EMPLOYMENT TRIBUNALS

Claimant: Ms ST Afitlhile

Respondents: (1) BUPA Care Homes (GL) Ltd
(2) Jane M Madden
(3) Patricia Ramsden
(4) Catherine Johns
(5) Dr David Batman

At: Manchester

On: 17 August 2022 (in chambers)

Before: Judge Brian Doyle

COSTS JUDGMENT

Acting under rule 75(1)(a) and rule 76(1)(a) and (b) of the Employment Tribunals Rules of Procedure 2013, the Tribunal orders the claimant to pay to the first respondent an award of costs in the total sum of £3,221.25.

REASONS

Introduction

1. This is the Tribunal's judgment and reasons in respect of the first respondent's application for an award of costs against the claimant.

2. The present judgment should be read in tandem with the Tribunal's judgment and reasons striking out the claim. That judgment was delivered orally on 4 July 2022, and then sent to the parties on 8 July 2022. The claimant requested written reasons for that judgment, which were signed by the judge on 1 August 2022, and then sent to the parties on 4 August 2022.

3. The application for costs was made on behalf of the respondents in writing on 1 July 2022. It was considered in the second part of the preliminary hearing on 4 July 2022. The first part of that hearing had determined the respondents' application to strike out the claim. Consideration of the application for costs was adjourned, and directions were made, on the agreed basis that it would be

further considered and determined on paper and without need for a further hearing.

Procedure

4. On the judge's instructions on the afternoon of 4 July 2022 the Tribunal wrote to the claimant's representative (a letter via email attachment) with a copy to the respondents.

5. The judge reminded the claimant that at the preliminary hearing on the morning of 4 July 2022 he had found that the claimant's second claim (Claim 2 – the present claim) made to the Employment Tribunal at Manchester in 2021 should be struck out as vexatious (an abuse of process) and as having no reasonable prospect of success; and as being out of time, in any event. The Tribunal recorded that the judge had struck out the claim because it was an obvious attempt to relitigate matters that were or should have been the subject of the claimant's first claim (Claim 1) before the Leeds Employment Tribunal in 2019. Claim 1 had been the subject of an unsuccessful application for reconsideration, and unsuccessful appeals to the Employment Appeal Tribunal and the Court of Appeal.

6. The Tribunal recorded that the judge did not have (during that morning's hearing) a copy of a paper bundle sent by Dr Mapara to the Tribunal a week earlier. The judge did not need to see the bundle at the hearing because, from Dr Mapara's description of it, its contents were not relevant to the application that the judge had to decide at the preliminary hearing. In any event, Dr Mapara read from the bundle to the extent that he thought necessary. However, the judge has now seen that bundle. A scanned copy was provided to him within an hour of the preliminary hearing concluding. He has now considered its contents. That confirmed that it was not necessary to have seen it when he was considering his decision as to strike out at the morning hearing.

7. The Tribunal recorded that the bundle confirmed the judge in his view that the issue of a second claim at Manchester (Claim 2), after an unsuccessful first claim at Leeds (Claim 1), was vexatious and an abuse of process. The judge found it difficult to understand how the claimant or Dr Mapara could have misread or misunderstood the case management summary and orders of Judge Shulman in Claim 1; or the basis upon which Judge Shepherd and members had dismissed Claim 1; or why on appeal the EAT and the Court of Appeal dismissed a challenge to that judgment in trenchant terms. It was also difficult to appreciate why the claimant or Dr Mapara considered that the matter could continue to be pursued in the face of those setbacks; and could be done so by issuing a second claim (Claim 2) in the terms in which it was; and why the clear guidance given by Regional Employment Judge Franey in respect of Claim 2 was ignored.

8. The Tribunal recorded that, in those circumstances, the judge was minded <u>in principle</u> to make a costs award against the claimant and in favour of the respondents (in practice, the first respondent). The threshold for so doing had been met. Before he could consider the matter further, however, the judge wished to consider the claimant's means and her ability to pay a costs award in the amount sought by the first respondent (or some lesser amount or at all).

9. Accordingly, within 14 days of the date of the Tribunal's letter – that is, by 18 July 2022 – the claimant was ordered to provide to the Tribunal (with a copy to the respondents' representative) details and supporting evidence of: (a) the claimant's income from earnings or other sources (such as state benefits); (b) her monthly expenditure (such as mortgage, rent, utilities, personal loans, hire purchase, credit card payments, travel, subsistence and any other identifiable monthly commitments); (c) any savings or investments; and (d) any capital, such as ownership of a house or other property (indicating what amount might be outstanding by way of mortgage or other loan upon such property). The claimant should identify whether she has dependants and/or is herself dependent upon another person (such as a spouse or partner) and the extent of such responsibility or dependancy. The judge would then consider the matter further after 14 days, with or without the benefit of that further input from the claimant.

