EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
1. Ms Jemma Hudson 2. Ms Bryony Waterson	**v**	Air Tanker Services Limited

Heard at: Watford **On:** 6 June 2022

Before: Employment Judge Bedeau

Members: Ms Emily Gibson
Mr David Snashall

Appearances
For the claimants: Ms L Mankau, Counsel
For the respondent: Mr D Brown, Counsel

JUDGMENT having been sent to the parties on 22 June 2022 and written reasons having been requested by the claimants orally on 7 June 2022 and in writing on 8 June 2022, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In a claim form presented to the tribunal on 23 February 2021, the claimants made claims under s.18, s.13, and s.19 Equality Act 2010 of: maternity and pregnancy discrimination; direct sex discrimination because of pregnancy; and indirect sex discrimination, respectively, as well as unauthorised deductions from wages s.13 Employment Rights Act 1996. In the response presented to the tribunal on 26 March 2021, the respondent averred that the s.18 and 13 claims, based on a provision in a collective agreement in relation to pay, having regard to s.76 Equality Act, are not legally sustainable before the tribunal as such claims should be made under the equal pay provisions in the Equality Act.

2. The case proceeded until 28 March of this year when an application was made to the tribunal by the claimants to amend their claims by adding a s.66 Employment Rights 1996, a claim alleging that they were suspended on maternity grounds. That application was opposed by the respondent on 5 April. It was argued that it was not a relabelling exercise but an application

to amend by adding a new claim which was out of time and should not be allowed as the claimants were legally represented from the presentation of their claims before the tribunal, to the hearing.

3. The application to amend under s.66 is a reference to being suspended while on maternity, pregnancy or breast feeding a child and the tribunal can take into account when considering that section, what would constitute a suspension. Section 66(3) states the following:

> "For the purposes of this part an employee shall be regarded as suspended from work on maternity grounds only if and for so long as she
>
> (a) Continues to be employed by her employer, but
>
> (b) Is not provided with work or (disregarding alternative work for the purposes of s.67) does not perform the work she normally performed before the suspension."

4. In the claim form, the claimants refer to the wording in a collective agreement reached between Unite the Union and the respondent in 2020. In it there is a provision in relation to the payment to those who are who are pregnant or on maternity. Payment is at a daily rate. We understand that once a female employee of the respondent discloses the fact that they are pregnant, for their health and safety, they are removed from their substantive duties on an aircraft and are grounded. They are then given their basic pay and if they are provided with work, they also get a daily rate.

5. In the claimants' cases they both allege that while they were grounded, they were required to work from home, but work was not provided to them. There were promises initially that they would be paid which were later retracted by the respondent. They pursued the matter by way of two grievances, save for a slight alteration in relation to the calculation of holiday pay, their grievances were not upheld. That, in summary, is their case in their claim forms.

6. The s.66 claim relies on not being provided with work on maternity grounds and for their circumstances to be considered as amounting to a suspension.

7. In the application to amend, paragraphs 19 and 20 refers to the s.66 and s.68 provisions of the Employment Rights Act 1996. No new facts are asserted in the application to amend.

8. Submissions were made by Ms Mankau, counsel for the claimants, and by Mr Brown, counsel for the respondent.

The law

9. A party can apply to amend a claim or response at any time in proceedings, Selkent Bus Co Ltd v Moore 1996 ICR 836 and rule 29, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Further in its response it avers that the claimant was informed by email from Ms Dauncey on 15 April 2021, that as she had recently

commenced employment with the respondent, she would not receive an annual salary review until the following April, April 2022. This was in line with clause 6 of the claimant's contract of employment. The claimant responded later in the day that she had notice such a clause in her contract.

