EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Miss P Cwalina	**The Polish Village Bread Limited**

v

COSTS JUDGMENT

1. The claimant's application for an order that the respondent pay her legal costs of the proceedings is dismissed.

2. The respondent's application for an order that the claimant pay their legal costs of the remedy hearing is dismissed.

REASONS

1. The final hearing of the claimant's complaints arising out of her employment by the respondent took place at Watford Employment Tribunal on 10 and 11 February 2022 when she was represented by Mr J Davies, solicitor and the respondent was represented by Mr L Werenowski, legal representative. At the start of the hearing the claimant withdrew her claim for a redundancy payment and of unauthorised deduction from wages.

2. I found that the claimant had been unfairly dismissed for reasons which were given orally and were not requested in writing either at the hearing or thereafter. Given the arguments of the claimant, in particular, in support of her application for an order that a costs order be made against the respondent, I record the following summary of my reasons for concluding that she was unfairly dismissed:

   2.1 I found that the respondent did not have reasonable grounds for deciding that the claimant was guilty of unauthorised copying of computer software and deleting information from her laptop because all of the decision makers had based their view on an inadequate analysis of the device by the General Manager. The Managing Director and HR Director, in particular, held the view that data had been deleted or removed which was not

supported by the evidence provided by the General Manager, when carefully analysed.

2.2 The original decision to dismiss had been procedurally indefensible (although I did not say so in so many words) but the claimant had then been reinstated before the appeal and was reimbursed for her pay between dismissal and appeal. The effective date of termination was therefore the date of the unsuccessful appeal.

2.3 I found that the Managing Director had made a firm decision prior to the date of the appeal hearing that the claimant's conduct definitely amounted to a breach of the duty of trust and confidence. I also found that all three of the respondent's managers involved failed to approach the decision at the appeal stage with an open mind. The appeal stage had been, in effect, the first opportunity the claimant had to have any input into the decision.

2.4 I decided that no reasonable employer would have inferred from the evidence before them that the claimant had admitted deleting data from the laptop and that there was insufficient investigation.

2.5 I also decided that because of the original flawed process and the fact that the first attempt at an ACAS compliant process was at the appeal stage, the claimant was, in effect, deprived of the right to appeal against the decision and it was not possible to say that a further appeal would have made no difference.

2.6 However I decided that the claimant was guilty of culpable conduct because she had transmitted company data (albeit not confidential information) to her personal cloud based data storage system because she used a personal Apple ID for a works phone. I ordered a 10% deduction from compensation because of culpable conduct.

3. I also made judgments in respect of the argument that there should be a deduction from compensation to take account of the prospect that she would have been fairly dismissed had a fair process taken place – and made no such deduction - and I decided that the period of loss was between the 21 January 2021 and the 9 February 2021. In evidence the claimant had accepted that her loss of earnings ended when she got a new job with effect on 9 February 2021. I rejected an argument by the respondent that the claimant had in that short period of time failed to mitigate her loss.

4. Although the judgment was not sent to the parties until 4 March 2022 both representatives were present when oral judgment with reasons was pronounced and also when I made case management orders for the remedy hearing. I directed that the claimant should send an updated schedule of loss to the respondent and the Tribunal by the 18 February 2022 and for a counter-

schedule of loss to be sent to the claimant and the Tribunal by 25 February 2022.

5. It was not until 3 March 2022 that the revised schedule of loss was sent to the respondent and they prepared a counter-schedule the following day. The remedy hearing took place on 7 March 2022 on which date I gave an oral judgment with reasons given orally that were not requested in writing either then or thereafter. At both that hearing and the liability hearing there had been a Tribunal appointed interpreter in the Polish language. I ordered the respondent to pay to the claimant compensation for unfair dismissal in the sum of £3,784.56 calculated as set out in the written judgment sent to the parties on 17 March 2022.