10. Late on the afternoon of 4 July 2022, Dr Mapara replied to the Tribunal's communication immediately above. He asked whether the judge had ignored the "facts" established in correspondence to BUPA from the claimant's then solicitors in December 2021 and January 2022. He suggested that that correspondence concluded that the physical and electronic documents requested did not exist; that the purported dismissal letter of 3 January 2019 did not exist; that the purported termination of contract of employment letter dated 3 January 2019 did not exist; and that the occupational health report dated 18 December 2018, alleged to have been written by and signed by Dr Batman, did not exist. He asked whether the General Medical Council (GMC) evidence of 18 March 2021 that Dr Batman did not write the purported 3 pages report that the courts quoted as authentic had been ignored? He asserted that the document was written by Dawn Murphy, the former Home Manager, who (Dr Mapara said) was dismissed after he blew the whistle on her and Jane Madden for fraud, forgery and impersonating Dr Batman, for which he was thanked by Dr Batman. He asked whether the "new evidence" by Ms Patricia Ramsden (of BUPA) on 16 September 2021 that concluded that the claimant was still on the BUPA payroll on 16 September 2021 had been ignored? He asserted that this was a fact endorsed by the BUPA Payroll Operations Manager, Ms Estera Williamson, in February 2019 after an internal investigation was conducted and revealed forged letters by Dawn Murphy and Jane Madden.

11. Dr Mapara's email of 4 July 2022 did not address the Tribunal's direction of 4 July 2022 as to the claimant's ability to pay a costs order.

12. The judge gave an instruction that that email was to be acknowledged and filed. He said that he would treat that email as a request for written reasons for his judgment on strike out of that morning and for the decision that he will take in due course on the costs application. It would not otherwise be appropriate to enter into correspondence about a decision made or in progress.

13. On 20 July 2022, Dr Mapara emailed the Tribunal. He repeated his request for written reasons for the Tribunal's judgment of 4 July 2022 (sent to the parties on 8 July 2022). He again took issue with the Shepherd Tribunal's hearing and judgment in Claim 1. He made it clear that he did not accept that the claimant had been dismissed. He repeated his view that she remained an employee of

BUPA and that documents had been forged. He set out again his allegations against those involved in the proceedings, including witnesses, lawyers, tribunal staff and so on.

14. Dr Mapara's email of 20 July 2022 did not address the Tribunal's direction of 4 July 2022 as to the claimant's ability to pay a costs order.

15. The Tribunal noted the respondents' solicitors' email of 21 July 2022, which is in effect an acknowledgement of the correspondence above.

16. On 31 July 2022, Dr Mapara emailed the Tribunal, addressing himself to the "Manchester Employment Tribunals Manager". In essence, its contents repeat or renew Dr Mapara's challenge to the judgment of the Leeds Employment Tribunal in Claim 1. He asserted again that the claimant had not been dismissed; that a dismissal letter or occupational health report did not exist; that the claimant had been exonerated; and that Judge Shepherd's judgment was "manufactured" and "fictitious" and resulted from a scandalous, sham trial. He made wide-ranging and indiscriminate allegations of fraud, forgery, impersonation, corruption, perjury, spoliation, subornation of perjury, theft of property, and malfeasance in public office.

17. Dr Mapara described the present judge's judgment of 4 July 2022 as perverse, scandalous, corrupt and dishonest. He stated that he was appealing that judgment based upon dishonesty, fraud and misfeasance in public office. He set out eight reasons for an appeal, repeating his essential objections to the judgment in Claim 1 and suggesting that the judges of the Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal had been misled as to the legitimacy of the hearing before Judge Shepherd and members. He repeated with some detail his central allegation that there had been no ET3 in Claim 1 presented in time or at all. He set out the rules under which a claim might be struck out, although without further explanation as to why he was doing so. He repeated his assertion that the claimant had not been dismissed and that she remained an employee of BUPA. He reiterated his accusations against the judges of the Employment Tribunal, Employment Appeal Tribunal and Court of Appeal, and two Masters of the High Court.