10. Whether an amendment is required will depend on whether the claim form or response provides, in sufficient detail, the complaint or defence the party seeks to make. The mere fact that a box is ticked indicating a specific claim such as direct race discrimination does not mean that it raises a complaint of indirect race discrimination and victimisation. In considering whether the claim form contains a particular complaint that the claimant is seeking to raise, the claim form must be considered as a whole. The mere fact that a box is ticked indicating that a certain claim is being made may not be conclusive in determining whether it sets out the basis for such a complaint, Ali v office of National Statistics 2005 IRLR 201, Court of Appeal.

11. Sir John Donnaldson, in Cocking v Sandhurst (Stationers) Ltd and Another, 1974 ICR, in the National Industrial Relations Court, set down, generally, the procedure when considering whether to allow an amendment. He stated that Tribunals must have regard to all the circumstances, in particular, any hardship which would result from either granting or refusing the amendment. This judgment was approved in Selkent.

12. In Selkent, Mr Justice Mummery, President, held that in determining whether to grant the amendment application, the Tribunal must always carry out a balancing exercise of all relevant factors, having regard to the interests of justice and to the relative hardship cause to the parties if the application is either granted or refused. The relevant factors are: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

13. Whether the claim would be in time if the amendment is a new claim, is not determinative of the application to amend.

14. In the case of New Star Asset Management Ltd v Evershed [2010] EWCA Civ 870, the Court of Appeal allowed the claimant to add public interest disclosure to a constructive unfair dismissal claim as the amendment did not raise new factual allegations.

15. In Ahuja v Inghams [2002] ICR 1485, the CA held, Mummery LJ, that Employment Tribunals have the power to allow an amendment even at a late stage based on the evidence given at the hearing. They have a wide jurisdiction to do justice in the case and "…should not be discouraged in appropriate cases from allowing applicants to amend their applications, if the evidence comes out somewhat differently from was originally pleaded. If there is no injustice to the respondent in allowing such an amendment, then it would be appropriate for the Employment Tribunal to allow it rather than allow what might otherwise be a good claim to be defeated.", paragraph 43.

16. It may be appropriate to consider, as another factor, whether the claim, as amended, has any reasonable prospects of success, but the Tribunal should proceed with caution as evidence will be required in support of the amendment, Cooper v Chief Constable of West Yorkshire Police and Another UKEAT0035/06; and Woodhouse v Hampshire Hospitals NHS Trust EAT0132/12.

17. In the Presidential Guidance – General Case Management, issued on 22 January 2018, amending a claim or response falls within rule 29 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the power of the Tribunal to issue case management orders. "In deciding whether the proposed amendment is within the scope of an existing claim or whether it constitutes an entirely new claim, the entirety of the claim form must be considered.", paragraph 7.

18. "The fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment", sub-paragraph 11.1.

19. The test is the balance of injustice and hardship in allowing or refusing the application and should be approached by considering the practical consequences of allowing an amendment, HHJ Tayler, Vaughan v Modality Partnership UKEAT/0147/20, paragraph 21.

20. The balance of prejudice can include an assessment of the merits of the proposed amended claim, Gillett v Bridge 86 Ltd UKEAT/0051/17.

21. In relation to time issues, where the amendment is granted, time takes effect at that point and not at the date of the original claim form or the date of the application, Galilee v Commissioner of Police of the Metropolis [2018] ICR 667, a judgment of the EAT, paragraphs 67-68, HHJ Hand QC.

Conclusion

22. As regards the timing of the application, it is acknowledged by Ms Mankau, that it comes 13 months after the presentation of the claim forms. What was the reason for the delay? She stated it was the complex wording of s.76 of the Equality Act. We do not accept that that is a good reason for the delay. The legal difficulties for the claimants in pursuing ss.18 and 13 were drawn to their representatives' attention in the response in March 2021. It is clear that they did not have any difficulties understanding that section. We, therefore, do not accept that the alleged complex wording of s.76 provides a good reason for the delay, but delay is one factor we have to take into account.

23. This is a balancing exercise. What is the nature of the amendment? We have come to the conclusion that it is a relabelling of facts already pleaded. As already stated, the claimants do not rely on additional factual matters and the nature of the amendment is not substantial that it alters the case against the respondent. It is putting a more appropriate claim to facts already pleaded.