6. The claimant, by her revised schedule of loss, had claimed some matters which were not consistent with the liability judgment. She had not made a deduction of 10% in respect of conduct. However, it was of more significance that she included a claim for future loss of earnings for two years from the date of termination of employment with the respondent and a claim for aggravated damages. This led to a total claim for future loss of earnings on the revised schedule of loss of £24,440. This was a longer period of loss than that claimed in the original schedule of loss.

7. I checked at the outset of the remedy hearing whether it was agreed that I had decided the period of loss on the last occasion. I set out my recollection and my note from the liability hearing which was that the claimant accepted that her losses stopped had when she got her new job. The original schedule of loss had claimed 10 weeks' loss of earnings, rather than 2 years, and had been explained to me as being from the original date of dismissal to the date of the new job. That had been why I had asked in evidence whether the claimant accepted that there was no loss thereafter which she had confirmed. Neither representative dissented from that position, both accepted that their notes and recollections were the same as mine. When that was clarified Mr Davies, who was again representing the claimant at the remedy hearing as he had at the liability hearing, agreed that the claimant was not continuing to claim future loss of earnings.

8. Following my judgment with oral reasons on the amount of compensation, the respondent's representative, Mr Werenowski, made an application that the claimant should pay the costs of the remedy hearing. The application was made on two bases, first that there had been unreasonable conduct of the proceedings in the delay in providing the schedule of loss and secondly that the revised schedule of loss had included claims which had no reasonable prospects of success which should either be regarded as falling within Rule 76(1)(b) of the Employment Tribunals Rules of Procedure 2013 or as being unreasonable conduct of the proceedings under Rule 71(1)(a). It was argued

that this revised schedule of loss had precluded meaningful settlement negotiations and meant that the cost of the remedy hearing was an inevitability.

9. The claimant's representative defended that application and made an oral application for the respondent to pay the claimant's costs of the entire proceedings. He had produced a cost schedule showing the costs claimed of more than £20,000 including VAT. He argued that the respondent had unreasonably rejected the claimant's explanation of the reasons for the delay and her offer to vacate the remedy hearing. These reasons were said to be that, until shortly before the remedy hearing, the claimant herself was in Poland seeing her mother who lives close to the Ukrainian border. At the relevant time the Russian invasion of Ukraine was of relatively recent date. The claimant was understandably concerned about her mother and Mr Davies said that there was some difficulties in obtaining instructions from the claimant as a result.

10. It was known when the remedy hearing was scheduled that the claimant was going to be abroad until immediately before the hearing date. Mr Werenowski argued that it should have been anticipated if this was going to cause any difficulties in taking instructions.

11. Mr Davies argued that he had had to prepare the revised schedule of loss in ignorance of the judgment which had not been sent to the parties until the 4 March 2022 and that it had been clear from the respondent's counter-schedule that they were not going to reach an agreement so the application for his client to pay the costs of the remedy hearing was, he argued, unreasonable.

12. He also argued that the respondents themselves had been guilty of unreasonable conduct of the proceedings. He did refer to the way in which the respondents had dealt with the claimant's appeal against dismissal but that is not conduct of the proceedings, as such. He argued that for them to continue in their defence of the proceedings was unreasonable because it should have been obvious to them that their defence of the unfair dismissal claim was bound to fail given their conduct at the appeal stage. He raised no argument about inability to pay because the amount of the costs claimed by the respondent was less than the compensation which I had ordered to be paid.

13. Although I heard oral submissions from each representative both in support of their own claim and in refuting the application made against their respective clients that meant that there was insufficient time for me to reach a decision and give a costs judgment with reasons on the day. It was agreed that since the basis of the respective applications had been outlined orally it would be fair for the parties to have one further opportunity of mutually exchanged written submissions to which they did not need to respond.

The law relevant to the applications for costs orders

14. The power to order that one party pay the legal costs of the other is found in rule 76 of the Employment Tribunal Rules of Procedure 2013 (hereafter referred to as the Rules of Procedure). So far as is relevant, rule 76 reads as follows:

> "(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 seven days before the date on which the relevant hearing begins.
>
> (2) A tribunal may also make such an order where the party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of party."