18. It is important to make clear that Dr Mapara's email of 31 July 2022 cannot be treated as an appeal. An appeal can only be made to the Employment Appeal Tribunal in accordance with its procedural rules. It also does not appear to be an application for reconsideration of this Tribunal's judgment of 4 July 2022.

19. Dr Mapara's email of 31 July 2022 did not address the Tribunal's direction of 4 July 2022 as to the claimant's ability to pay a costs order.

20. By email of 1 August 2022, the respondents' solicitors wrote to the Tribunal that, further to the Tribunal's case management order of 4 July 2022, they noted that the claimant had not provided the Tribunal with details and supporting evidence of the claimant's income and expenditure by 18 July 2022. The respondents asked the Tribunal to provide a decision on the respondents' cost application as soon as possible.

21. On 2 August 2022, the judge gave an instruction that a reminder be sent to the claimant's representative (copied to the respondents) that information about the claimant's ability to pay a possible costs order, if one were to be made, was outstanding. He granted the claimant a further 7 days to comply, after which he would proceed to make a decision on whether to make a costs order. That instruction was acted upon on 4 August 2022.

22. That resulted in two further emails from Dr Mapara on 4 August 2022 at 11.02 and 14.56, one in response to the written reasons for the judgment of 4 July 2022 and the other in response to the judge's instruction of 2 August 2022 (sent on 4 August 2022).

23. In the first email, Dr Mapara purported to relate a conversation with a BUPA employee that he said that he had just had. He again referred to there being no evidence or records that the claimant had been dismissed or terminated on 3 January 2019. He explained why he believed this to be the position. He said that the BUPA employee asked him to ask the present judge to send the original documentation that is said to record the dismissal and termination and the occupational health report.

24. In the second email, Dr Mapara's account of the position became more difficult to understand. The Tribunal does not reproduce it here. It is sufficient to say that Dr Mapara again took issue with the judgment of the Shepherd Tribunal in Claim 1 and the judgment of the present Tribunal on strike out in Claim 2.

25. Neither email of 4 August 2022 addressed the Tribunal's direction of 4 July 2022 as to the claimant's ability to pay a costs order.

26. The present judge gave an instruction that Dr Mapara be informed that there was nothing in either email that would cause the judge to revisit his decision on strike out. It would be inappropriate to enter into correspondence about that decision. The basis for it had been explained in the written reasons. It was not for the Tribunal to produce documents to a party. Its function was to make findings of fact and a decision based upon materials put before it by the parties.

27. The Tribunal administration acted on that instruction on 5 August 2022. No further communications have been received from the claimant or Dr Mapara by 17 August 2022. The Tribunal's direction of 4 July 2022 as to the claimant's ability to pay a costs order has not been addressed.

28. The Tribunal considered the matter in chambers on 17 August 2022 and reached its decision on the costs application.

The claimant's bundle

29. As Dr Mapara has asked that the claimant's bundle of documents be taken into account, what is the best that can be said about Dr Mapara's assertions, as evidenced by the documents he includes in the bundle? References to that bundle are in square brackets with the prefix "C". If a reference to the respondent's bundle is necessitated, that appears without a prefix.

30. In the Tribunal's judgement, the record of the preliminary hearing before Judge Shulman in Leeds on 8 May 2019 in Claim 1 could not be clearer [C50-55]. There is no suggestion that the respondents had not presented an ET3 in time or at all. There is no inkling whatsoever that any ET3 had been struck out or that the respondents were debarred from defending the claim or any part of it. There is no hint that there was an admission of liability to any extent by the respondents or by their counsel. The case summary makes it obvious that all complaints and issues remained alive and contested. The matter was listed for a full merits hearing of 4 days. If liability had been conceded, even in part, and if the main purpose of the hearing was to be a remedy hearing only, then it is difficult to see why a hearing of 4 days would be required.

31. There is simply no basis upon which this Tribunal is enabled to go behind the express terms of Judge Shulman's case management summary and orders in Claim 1. There is a presumption of regularity, which is not easily disturbed – "*omnia praesumuntur rite esse acta*". The presumption that in the absence of evidence to the contrary something which should have been done was in fact done, or something which has been done was done in accordance with all relevant technicalities. The presumption is simply a specific formulation and application of the presumption of legality.

32. The Leeds Tribunal's letter of 30 May 2019 takes the matter no further [C56]. Judge Smith is simply responding to a dispute between the parties over a matter of disclosure. This document is indicative of very little that helps or hinders Dr Mapara's allegations.