24. What about the prejudice to the parties taking into account the balance of hardship? Ms Mankau acknowledged that the claimants only claim currently before the tribunal is s.18 claim, pregnancy and maternity discrimination, and that legally cannot be pursued against the respondent. On its face, it has no reasonable prospect of success and is misconceived. If the application is refused it would mean that these two claimants have no legal recourse against the respondent.

25. What about the respondent if it is granted? Mr Brown told the tribunal that if it is granted the respondent would not be seeking an adjournment; that what is stated in the respondent's witnesses' statements do not require any further amendments; and it would not need an adjournment to present new evidence in rebuttal.

26. Taking into account the balance of prejudice, we have come down on the side of the claimants. They are likely to suffer great prejudice were we to refuse this application to amend, whereas the respondent can contest this new claim and do not require time to gather additional evidence.

27. As for the out of time point, we take the view that the correct test is the reasonable practicability, but as this is a relabelling exercise it is, in our view, of little importance.

28. We, therefore, have come to the conclusion that the application to amend should be granted.

29. After giving the tribunal's ruling, Ms Mankau withdrew the claimants' s.18 Equality Act claims. Consequently, they are dismissed upon withdrawal.

The evidence

30. The tribunal heard evidence from Ms Jemma Hudson on behalf of both herself and Ms Bryony Waterson, the other claimant in these proceedings. On behalf of the respondent Mr David Shankland, Cabin Crew and Services Manager, gave evidence. The parties called these two individuals as it was not necessary to call and cross-examine the other witnesses in the case as the issue was fairly narrowly confined.

31. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 152 pages, however, during the course of the evidence we were only referred to a limited number of the documents in the joint bundle. Having considered the evidence in this case, we made the relevant findings of fact.

Findings of fact

32. The respondent is a defence and aerospace busines providing aircraft, infrastructure, service delivery, personnel, training and expertise to its major client, the UK Ministry of Defence, as well as to its global partners. It operates from its base on RAF Brize Norton and employs approximately

640 staff, such as pilots, cabin crew, engineers, ground crew and support staff. It also has contract staff as well as staff seconded from the RAF.

33. Ms Hudson commenced employment with the respondent in 2015, as a Purser and is responsible to the Aircraft Commander for the safety and wellbeing of passenger cabin crew occupants, including evacuation procedures.

34. Ms Bryony Waterson commenced her employment with the respondent, she told the tribunal in her witness statement, on 4 August 2014, as a member of cabin crew. She also wrote that her role is customer forward facing, to provide service to passengers onboard the aircraft. They continue to work for the respondent.

35. The parties have agreed some facts in this case, and they are as follows:

    35.1 The claimants were employed by the respondent at all material times and remain so employed.

    35.2 Jemma Hudson notified the respondent of her pregnancy on 17 August 2020.

    35.3 Bryony Waterson notified the respondent of her pregnancy on 21 August 2020.

    35.4 The claimants were grounded due to their pregnancies in accordance with a risk assessment. There is no challenge to that decision.

    35.5 The claimants were not provided with work after they were grounded prior to the commencement of maternity leave.

    35.6 The claimants did not refuse any work after 18 and 21 August 2020 respectively.

    35.7 The claimants were paid their basic salaries but not a daily rate calculated in accordance with the terms of the pay award settlement 2020.

36. In July 2020 there was a pay award Settlement. This was a collective agreement between the recognised union, Unite the Union, and the respondent. The terms of that award are set out in the bundle of documents at page 62 and reads as follows:

> "Following negotiations between Air Tanker and Unite the Union the pay award as detailed below has been balloted and accepted by the Unite membership.
>
> - An agreement for cabin crew to receive the airtime pay award for a period of three years, commencing and including pay award 2020, 2021 and 2022. The same award that is received by Air Tanker staff. This award will be backdated to 1 January of that year or the date applicable to all Air Tanker staff. This award also applies to duty pay; however, this adjustment will normally take place from 1 July each year.