15. By rule 78 (1), the Tribunal may order the paying party to pay a specified amount not exceeding £20,000 or the whole or a specified part of the costs of the receiving party, to be determined by way of detailed assessment.

16. The power to make a wasted costs order against a representative is found in rule 80 and arises in situations including where the Tribunal considers that a party has incurred costs as a result of any improper, unreasonable or negligent act or omission on the part of the representative. This is a different test to that under rule 76.

17. There are therefore two stages to determining a costs application made following the procedure set out in rule 77. First the Tribunal must consider whether the grounds for making a costs order in rule 76(1) exist and secondly, if they do, then the Tribunal must consider whether or not to make one. In deciding whether or not to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay: rule 84 Rules of Procedure.

18. When deciding whether or not the litigant's conduct of the proceedings has been unreasonable, the words of the rule are the starting point, remembering that, in the employment tribunal, a costs award is the exception, rather than the rule. As Mummery LJ said in Barnsley MBC v Yerrakalva [2012] I.R.L.R. 78 CA at para.41,

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask 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 effects it had. The main thrust of the passages cited above [from Mummery LJ's judgment in McPherson v BNP Paribas [2004] EWCA Civ 586] was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that 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."

Discussion and conclusions

19. The claimant's submissions in support of her application and in defence to the respondent's application were received on the 21 March 2022. In that, it was argued by Mr Davies that any order made on the application should be made on the basis of a wasted costs order against those representing the claimant and not against her but that the application is opposed in any event. In subsequent correspondence he said that he was arguing that any costs order should be "on the basis of a wasted costs order against myself" (email from Mr Davis of 14 April 2022 forwarded to the Tribunal on 22 April 2022).

20. He also disclosed that the claimant had sought counsel's advice and the inference from the correspondence enclosed with the submissions is that counsel advised that aggravated damages could be included in the revised schedule of loss and later conceded that their advice was wrong. I presume that the claimant had waived privilege in respect of this correspondence although Mr Davis does not state as much.

21. The respondent has argued that the discretion to award costs arises under rule 76 rather than rule 80. Given that there is an entirely different test and that the respondent does not apply for a wasted costs order, I decline to make any order against the claimant's representative rather than against her. It is a matter between Mr Davis and his client as to who would satisfy any order, if one is made.

22. Other arguments raised in defence of the respondent's costs application included that:

    22.1 The original schedule of loss had taken the date of dismissal as 2 December 2020 rather than the date of the appeal (i.e. Mr Davis sought to explain the original period of loss claimed). However, the evidence was that the claimant was reinstated and paid between the original date of dismissal and appeal so it is hard to understand why the claimant's claim included a period during which she was not out of pocket.

22.2 He argued that there were difficulties in communication when the claimant was abroad and also because her first language is not English. This may be true, but this could have been anticipated at the end of the liability hearing when the dates for providing the revised schedule of loss were set. The date of the remedy hearing was adjusted because the claimant was due to be abroad. It is hard to see the relevance of the claimant's first language not being English – unsurprisingly, Mr Davis does not suggest that he did not take instructions before submitting the schedule of loss and the criticisms of the schedule do not seem to me to be ones which are explicable by a language barrier.

22.3 He repeated the argument that the counter-schedule of loss persisted in arguing about mitigation in loss which meant there was a dispute between the parties that could not be resolved without the intervention of the Tribunal.

22.4 He argued that the respondent had not stated in the counter-schedule that it was inappropriate to claim aggravated damages rather that they defended the claim for them.

22.5 I presume that the complaint that the respondent showed no appetite for settlement throughout the litigation is intended to support the argument that settlement between the liability and remedy hearings was unlikely.

