claimant's spreadsheet applying the reduced hourly rates, and adjusting the amounts accordingly, and setting out what items he has disallowed. The total amount of costs payable by the respondent to the claimant is accordingly summarily assessed at £4098.70.

Employment Judge Holmes

Date: 5 July 2022

Sent to the parties on:

8 July 2022

For the Tribunal:

02/12/2020	Adrian Fryer	Prep/Consider Emails	00:06	Disallowed	TO AMANDA RE PCP POINT
02/12/2020	Adrian Fryer	File/Document Review	00:06	Disallowed	AMANDA EMAIL TO ACAS
02/12/2020	Adrian Fryer	Prep/Consider Emails	00:06	Disallowed	FROM ACAS WITH LATEST OFFER
02/12/2020	Adrian Fryer	Prep/Consider Emails	00:06	Disallowed	FROM AMANDA WITH VARIOUS QUERIES
03/12/2020	Adrian Fryer	Drafting	00:12	Disallowed	EMAIL TO AMANDA RE VARIOUS QUERIES
03/12/2020	Adrian Fryer	Prep/Consider Emails	00:06	Disallowed	FROM WEIGHTMANS WITH OFFER
03/12/2020	Adrian Fryer	Prep/Consider Emails	00:06	£25.70	TO AB
17/12/2020	Adrian Fryer	Telephone In/Out	00:18	£77.10	FROM AB RE HEARING
18/12/2020	Adrian Fryer	File/Document Review	00:12	£51.40	MINUTES & NOTE FROM FEB PRELIMINARY HEARING
18/12/2020	Adrian Fryer	Drafting	00:18	£77.10	EMAIL TO WEIGHTMANS RE CORRECT RESPONDENT
21/12/2020	Adrian Fryer	Prep/Consider Emails	00:12	£51.40	FROM / TO WEIGHTMANS
22/12/2020	Adrian Fryer	Prep & Perusal	00:06	£25.70	FILE NOTE
22/12/2020	Adrian Fryer	Prep/Consider Emails	00:12	£51.40	FROM / TO AMANDA
22/12/2020	Adrian Fryer	Telephone In/Out	00:12	£51.40	MARK FOSTER WEIGHTMANS
22/12/2020	Adrian Fryer	Telephone In/Out	00:18	£77.10	AMANDA
06/01/2021	Adrian Fryer	Prep & Perusal	00:06	£25.70	FILE NOTE OF TELECON
06/01/2021	Adrian Fryer	Prep/Consider Emails	00:18	£77.10	TO CLIENT RE SETTLEMENT OFFER
06/01/2021	Adrian Fryer	Prep/Consider Emails	00:06	Disallowed	TO AB RE SETTLEMENT
06/01/2021	Adrian Fryer	File/Document Review	00:06	Disallowed	SCHEDULE OF LOSS
07/01/2021	Adrian Fryer	Telephone In/Out	00:06	Disallowed	WEIGHTMANS RE OFFER
07/01/2021	Adrian Fryer	Prep/Consider Emails	00:06	Disallowed	UPDATE EMAIL TO CLIENT
07/01/2021	Adrian Fryer	Drafting	00:12	£51.40	WEIGHTMANS EMAIL TO ET AND APPLICATION
07/01/2021	Adrian Fryer	File/Document Review	00:06	£25.70	COMPARING NAME OF R ON ET1 AND AGENDA
08/01/2021	Adrian Fryer	Drafting	00:18	£77.10	ADVICE EMAIL TO AB RE OPTIONS
12/01/2021	Adrian Fryer	Letter In/Out	00:06	£25.70	NOTICE OF HEARING FROM ET
12/01/2021	Adrian Fryer	Drafting	00:18	£77.10	EMAIL TO ET
03/02/2021	Adrian Fryer	Drafting	00:12	£51.40	EMAIL TO WEIGHTMANS
03/02/2021	Adrian Fryer	Research	00:48	£205.60	KHAN CASE RE RE-ISSUING DISMISSED CLAIMS
05/02/2021	Adrian Fryer	Prep/Consider Emails	00:12	£51.40	FROM TO CLIENT RE NEXT STEPS
10/02/2021	Adrian Fryer	Prep/Consider Emails	00:12	£51.40	FROM / TO AMANDA RE NOTICE OF HEARING
10/02/2021	Adrian Fryer	Prep/Consider Emails	00:12	£51.40	FROM / TO AMANDA RE UPDATE FROM WEIGHTMANS
17/02/2021	Adrian Fryer	Prep/Consider Emails	00:06	£25.70	FROM AMANDA
17/02/2021	Adrian Fryer	File/Document Review	00:30	£128.50	ET JUDGMENT FROM 1&2 DECEMBER HEARING
01/03/2021	Adrian Fryer	Research	00:30	Disallowed	APPLICATION OF PCP
01/03/2021	Neil Gouldson	Prep & Perusal	01:42	Disallowed	re PCP
01/03/2021	Adrian Fryer	Research	00:30	Disallowed	APPLICATION OF PCPs