> - Duty pay will continue to be paid for all time away from base but will no longer be paid for ground duties. This does not affect airport standby duties, where we will continue to pay duty pay.
>
> Crew that are grounded due to maternity will receive a daily rate. This will be a calculation of the average the individual received in duty pay paid over the 12 weeks prior to notification of pregnancy to Air Tanker."

37. There is then a calculation. The next paragraph states:

> "This daily rate would be payable for each day that the crew member undertook work on behalf of Air Tanker. The working day would be from 08:30 to 17:00 Monday to Thursday and 08:30 to 16:30 on a Friday. Should a crew member need adjusted start of finish times to attend a medical appointment then the daily rate would still apply. The daily rate is payable in addition to the crew members basic salary.
>
> - Subject to the above two points being accepted by the membership we will implement, at the earliest opportunity, the scheduling protocol document that has been agreed with the Air Tanker Unite Representatives.
>
> This agreement will now be implemented with immediate effect."

38. Ms Hudson told the tribunal that she was a Unite representative at the time of the discussions leading up to the above pay award Settlement, and she was aware of the discussions at that time. We find that in accordance with the pay award, payment for ground duties by way of a daily rate only covers pregnant women who are grounded.

39. On behalf of the respondent Mr Shankland told the tribunal, and we accepted his evidence as fact, that he negotiated the award. He also in his witness statement, made reference to the problems experienced by the respondent during the Covid-19 pandemic. He stated that cabin crew were busy operating military flights. Commercial flights were affected significantly; the respondent had lost its customer, Jet2, as Jet2 no longer required aircraft; pilots were made redundant; and office staff and ground drew were working from home but without the necessary IT equipment. He conveyed the impression that this was a unique situation experienced by the respondent impacting on the availability of work.

40. The claimants were grounded from August 2020 to, in Ms Hudson's case, 12 February 2021, when she went on maternity leave. In Ms Waterson's case, to 15 February 2021, when she also went on maternity leave. During the time they were grounded and prior to going on maternity leave, as started in the agreed finings of fact, they were not provided with any work. Ms Waterson in her witness statement stated that she was provided with work in 2018 when she was pregnant with her first child.

41. Their position became confused because their line manager, Ms Rachel Allen, Performance Development Instructor, had informed them in or around August 2020, that they would be entitled to the daily rate although work was not provided for them to do. However, on 21 September 2020, Mr

Shankland informed them that they would not be paid the daily rate because, in accordance with the pay award settlement, they had not been provided and were not engaged in work while grounded. The claimants, understandably, were dissatisfied with the change of position adopted by the respondent, conveyed to them by Mr Shankland, and lodged grievances. The matter proceeded through the grievance process, but the outcome was not to their satisfaction.

42. Those are the tribunal's material findings of fact.

Submissions

43. The claimants' claims are based on ss.66 and 68 of the Employment Rights Act 1996. They argue that they were suspended and are entitled to be remunerated under s.68. The respondent's position is that no work was available having regard to the difficult circumstances brought upon by the Covid-19 pandemic, and in accordance with the pay award settlement, it was not obligated to pay the claimants as they were not engaged in work while grounded.

The law

44. S.66 of the Employment Rights Act reads as follows:

> " (1) For the purposes of this Part an employee is suspended from work on maternity grounds if, in consequence of any relevant requirement or relevant recommendation, she is suspended from work by her employer on the ground that she is pregnant, has recently given birth or is breastfeeding a child."

45. Both claimants were pregnant at the material time.

46. Subsection 2 deals with relevant requirement and relevant recommendation in subsection1, and states the following:

> "(2) In subsection (1)—
>
> "relevant requirement" means a requirement imposed by or under a specified provision of an enactment or of an instrument made under an enactment, and
>
> "relevant recommendation" means a recommendation in a specified provision of a code of practice issued or approved under section 16 of the Health and Safety at Work etc. Act 1974;"

47. It is of relevance the definition of relevant requirement as this case does not concern the application and definition of relevant recommendation.