22.6 In paragraph 15 of the submissions it was argued that "The claimant could have relied upon her rights to question the finding of continuing loss, as the Tribunal's order was not served until 4 March 2022 after the preparation of the revised schedule of loss and she could have challenged the finding there was no continuing loss, despite counsel's advice to the contrary, she chose not to do so in order to bring matters to a close, as felt there were more important matters globally concerning her and her family and did not want the hearing adjourned."

22.7 It was therefore argued that it was disingenuous to say that an agreement could have been reached without the need for a hearing and there were no sensible grounds for compromise.

23. I am surprised by the submissions set out in paragraph 22.6XX above. Although the claimant naturally has the right to apply for a reconsideration or to appeal my decision, the judgment that there was no continuing loss was based upon the claimant's evidence and the original schedule of loss. The discussion at the remedy hearing set out above (para.7XX) shows that this was agreed by both representatives. Such a challenge would therefore face an uphill struggle. If the claimant considered that this hadn't been her evidence or if her recollection of events differed to Mr Davis's then it would be open to her to challenge the judgment but it would be surprising that Mr Davis should be able to represent her given his recollection of the liability hearing as recorded above. I do not think that this argument has merit. In any event, the direction was to

submit an updated schedule of loss to reflect the liability judgment. The option open to the claimant would be limited to submitting an updated schedule as directed, without prejudice to any arguments on reconsideration or appeal that the liability judgment should be revoked.

24. Mr Werenowski responded to the complaint that the respondent had pursued an argument of mitigation of loss by saying that the respondent had presumed in the light of the claimant seeking to reopen decided matters that it would be wise to counter with arguments directed to those matters. I do not see that that follows.

25. Points made in support of the argument that the respondent's defence had had no reasonable prospects of success were intertwined with points more suggestive of allegations of unreasonable conduct of the proceedings. I understood the former to be the real basis of the application but consider the argument on both heads. The arguments included that:

    25.1 The respondent did not comment on the schedule of loss provided on 20 August 2021. Mr Davis alleges that there was a failure to provide a proper break down of the claimant's salary. These may have caused difficulties in preparing the original schedule of loss but are within the usual sort of challenges posed in preparing a case.

    25.2 Mr Davis argued that every attempt had been made by the claimant to settle matters in advance to no avail and references was made to some correspondence in a short bundle of 8 pages. In particular, Mr Davies pointed out that, in January 2022, the respondent replied to overtures to commence settlement negotiations with the information that the respondent did not wish to make an offer. This appears to be an argument that it was unreasonable conduct of the proceedings not to negotiate given the submissions about the merits of the defence.

26. In further support of the claimant's application for an order that the respondent pay her costs it was argued that there was some material in consistencies and inaccuracies in the witness statement of Mr Tomicki.

    26.1 It pointed out that there were inconsistencies between the other two respondent's witnesses about whether the whole of the data or a substantial amount of the data had been deleted from the laptop and mobile telephone when they were retrieved by the respondent;

    26.2 Essentially it is argued at paragraph 10 of the submissions that because I found that the three respondents witnesses had met and decided to dismiss the claimant without further considering her case their defence had no reasonable prospect of success;

26.3 It is also argued that it was blatantly obvious that no reasonable employer would dismiss for matters such as this when there was no allegation of theft.

26.4 It is therefore argued that the weakness of the respondent's defence overall means that they should have realised there was no reasonable prospect of success defending the claim and they should have engaged constructively with proposals to negotiate settlement.

27. The schedule of costs proposed by Mr Davies is referred to in paragraph 16 where he says that the hourly rate of £500 per hour which he charges as High Court litigation indeed he describes the statement of costs as being *"*a pro forma schedule based on his charge out rate for High Court litigation*"* and goes on to invite the respondent to indicate a figure they would accept without prejudice subject to the Tribunal deciding whether costs should be paid and complains that no response has been received. The expectation is that a costs schedule would include sums for which the claimant has actually become liable.

28. I sympathise with Mr Werenowski's sceptism about whether the claimant has agreed a retainer which accepted a liability to incur costs at that rate given the open invitation to negotiate about what would be a reasonable rate. He argues that the rate is significantly inflated and is not transparent because, contrary to the Law Society regulations, it is not available on the firm's website in order to be capable of scrutiny.