33. The judgment of Judge Shepherd's Tribunal in Claim 1 is unremarkable [145-161]. There is no suggestion that the respondents had not presented an ET3 in time or at all. There is no inkling whatsoever that any ET3 had been struck out or that the respondents were debarred from defending the claim or any part of it. There is no hint that there was an admission of liability to any extent by the respondents or by their counsel. The judgment and reasons make it obvious that all complaints and issues remained alive and contested. The matter required 3 days of hearing plus a day in chambers. The matter was sufficiently demanding to require a reserved judgment. If liability had been conceded, even in part, and if the main purpose of the hearing was to be a remedy hearing, then it is difficult to see why a hearing of 4 days would be required, or why that would not be apparent from the reserved judgment and reasons. Again, the presumption of regularity does not begin to be disturbed.

34. It seems that Judge Shepherd refused an application for reconsideration of his Tribunal's judgment on 10 October 2019 [C60]. The terms of the application are not revealed. However, the judge refers to "allegations as to the credibility and veracity of the evidence" and "new evidence unlikely to have any bearing on the result of the case" and whose existence could have been foreseen.

35. It does appear that Dr Mapara's present allegations were put to the Employment Appeal Tribunal to some degree [C64-71]. Judge Sheldon QC gives them relatively short shrift. He rejects the challenge to the authenticity of the dismissal and termination letters. He rejects the allegations of conspiracy, fraud and forgery. He rejects the suggestion that the claimant had not been dismissed or was still on the payroll. The judge rejects the notion that somehow

or another the respondents had been debarred from defending the claim. There is just assertion rather than evidence. See also Judge Tucker's remarks at [C88-89].

36. The Court of Appeal agreed with both Employment Appeal Tribunal judges. Lord Justice Bean referred to the "wild allegations of conspiracy" as being "wholly without merit" and "an abuse of process" [C71].

37. On 16 September 2021, BUPA's in-house Senior Legal Adviser asserted that BUPA had no reason to believe that documents used in the hearing of Claim 1 by the Leeds Employment Tribunal, or in the subsequent appeals, were anything other than genuine [C34]. BUPA had seen no evidence to suggest otherwise. Of course, that does not without more establish whether that assertion is correct, but it sets out clearly BUPA's position in relation to Dr Mapara's allegations.

38. On 18 March 2021, the General Medical Council replied to Dr Mapara's inquiries about Dr Batman and his occupational health report [C31-32]. The GMC explained that it did not consider that it could take any action. It explained the limits of its powers. It explained that it was unable to validate, review or establish the content of any occupational health reports or to confirm who may have written them. That letter does not bear the meaning that Dr Mapara attributes to it. It is not casting doubt upon the authenticity of any particular occupational health report nor is it calling into question Dr Batman's authorship of it. It is simply explaining its powerlessness to investigate the matter or otherwise to intervene. The suggestion that Dr Mapara might refer the matter to the police is incapable of being read as an indication that the GMC had concerns about the issue raised by Dr Mapara. It is a simple and obvious indication of what he might do if he had concerns that required investigation. This document is not capable of being offered as evidence that the GMC believed that an occupational health report had been forged or that someone had impersonated Dr Batman.

39. On 17 May 2021, solicitors acting for BUPA provided to Dr Mapara copies of the ET3 and grounds of resistance dated 17 April 2019, together with the occupational health report and termination letter [C75-76]. These documents are not in materials before this Tribunal.

40. Dr Mapara's email of 22 September 2021 to the claimant's then solicitors is not capable of being treated as compelling evidence of an alleged meeting between Dr Mapara and a BUPA officer, Ms Patricia Ramsden, on 16 September 2021 or of the contents of that alleged meeting [C33]. Dr Mapara relies upon that document to support his allegation that the dismissal letter and the final termination letter were forged by Dawn Murphy and Jane Madden respectively; that the claimant had not been dismissed; and that the claimant was still on the BUPA payroll and in receipt of salary [C33]. That email is also not compelling evidence of the other matters alleged therein in support of Dr Mapara's general conspiracy theory [C33-34]. It is no more than a communication by Dr Mapara to those solicitors of the various allegations he makes against other parties. See also to like effect Dr Mapara's emails of 25 October 2021 [C46-47]; 3 November 2021 [C45]; and 16 November 2021 [C38].