48. Section 66(3) states:

> "(3) For the purposes of this Part an employee shall be regarded as suspended from work on maternity grounds only if and for so long as she—

> (a) continues to be employed by her employer, but
>
> (b) is not provided with work or (disregarding alternative work for the purposes of section 67) does not perform the work she normally performed before the suspension."

49. The relevant requirement as referred to in subsections 1 and 2, is the provision in regulation 16(3) of the Management of Health and Safety at Work Act Regulations. When a female member of staff is pregnant there is a requirement to undertake a risk assessment. Regulation 16(3) states:

> "If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the employer shall, subject to section 67 of the 1996 Act suspend the employee from work for so long as is necessary to avoid such a risk."

50. In the context of this case, the claimants' hours of work were not adjusted. They, therefore, rely on the application of regulation 16(3).

51. In relation to s.67 ERA, this deals with the right to offer alternative work which is not the position of the claimants in this case. S.68 is the right to remuneration, and it provides:

> "68. Right to remuneration.
>
> (1) An employee who is suspended from work on maternity grounds is entitled to be paid remuneration by her employer while she is so suspended.
>
> (2) An employee is not entitled to remuneration under this section in respect of any period if—
>
> (a) her employer has offered to provide her during the period with work which is suitable alternative work for her for the purposes of section 67, and
>
> (b) the employee has unreasonably refused to perform that work."

52. The offer of suitable alternative work is not part of the claimants' case in these proceedings.

Conclusion

53. We have come to the conclusion that the claimants were suspended from work applying s.66 and also regulation 16. They, in accordance with s.68, are entitled to be remunerated while on suspension. The argument by the respondent that they are not liable because there was no work available and, having regard to the terms of the pay award Settlement, both claimants were not entitled to the daily rate.

54. That particular circumstance is not referred to in ss.67 and 68. In any event, we do accept the submission by Ms Mankau, on behalf of the claimants, that if we were to accept the respondent's submissions that the pay award applies in this case and that the claimants are not entitled to the daily rate or

to pay or to remuneration, we should have regard to s.203(1) Employment Rights Act, which states the following:

> "203 Restrictions on contracting out.
>
> (1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—
>
> (a) to exclude or limit the operation of any provision of this Act."

55. The claimants are entitled to be remunerated. They have satisfied the requirements of s.66 and that the argument that the pay award provisions apply is void as it is an attempt to deny the claimants' rights to compensation, contrary to s.203(1).

56. In the case referred to us by Ms Mankau, of British Airways (European Operation Gatwick) Ltd v Moore, the finding in that case was that the two claimants were grounded because they were pregnant. They were, therefore, suspended from work. The particular facts in that case are different when compared with the cases before us, in that, that case involved the issue of suitable alternative employment as well as equal pay.

57. The conclusion of this tribunal is that the s.66 claim in respect of both claimants are well-founded.

58. After giving judgment on liability, the parties were given time to agree compensation. The agreement was that the respondent would pay Ms Hudson the sum of £1,572.88, and Ms Waterson the sum of £1,862.91. This agreement was adopted by the tribunal having regard to rule 64.

The respondent's costs application

59. Mr Brown applied for the respondent's costs to be paid by the claimants. It was made on two bases. Firstly, that the conduct of proceedings by the claimants could be described as unreasonable, rule 76(1)(a), Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, "ETR" and, secondly, that the discrimination claims stood no reasonable prospect of succeeding, rule 76(1)(b) ETR. He asked that the claimants' representatives should pay the costs by way of a Wasted Costs order, rule 80. It was pointed out by the tribunal that an application for Wasted Costs have to be made on notice giving the legal representatives time to submit a response, which was not the case here, rule 82. Having explained the position, he withdrew his application for a Wasted Costs order.