29. The statement of costs does not say when the various items were expended. It is dated 7 March 2022 and includes counsel's fee for a hearing of £1,000. I am not aware of a hearing at which counsel attended. Presumably the attendance by Mr Davis claimed for hearings are for the two days liability hearing but some 34 hours are charged at £25 per hour for writing letters without identifying the name or the experience and grade of the fee earner who has written the letters. There is then a total of £6,650 charged for work done at Mr Davies' rate for various items connected with the litigation. In short, I accept that the schedule of the legal costs said to have been incurred by the claimant is not transparent.

30. The claimant relies upon the case of Opalcova v Acquire Care Limited EA2020-000345-RN presumably to support an argument that I should consider whether the response, when submitted, had no reasonable prospect of success or whether at some later stage it ceased to have a reasonable prospect of success and should the respondents have known of that.

31. The respondent's submissions were received on 3 March 2022. Their application included a transparent and particularised assessment of costs in the sum of £2,461 which included attendance at the remedy hearing and the costs of preparing the written costs submissions. There are disputes between the parties as to whether the respondent had approached the claimant's representative for time to prepare the submissions or whether, as alleged by Mr

Davies in the email of the 22 March 2022, the respondent's representative has attempted to steal a march upon him by not preparing his submission as directed but instead presuming an application for additional time would be agreed to. He objected to an extension of time being granted. I do not see that this disagreement between the parties is at all material to the decision on the applications.

32. Further correspondence concerning whether there should be a stay of the judgment was forwarded to me on 10 June 2022 and I ordered a stay of execution of the award on the 25 June 2022 until the date on which the Tribunal's decision on the costs application are sent to them or further order.

33. Having summarised the arguments, the questions for me on the claimant's application for costs are:

    33.1 Did the respondent's defence have no reasonable prospects of success? Did there come a point where respondent should have realised that their defence had no reasonable prospects of success?

    33.2 Was there unreasonable conduct of the proceedings in not engaging with overtures to promote settlement?

    33.3 If so then should the respondent be ordered to pay the claimant's legal costs of the proceedings and in what sum?

34. Although there were aspects of the defence which could be described as not very likely to succeed - given the indefensible first stage of the disciplinary process - overall I do not conclude that the defence had no reasonable prospects of success. There was documentary evidence which suggested that the managing director had made a firm decision prior to the appeal hearing that the claimant had committed the misconduct alleged against her and that the three senior managers had met together to discuss the claimant's conduct and not kept anyone isolated from proceedings as decision maker or potential appeal officer. However, this needed to be tested in oral evidence.

35. On the other hand, as Mr Werenowski argues, the claimant had included claims which were rightly defended and which were withdrawn at the start of the hearing. The claim form was difficult to understand. These were matters which were rightly defended, in my view. Furthermore, it is not unusual that the apparent merits of a response have not survived a spotlight being shone on the evidence under cross-examination. It is not every case where that happens in which it can be said that the defence had no reasonable prospects of success from the start or that there came a point prior to the hearing when the lack of merits should have been apparent.

36. If I am wrong about that I am of the view that it would not be right to exercise my discretion in favour of awarding costs. The complete refusal of the

respondent to negotiate may reflect a failure to understand where their vulnerabilities were. I do not think it can be regarded as unreasonable conduct of the proceedings in all the circumstances. Further, the claimant has not put sought to rely on a particular without prejudice save as to costs offer that was rejected and that showed that a realistic offer of settlement was refused. There were issues, particularly as to remedy, on both sides which had apparent merit.

37. I accept that the amount of the costs claimed does seem high and many of Mr Werenowski's criticisms that the sums claimed are not transparent are, in principle, well made. The overall thread of the claimant's argument that the respondent should pay her costs relies heavily on a compliant that they did not seek to settle the claim. Negotiations fundamentally need to be consensual and parties should not, in my view, feel that they are at risk of a costs order being made against them merely for a failure to negotiate.