41. On 21 October 2021, the claimant's then solicitors wrote to Dr Batman, and they reported back to the claimant on 3 November 2021 as to his reply [35-36]. Until that point, Dr Batman had been unaware of any case or proceedings. He had met with Dr Mapara, who provided him with a copy of an occupational health report appearing to concern the claimant and dated 20 December 2018 [C35]. Dr Batman denied that Dr Mapara had been told by him or by an associate (Mrs King) that the report was false and had not been written by him [C36]. At that point, Dr Batman had no recollection of having seen the claimant or of having prepared an occupational report in respect of her. He explained why he did not recollect – it was 3 years later and he did not have access to his records. He denied stating that he could not confirm or deny the authorship of the report. He did not say that he was not the author. He could have no recollection of the matter without accessing his records [C36]. He could neither certify nor deny the authenticity of the report. He could not say whether the report was a fake.

42. See also the claimant's then solicitors email to Dr Mapara dated 16 November 2021 [C38-39], in which the solicitors appear to take an optimistic view of Dr Batman's impaired recollection. Note also their letter to the BUPA legal team dated 22 November 2021 [40-41], in which they seek additional information and disclosure of relevant documents.

43. As a result of a request made on 22 October 2021, the claimant sought to ascertain whether BUPA had relied upon an occupational health report in its evidence in Claim 1 and whether that report had informed the decision to dismiss her [C26].

44. Also as a result of that request dated 22 October 2021, the claimant sought to ascertain whether she had been dismissed on 3 January 2019, as it was asserted that Dr Mapara had been informed by Ms Patricia Ramsden of BUPA on 16 September 2019 that the claimant remained an employee on BUPA's payroll [C26].

45. The BUPA legal team replied to the claimant's then solicitors. The date of the reply is uncertain, but it is incorporated within an email from the claimant's then solicitors to Dr Mapara dated 16 November 2021 [C39]. BUPA took the position that the claimant's dismissal and related evidence had been explored in the Tribunal proceedings in Claim 1 and that all avenues of appeal had been exhausted. They confirmed that the claimant had been dismissed on 3 January 2019 and that she was no longer an employee on its payroll.

46. Also as a result of that request dated 22 October 2021, the claimant sought a copy of her sickness record/file [C27]. On 22 November 2022, the claimant's then solicitors confirmed to the claimant and Dr Mapara that BUPA's privacy team had been unable to locate the file [C37].

47. As a result of a subject access request made on 21 November 2021, the claimant's occupational health records were sent to her by BUPA on 21 December 2021 [C24].

48. As a result of that same subject access request, BUPA confirmed that her paper and electronic personnel file could not be found [C24 and C30].

49. As a result of a further (but unidentified) request dated 29 November 2021, digital copies of further documents were disclosed to the claimant [C43].

50. On 21 December 2021, the claimant's then solicitors updated her regarding Dr Batman. He had now had access to his notes and relevant records. He confirmed that he had had a consultation with the claimant on 13 December 2018. He confirmed that the occupational health report was authentic and that it had been provided by him as a result of the consultation [C42]. The solicitors then took a less optimistic view of the matter. They said that they were unable to progress the matter without stronger evidence [C43-44].

51. In short, Dr Mapara's bundle does not bear the weight of the allegations he makes in Claim 2.

The application for costs

52. The costs application is contained in a letter dated 1 July 2022 from the respondents' solicitors addressed to the Tribunal and copied to the claimant (or her representative).

53. The application is for the claimant to pay the costs incurred by the first respondent as a result of having to defend the litigation, pursuant to rules 76(1) and/or 76(2). The respondents contend that: (1) the claimant's claims have no reasonable prospects of success; and (2) in the circumstances, the claimant's representative has, in bringing the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably for the reasons set out in the respondent's ET3. The proceedings are said to be an abuse of process.

54. The application is for an award of costs in the sum of £3,865.00 (which includes counsel's fees up to and including the full merits hearing, plus the costs of the application (to be assessed in due course)). A breakdown of the first respondent's costs up to and including the merits hearing was attached. In the circumstances, the respondents submitted that a costs hearing was not necessary and the application should be dealt with at the preliminary hearing on 4 July 2022. In the alternative, the respondents submitted that the application should be dealt with on the papers and that the amount of any such order should be determined under rule 78(1)(a). In the alternative, if the Tribunal did not wish to make an order at the preliminary hearing or under rule 76 on the papers, the matter should be listed for a costs hearing, although the first respondent reserved its position as to whether it would rely on written representations.