60. In relation to the first ground of the application, Mr Brown submitted that the claimants acted unreasonably in pursuing the claims after receiving the respondent's response setting out its position that a discrimination claim in relation to pay, has to be brought under the equal pay provisions in the Equality Act.

61. On 11 May 2022, a "Without Prejudice save as to costs" email was sent to the claimants' representatives informing them of the legal difficulties involved in

pursuing the discrimination claims. There was no response and the case proceeded to the liability hearing. There was an opportunity before the exchange on witness statements on 16 May 2022, to withdraw the claims thereby saving costs, but this was not considered by them, submitted Mr Brown.

62. The section 66 ERA claims were dealt with in one day. Cross-examination was limited to a few questions, and only a few pages in the bundle were referred to. Up until the 5 June 2022, the respondent had no idea whether the claimants had taken on board its position in relation to section 76 Equality Act. Mr Brown, therefore, had to prepare for a contested discrimination hearing, both on ss.13 and 18. The s.13 claim was withdrawn on the first day of the hearing. The s.18 claim was kept in to allow the claimants to make their application to amend.

63. The compensation the claimants received was substantially below what they had originally claimed.

64. In relation to the second ground of the costs application, Mr Brown submitted that all the original claims had no reasonable prospect of success and that the respondent's legal representatives, as already been referred to, in their email dated 11 May 2022, informed the claimants' representatives of their position and that they would be seeking the respondent's costs should the claimants be unsuccessful. Section 18, as pleaded, is precluded by s.76, and s.13 is precluded by ss. 70 and 71, Equality Act. The unauthorised deductions from wages were predicated on the claimants having suffered discriminatory treatment. He relied on the wording in the pay award settlement in support of the respondent's position that it was not obligated to pay the claimants' a daily rate.

65. The claimants were represented by Thompson's solicitors from the outset, and they should have known that the discrimination claims, as pleaded, based on pay, could not proceed before the tribunal. This was pointed out in the response to the claims, yet claimants' solicitors did nothing.

66. Ms Hudson was seeking £2,710.78 in compensation. (40) Ms Waterson £3755.21. (43) In the end they received less than what they were asking for.

67. If the only claim, at the outset, was s.66 ERA, the costs incurred by the respondent would have been substantially lower than what it is asking the tribunal to award. Cross-examination of the witnesses were very brief, and Mr Brown submitted that his submissions on the issue of liability was short. As the sums were comparatively small, it was highly likely that the s.66 claims would have been settled.

68. In the respondent's Costs Schedule, it lists the hourly rates: Partner, £300; a Senior Associate, £245 increased to £250 from 1 May 2022; and a Solicitor, £170 increased £175 from first of May 2022. In relation to client and witnesses, 19.62 hours, it claimed £4,849.50; for attendance on claimant's representatives meetings, letter, emails, 2.06 hours, it claimed £497; for attendances on others, including counsel and the tribunal, 8.44 hours, it

claimed £2,156.70 for work on documents including considering evidence, legal research, case analysis, drafting witness statements, work on disclosure and preparing bundles, brief to counsel, schedule of loss, preparation for hearings, a total of 55.44 hours, it claimed £12,466. For attendance at hearing, five hours, it claimed £1,250. For counsel's fees in reviewing witness statements, £750. Counsel's brief fee including refresher fees, £4,850. The total cost to date of the hearing, excluding VAT and disbursements and expenses, was £24,818.50.

69. It is unclear who did what, when, and the costs incurred. However, Mr Brown invited the tribunal to make an award in the sum of £25,818.50 to be assessed, or alternatively, £20,000 being the maximum of the tribunal's jurisdiction. If a more detailed Costs Schedule were required, it would necessitate an adjournment with further attendant costs.

70. Ms Mankau, on behalf of the claimants, submitted that costs is a two-staged process. Even if the respondent's grounds were successful, the tribunal retains the discretion whether to award costs.