38. I dismiss the claimant's application for an order that the respondent pay the costs of the proceedings.

39. On the respondent's application for an order that the claimant pay their costs connected with the remedy hearing the issues are:

    39.1 was it unreasonable conduct of the proceedings to present the revised schedule of loss late and/or with the particular heads of loss it contained or

    39.2 were there no reasonable prospects of success in the claim for future losses or the claim for aggravated damages?

    39.3 If so then should a costs order be made taking into account the likely consequences of that conduct?

40. I take into account that Mr Davis explains that he is not a specialist employment lawyer and has conducted a limited amount of employment work. However he held himself out as competent to conduct the litigation and any lack of specialism only goes so far. The first question requires me to consider whether the claimant or her representative has, in the conduct of the proceedings, behaved unreasonably by,

    40.1 including in a schedule of loss a head of loss which cannot in law be recovered and

    40.2 including another head which is contrary to the liability judgment, the claimant's evidence and her previous schedule of loss in asserting future loss which had not previously been claimed.

41. I have come to the conclusion that this was unreasonable conduct of the proceedings. Whatever the expertise of the claimant's representative, he should have accurately recorded the liability findings which did not permit of a

claim of future loss. The fact that the written judgment was not sent to the parties until after the schedule should have been drafted is neither here nor there. One does not have to be an experienced employment lawyer to keep an accurate note of the judgment as to the period of loss. For the purposes of the application under rule 76 it matters not whether the conduct was that of the claimant or her representatives; she included in the revised schedule of loss a claim for aggravated damages which was not fairly arguable and this also was unreasonable conduct of the proceedings.

42. I take on board the argument (para.9XX above) that the respondent had unreasonably rejected the explanations for delay and the offer to vacate the remedy hearing. This argument has little merit. The claimant's travel plans were known at the time the remedy hearing was listed and had any difficulty been envisaged it would have been easy to choose a different date from the start. The hearing date having been set, and Tribunal lists being what they are, it was not unreasonable of the respondent to expect the claimant to provide a revised schedule in sufficient time for them to consider it or to wish to avoid the postponement of the hearing.

43. However, the consequences of that are less obvious than the respondent's would argue. I accept that it is not necessary that particular costs should have been caused by the unreasonable conduct relied on but I do need to assess the argument that the consequences were that the need for a remedy hearing became a certainty as a result. I think that Mr Davis's strongest arguments are directed to whether the prospects of settlement following the liability hearing were so strong that it can be said that any unreasonable conduct in drafting the schedule of loss caused the respondent to suffer the costs of the remedy hearing which would otherwise have been avoided.

44. I am mindful that the respondent did not show much appetite for settlement prior to the remedy hearing despite the obvious litigation risk. The decisions at the liability stage did leave only limited scope for disagreement about the calculation of compensation but there remained remedy issues to be decided. The respondent did not make a without prejudice save as to costs offer between liability and remedy which they could easily have done had they wanted to take all reasonable steps to avoid the cost to them of a remedy hearing. There was no need to await the revised schedule of loss before doing so.

45. The claimant's argument that it was not said in the counter schedule that aggravated damages were inappropriate is without merit.

46. It has not been argued by the claimant that I should take into account any information about the claimant's ability to pay. As I say, the amount claimed by the respondent is less than the amount which they have been ordered to pay in compensation.

47. I take all of the above into account. I also bear in mind that the claimant suffered an unfair dismissal for which she should be compensated where she has had to pursue her former employers for compensation. I do not think it can fairly be said that the effects of the unreasonable conduct I have found caused the respondent to incur additional costs. In all those circumstances, I dismiss the respondent's application for an order that the claimant pay their costs of the remedy hearing (including those of the costs application itself).

J Sarah George

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Employment Judge George

Date: …3 September 2022……..

Sent to the parties on: 8 September 2022

GDJ
For the Tribunal Office