55. The Tribunal had before it at the hearing on 4 July 2022 a costs schedule showing the costs incurred to date from 8 February 2022 to 4 July 2022 based upon a partner and a solicitor handling the matter (whose respective hourly rates are £185 and £115). The costs incurred (inclusive of VAT) are said to be: (1) Grounds of resistance = £742.50; (2) General conduct, care, advice and correspondence = £69.00; (3) Preparation for preliminary hearing on 4 July 2022 = £414.00; (4) Counsel's brief fee for preliminary hearing on 4 July 2022

= £2,040.00; and (5) preparation of costs application = £600.00. The total is £3,865.50 (inclusive of VAT).

Submissions as to costs

56. Counsel did not address costs in her skeleton argument, but she made oral submissions. She relied upon both rule 76(1)(a) and rule 76(1)(b). The test of no reasonable prospect of success is satisfied as a result of the Tribunal's decision to strike out the claim (see the Tribunal's first judgment). Counsel also contends that the claimant (or her representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings or in the way that the proceedings have been conducted. This was an attempt to relitigate something that had already been decided by the Employment Tribunal (at Leeds), the Employment Appeal Tribunal and the Court of Appeal. It involved serious allegations made against all who had been involved in Claim 1, with serious ramifications for the individuals concerned, but with no evidence in support of the allegations. The respondents had given the claimant a warning as to costs. Regional Employment Judge Franey also warned the claimant on 16 February 2022 that the claim (Claim 2) may be an abuse of process and that, if the claimant had fresh evidence, then the proper course was to apply for reconsideration of the decision in Claim 1. Judge Franey also refused the claimant's attempt to join a further 10 persons as respondents.

57. Counsel submitted that in the circumstances the application for costs was a reasonable one. She appreciated that the claimant was not in attendance and so could not be examined as to her means or her ability to pay a costs order. She asked for a decision in principle and then for the claimant to be required to provide evidence as to her means.

58. The claimant's representative did not object to the making of the costs application. He signalled his ability to deal with it. He asked the Tribunal to consider the evidence in the bundle presented on behalf of the claimant. He suggested that the respondents have admitted liability (the Tribunal understands that to mean that the documents bundle will demonstrate that). He invited the Tribunal to look at the evidence and to contact BUPA, the GMC and so on. In reply to the respondents' suggestion of serious allegations being made by the claimant, Dr Mapara asserted that there had been dishonesty.

59. Having heard both parties on the question of costs, and with their agreement, the Tribunal adjourned the hearing on the basis that it would consider Dr Mapara's bundle of documents, consider whether in principle it was minded to make an award of costs, and if so, it would then deal with the amount of costs and ability to pay on paper and without further hearing. Both parties agreed to that procedure.

Relevant legal principles

60. As the respondents are legally represented, a costs order may be appropriate in this case (rule 75(1)(a)).

61. Rule 76(1) 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 (b) any claim or response had no reasonable prospect of success.

62. Rule 77 provides that a party may apply for a costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

63. Rule 78(1) provides (so far as is relevant) that a costs order may (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; or (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles.

64. Rule 84 provides that in deciding whether to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay.

65. In Employment Tribunal litigation costs awards are usually regarded as the exception rather than the rule. Costs do not follow the event, as in the civil courts, but are only made if one or more of the grounds in rule 76 are satisfied. Even then, the grounds for making a costs order are discretionary. The Tribunal "may" make a costs order if a ground is made out, but it is not obliged to do so. Nevertheless, so far as grounds (a) and (b) are concerned, the Tribunal "shall" consider whether to make a costs order. In other words, rule 76(1) imposes a two-stage test: first, a Tribunal must ask itself whether a party's conduct falls within rule 76(1)(a) or (b). If so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

66. The claimant is not professionally represented. However, she is not a litigant in person either. She is represented by Dr Mapara, who the Tribunal understands to be medically trained, but not legally trained. Nevertheless, he has demonstrated some understanding of, and skill in, tribunal representation. However, while the claimant is not immune to the risk of costs, some account must be given for the fact that the claimant's status falls between the two paradigm positions of a litigant in person and a litigant who is professionally represented. This is relevant to both the threshold test for considering making a costs award and the exercise of discretion whether to do so.

67. The conduct of the claimant's representative is also a relevant factor – both in bringing the proceedings on behalf of the claimant in the first place and then at each stage thereafter when he had an opportunity to reconsider the wisdom of doing so. The Tribunal notes that this is not application for wasted costs against

Dr Mapara under rule 80. Under rule 76 any award of costs can only be made against the claimant. The relative experience or inexperience of the representative is a relevant factor.