71. The amendment application made on 28 March 2022, was based on s.66 ERA. It was resisted by the respondent. The tribunal concluded that it was a re-labelling exercise. There was no prejudice to the respondent in it being granted. The respondent could have consented to it thereby avoiding a hearing to determine whether it should be allowed.

72. In relation to the s.66 claims, cross-examination and submissions were limited. The facts were agreed, which, in the main, supported the claims. No new facts were alleged.

73. In relation to the Costs Schedule, it is difficult to discern what costs are attributable to the withdrawn claims as the schedule is not broken down and does not state which fee earner did what, and when.

74. In the amended pleadings served on 27 May 2022, the indirect sex discrimination and unauthorised deductions from wages claims were withdrawn. Only sex discrimination, pregnancy and maternity discrimination were left. The factual matrix was the same whether it was solely s.66 ERA claims or the original discrimination claims. It cannot be said that costs would have been saved if only s.66 was pursued from the start. Further, it is not clear what costs are attributable to the delay in making the amendment.

75. On 10 May 2022, the claimant's offer to settle via ACAS but the respondent did not wish to negotiate.

76. Ms Mankau submitted that it would be unreasonable to make an award of costs to the respondent.

The law on costs

77. The costs provisions are in rules 74 to 84, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as

amended. "Costs" includes any fees, charges, disbursements or expenses including witness expenses incurred by or on behalf of the receiving party, rule 74(1).

78. The provisions in relation to making a costs order are contained in rule 76. Rule 76(1) provides,

> "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."

79. In deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay, rule 84.

80. In the case of Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255, the Employment Judge in the case awarded the respondent 100% of its costs based on the claimant's lies prior to her decision to withdraw. On appeal the EAT said that it was unable to see how the lies told at the prehearing review caused the respondent any loss at all from which they were entitled to be compensated. She succeeded in her appeal. On appeal to the court of Appeal, Mummery LJ giving the leading judgment held:

> "The vital point in exercising their discretion to order costs is to look at the whole picture of what happened in the case and asked whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what affects it at that. The main thrust of the passages cited above from my judgement in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs the claimant. In rejecting that submission I have no intention of giving birth to erroneous notions, such as that causation was irrelevant or the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances….
>
> 52 In my judgment, although the employment tribunal had jurisdiction to make a costs order, it erred in law in the exercise of its discretion. If, as should have been done, the criticisms of the council's litigation conduct had been factored into the picture as a whole, the employment tribunal would have seen that the claimant's unreasonable conduct was not the only relevant factor in the exercise of the discretion. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case, including the council's conduct and its likely effect on the length and costs of the prehearing review."

81. The tribunal have to consider, once the claims have been brought, whether they were properly pursued, Npower Yorkshire Ltd v Daly UKEAT/0842/04.

82. Knox J, in Keskar v Governors of All Saints Church England School and Another [1991] ICR 493, page 500, paragraphs E-G, held,

> "The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint.
>
> That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations."

83. We have also taken into account the cases of AQ Ltd v Holden [2012] IRLR 648, a judgment of the Employment Appeal Tribunal, E.T Marler v Robertson [19974] ICR 72, a judgment of the National Industrial Relations Court, and Oni v Unison UKEAT/0370/14/LA.

84. In Marler, it was held by Sir Hugh Griffiths under the old "frivolous or vexatious" costs requirements that

> "If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee.", page 76 D-F.

85. In the Oni case, Simler J, President, re-stated the principles, namely that the tribunal has a wide discretion in deciding whether to award costs. It is a two-stage process. The first being, to determine whether the paying party comes within one or more of the parameters set out in rule 76. The second, is if satisfied that one or more of the requirements have been met, whether to make the award of costs. However, costs had to be proportionate and not punitive, and reasons must be given.