02/03/2021	Adrian Fryer	Research	00:30	£128.50	LIABILITY OF AGENTS
02/03/2021	Adrian Fryer	Prep/Consider Emails	00:12	£51.40	FROM / TO AMANDA RE UPDATE
02/03/2021	Adrian Fryer	File/Document Review	00:06	£25.70	CONSIDERING R'S AMENDED GROUNDS OF RESI
02/03/2021	Adrian Fryer	Prep/Consider Emails	00:06	Disallowed	ACAS OFFER
02/03/2021	Adrian Fryer	File/Document Review	00:06	Disallowed	CHECKING PREVIOUS OFFERS
08/03/2021	Adrian Fryer	Prep/Consider Emails	00:06	Disallowed	EMAIL TO AMANDA RE OFFER
08/03/2021	Adrian Fryer	File/Document Review	00:18	Disallowed	REVIEW FILE RE PREVIOUS OFFERS/ SDA MERITS
09/03/2021	Adrian Fryer	Telephone In/Out	00:18	Disallowed	AMANDA RE OFFER
09/03/2021	Adrian Fryer	Miscellaneous	00:06	Disallowed	FILE NOTE
10/03/2021	Adrian Fryer	Telephone In/Out	00:18	Disallowed	AMANDA RE LATEST OFFER
10/03/2021	Adrian Fryer	Drafting	01:30	Disallowed	DETAILED OFFER EMAIL TO WEIGHTMANS
10/03/2021	Adrian Fryer	Prep & Perusal	00:06	Disallowed	FILE NOTE
16/03/2021	Adrian Fryer	Prep/Consider Emails	00:12	£51.40	FROM / TO AMANDA RE UPDATE
16/03/2021	Dan Pugh	Research	01:30	£187.50	CASE LAW IN ADVANCE OF PRELIMINARY HEARING
17/03/2021	Adrian Fryer	File/Document Review	02:00	£514.00	DRAFTING SKELETON ARGUMENT
17/03/2021	Adrian Fryer	Research	01:30	£385.50	CASE LAW ON RES JUDICATA
17/03/2021	Adrian Fryer	Letter In/Out	00:06	£25.70	LETTER FROM ET
17/03/2021	Adrian Fryer	Drafting	00:06	£25.70	ADVICE TO AMANDA RE LETTER
17/03/2021	Adrian Fryer	Prep/Consider Emails	00:06	£25.70	TO ET ATTACHING SKELETON ARGUMENT
17/03/2021	Adrian Fryer	Prep/Consider Emails	00:06	£25.70	FROM WEIGHTMANS CONCEDING POINT RE GOLDIE
17/03/2021	Adrian Fryer	Drafting	00:12	£51.40	EMAIL TO ET RE COSTS APPLICATION
17/03/2021	Adrian Fryer	Telephone In/Out	00:12	£51.40	UPDATING AMANDA
17/03/2021	Adrian Fryer	Letter In/Out	00:06	£25.70	LETTER FROM ET RE COSTS APPLICATION
17/03/2021	Adrian Fryer	Prep/Consider Emails	00:06	£25.70	EMAIL TO ET RE COST APPLICATION
17/03/2021	Adrian Fryer	Prep & Perusal	00:06	£25.70	FROM WEIGHTMANS RE COSTS APPLICATION
17/03/2021	Adrian Fryer	Prep & Perusal	00:06	£25.70	FILE NOTE
18/03/2021	Adrian Fryer	Letter In/Out	00:06	£25.70	FROM ET RE POSTPONEMENT
19/03/2021	Dan Pugh	Research	01:42	£212.50	COSTS APPLICATIONS
23/03/2021	Adrian Fryer	Prep/Consider Emails	00:12	£51.40	FROM / TO AMANDA RE UPDATE
23/03/2021	Adrian Fryer	Research	00:12	£51.40	COSTS APPLICATIONS
24/03/2021	Dan Pugh	Research	00:36	£75.00	CASE LAW RE WASTED COSTS
14/04/2021	Adrian Fryer	Prep/Consider Emails	00:06	£25.70	TO AMANDA WITH UPDATE
14/04/2021	Adrian Fryer	Prep/Consider Emails	00:06	£25.70	TO ET RE COSTS APPLICATION
29/04/2021	Adrian Fryer	Letter In/Out	00:06	£25.70	FROM ET RE COSTS APPLICATION & LENGTH OF
29/04/2021	Adrian Fryer	Prep/Consider Emails	00:06	£25.70	TO ET RE COSTS APPLICATION & LENGTH OF HEARING
29/04/2021	Adrian Fryer	Prep/Consider Emails	00:06	Disallowed	TO AMANDA RE LENGTH OF HEARING
29/04/2021	Adrian Fryer	Prep/Consider Emails	00:12	Disallowed	FROM / TO AMANDA RE LENGHTH OF HEARING
29/04/2021	Adrian Fryer	Prep & Perusal	00:06	Disallowed	FURTHER EMAIL TO ET RE LENGTH OF HEARING
29/04/2021	Adrian Fryer	Prep/Consider Emails	00:06	Disallowed	FROM AMANDA TO CONFIRM 2 DAYS ELH
07/05/2021	Adrian Fryer	Drafting	02:00	£514.00	WRITTEN COSTS APPLICATION
				£ 4,098.70	