68. Vexatious conduct involves the bringing of a "hopeless" claim with no realistic expectation of recovering compensation, but out of spite, to harass the respondents or out of some other improper motive: *ET Marler Ltd v Robinson* [1974] ICR 72 NIRC. Being "misguided" is not sufficient: *AQ Ltd v Holden* [2012] IRLR 648 EAT. However, the hallmark of vexatious proceedings may be that it has little or no basis in law (or at least no discernible basis); and that whatever the intention of the proceedings may be, its effect is to subject the respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process, meaning a use of the judicial process for a purpose or in a way which is significantly different from the ordinary and proper use of the judicial process: *Scott v Russell* [2013] EWCA Civ 1432 CA. Where the effect of the conduct is as just described, this can amount to vexatious conduct, irrespective of the motive behind it.

69. The Tribunal does not consider that it is dealing with disruptive or abusive conduct here, but if the bringing or conduct of the claim is not vexatious, then it could be unreasonable in the ordinary sense of that word; or it may be both vexatious and unreasonable. What matters is the nature, gravity and effect of the alleged unreasonable conduct: *McPherson v BNP Paribas* [2004] ICR 1398 CA; although it is the totality of the circumstances and the whole picture that matters: *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA. The Tribunal should identify the conduct, what was unreasonable about it and what effect it had.

70. Costs are designed to be compensatory rather than punitive. Rule 84 also makes it clear that in deciding whether to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay. There is no obligation to have regard to ability to pay. In the present case, the Tribunal has raised the claimant's ability to pay of its own initiative. It will need to explain whether it has taken this into account and, if so, how – and if not, why not.

Discussion and conclusion

71. The Tribunal is satisfied that the initial threshold for making a costs order against the claimant has been met, subject to the Tribunal's discretion in the matter and its consideration of her ability to pay an award. Rule 76(1) is satisfied. The Tribunal considers that the claimant and her representative have acted vexatiously or otherwise unreasonably in bringing Claim 2. It might also be said that the way in which the proceedings have been conducted by Dr Mapara on behalf of the claimant has been vexatious or unreasonable. It is also the case that, as the Tribunal has already found in its judgment of 4 July 2022, the claim had no reasonable prospect of success.

72. In short, there can have been no proper basis to have issued Claim 2 in the circumstances where an identical or similar claim had been advanced unsuccessfully in Claim 1. The only difference between the two claims is the attempt to widen the scope of the litigation first by making wide-ranging

allegations against those involved in Claim 1 and second in the unsuccessful attempt to add further persons as respondents to Claim 2.

73. Claim 2 has been nothing more than an obvious attempt to re-litigate Claim 1 before a different Tribunal and in the face of the earlier decisions of the Employment Tribunal at Leeds, the Employment Appeal Tribunal and the Court of Appeal. The litigation should have been brought to an end, and it should not have been capable of being revived in any way, following the unequivocal references of Lord Justice Bean to the "wild allegations of conspiracy" as being "wholly without merit" and "an abuse of process" [C71]. Instead, the claimant (or Dr Mapara on her behalf) has attempted to re-litigate the matter on the basis of unsupported and unsupportable allegations; and a bundle of documents that simply does not bear the weight of interpretation that Dr Mapara seeks to place upon it. Dr Mapara has then pursued the matter despite the warnings of the respondents' solicitors and of Regional Employment Judge Franey.

74. The procedural requirements of rule 77 have been complied with.

75. The Tribunal proposes to proceed under rule 78(1)(a). It proceeds to consider whether to make a costs order that the claimant shall pay the first respondent a specified amount, not exceeding £20,000, in respect of its costs as the receiving party. This is not a case where a detailed assessment under rule 78(1)(b) is required. It is, however, a case where the Tribunal should give careful consideration under rule 84 before deciding whether to make a costs order, and if so, in what amount, by having regard to the claimant's ability to pay.

76. How should the Tribunal exercise its discretion in the matter? It has reminded itself that in Employment Tribunal litigation costs awards are usually regarded as the exception rather than the rule. Costs do not follow the event. The grounds for making a costs order are discretionary. The Tribunal "may" make a costs order if a ground is made out, but it is not obliged to do so, although it shall consider whether to do so. The claimant's conduct (and that of her representative) falls within rule 76(1)(a) and (b). The Tribunal then asks itself whether it is appropriate to exercise its discretion in favour of awarding costs against the claimant.