86. In Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, a case where the claimant was ordered to pay costs of £3,000 because she had made a case dependent on advancing assertions that were untrue. The Court of Appeal held that under rule 41(2) the tribunal was not obliged to take her means into account although it had done so. The fact that her ability to pay was limited, in that she was unemployed and no longer in

receipt of statutory maternity pay, did not require the tribunal to assess a sum limited to an amount she could pay. The amount awarded was properly within the tribunal's discretion.

87. In relation to the exercise of the tribunal's discretion whether to take into account the paying party's ability to pay, under the old rules, HHJ Richardson, in the case of Jilley v Birmingham & Solihull Mental Health NHS Trust (EAT/584/06), held:

> "The first question is whether to take ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means."
>
> "If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential."

Conclusion

88. On the issue of the claimants' unreasonable conduct of proceedings, we do accept the respondent's submissions that they, through their solicitors, were put on notice in the response as early as 26 March 2021, that the discrimination claims were misconceived and set set out the bases for their contention in paragraphs 18-35.

89. Had the claimants' representatives taken on board what the respondent's representatives were contending, it would have been possible for them to address the points made and to apply in a timeous manner, in or around April or May 2021, to amend the claims by adding s.66 ERA and withdrawing the other claims. Instead, what happened was that on 28 March 2022, over a year after the claim form was presented, did they apply to amend and serving an Amended Grounds of Claim in which they withdrew indirect sex discrimination and unauthorised deductions from wages. Leaving pregnancy and maternity and direct sex discrimination.

90. It was only on the first day of the hearing when, having been successful in their application to amend, did they withdraw the s.13 pregnancy and maternity discrimination claim. By then the respondent had to prepare for an effective hearing to address the discrimination claims. They also made an application to strike out that claim. Counsel was briefed to attend to articulate the basis of the application.

91. We have come to the conclusion that the respondent has satisfied rule 76(1)(a), that the claimants' conduct of proceedings by delaying its application to amend, was unreasonable.

92. In relation to the claims being misconceived, we refer to the response to the claim and to the respondent's representatives' email of 11 May 2022. Section 18 EqA, where it concerns a contractual entitlement to pay is precluded by s.76 and has to be brought under the equal pay provisions.

93. Similarly, a s.13 EqA claim on the same facts, cannot be pursued having regard to ss. 70-71, and 76.

94. The same applies to s.19 EqA, indirect sex discrimination. By virtue of s.19(3), pregnancy and maternity are excluded as protected characteristics.

95. In relation to the unauthorised deductions from wages claim, it was pleaded on the basis that the claimants suffered unauthorised deductions because of their discriminatory treatment. As they cannot establish discriminatory treatment on the basis of pay, this claim was also misconceived.

96. The claimants have been represented by their union solicitors throughout these proceedings. We have seen the correspondence in the file and have considered the respondent's costs schedule.

97. Ms Mankau is correct in her submissions that there is the absence of specific detail of who of the respondent's legal representatives did what, and when, and what costs can be attributable to the delay. What is clear from file is that the respondent's representatives did communicate with the claimants' representatives and the tribunal. They made an application to strike out the remaining claim and counsel had to prepare his submissions on the point. They also had to prepare their case for an effective final hearing.

98. There was no suggestion that the costs schedule was a misrepresentation of the work done, only that it lacked the detail expected. We also accept that it could be challenged that some of the costs may be unreasonable. The alternative was to list the case for a further hearing and order that the respondent serve a more detailed schedule. That would add to the parties' costs in this case.

99. We accept that some of the evidence relevant to the discrimination claims were also relevant to the s.66 ERA and we have taken that into account.

100. We have also taken into account the claimants' ability to pay costs as it would be borne by their union.

101. Taking all of the above into account, and seeking a just, equitable and proportionate outcome, we have come to the conclusion that we would reduce the costs to be paid by the claimants to the respondent from £24,818.50 to £10,000. This represents 40% of the total the respondent is seeking to recover. This is the unanimous judgment of the tribunal.

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Employment Judge Bedeau

Date: 18 July 2022

Sent to the parties on: 2 August 2022

T Cadman
For the Tribunal Office