77. The Tribunal acknowledges that the claimant is not professionally represented. Dr Mapara is not a lawyer nor is he a professional tribunal advocate. He is a lay representative. However, that does not afford the claimant automatic immunity from an award of costs against her. The conduct of Dr Mapara is also a relevant factor – both in bringing the proceedings on behalf of the claimant in the first place and then at each stage thereafter when he had an opportunity to reconsider the wisdom of doing so. His relative inexperience is a relevant factor, but it is not determinative.

78. Nevertheless, the claimant and Dr Mapara have clearly brought a "hopeless" claim with no realistic expectation of recovering compensation. They have been more than simply misguided. The second claim (Claim 2) has been brought out of some improper motive. From the inception of Claim 2, it had little or no basis in law. Its effect has been to subject the respondents (and potentially other persons) to inconvenience and expense out of all proportion to any gain likely

to accrue to the claimant. It has involved an abuse of the process. This amounts to vexatious conduct, irrespective of the motive behind it.

79. If the bringing or conduct of these proceedings is not properly to be regarded as vexatious, then it is undoubtedly unreasonable. The Tribunal takes into account the nature, gravity and effect of the unreasonable conduct, measured against the totality of the circumstances and the whole picture. The impugned conduct is the commencement of fresh proceedings in the face of the earlier proceedings being found to be unfounded at all stages and the appeal to be wholly without merit. Those words alone should have rung a warning bell for the claimant and her representative, quite apart from any warnings by the respondents' solicitors and Regional Employment Judge Franey. This is self-evidently unreasonable and has put the respondents to wholly unnecessary wasted time and expenses, together with inappropriate use of judicial resources.

80. The Tribunal reminds itself that costs are designed to be compensatory rather than punitive. Nevertheless, subject only to consideration of the claimant's ability to pay, the threshold for an award of costs has been passed by some margin.

81. Rule 84 makes it clear that in deciding whether to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay. There is no obligation to have regard to ability to pay. In the present case, the Tribunal has raised the claimant's ability to pay of its own initiative.

82. The claimant (through Dr Mapara) has been given a generous and repeated opportunity to provide evidence as to her means and as to her ability to pay. There has been passing reference by Dr Mapara to the claimant being "destitute", but no evidence or confirmation of this has been provided. Dr Mapara (on behalf of the claimant) has simply refused or neglected to engage with this question, despite being given ample opportunity to do so. The Tribunal is left with no evidence at all as to ability to pay and so cannot take this matter into account. It is not for the Tribunal to speculate as to the claimant's means or her ability to pay. See *Ono v NHS Leicester City* [2013] ICR 91 EAT.

83. The Tribunal thus proceeds to consider an award of costs on the "unassessed" basis. This does not mean that the Tribunal can award an arbitrary figure (provided it is less than £20,000). Regard must be had to the guiding principles and to the actual sum of costs incurred. The order must be in respect of costs incurred by the represented party. That is, fees, charges, disbursements and expenses incurred by or on behalf of that party. The amount of the order must reflect this.

84. The Tribunal has stated above on what basis, and in accordance with what established principles, it is minded to award a sum of costs. It has regard to the schedule of costs put before it by the respondents, both as to its constituent parts and its total, together with the relative seniority of the two solicitors involved (one a partner and one an assistant solicitor), and counsel in addition, and their charging rate (and the implicit calculation of the sums involved by reference to time expended in servicing the litigation). It has explained why costs are being awarded against the claimant. The sum being applied for has

not simply been plucked out of the air. The sums incurred are rational and reasonable sums to have been incurred in defending a claim of this kind in the Tribunal and at the various stages of the Claim 2 proceedings. Although a detailed assessment is not being undertaken here, the costs schedule has been subjected to judicial scrutiny and a summary assessment. The sum claimed by way of costs is a reasonable sum in all the circumstances.

85. The amount claimed is inclusive of VAT. The Tribunal may only award the VAT-exclusive amount on the assumption that the receiving party is able to recover the input tax paid. See *Raggett v John Lewis plc* [2012] IRLR 906 EAT.

86. Accordingly, acting under rule 75(1)(a) and rule 76(1)(a) and (b), the Tribunal orders the claimant to pay to the first respondent an award of costs in the total sum of £3,221.25.

Judge Brian Doyle
DATE: 17 August 2022

JUDGMENT SENT TO THE PARTIES ON

23 August 2022

FOR THE TRIBUNAL OFFICE