THE EMPLOYMENT TRIBUNALS

Claimant: **Miss M Bogdan**

Respondent: **The Cabinet Office**

Heard at: **East London Hearing Centre**

On: **2 December 2021**

Before: **Employment Judge Lewis**

Representation

Claimant: Ms A Ahmed - Counsel

Respondent: Mr J Chegwidden

RESERVED JUDGMENT
IN RESPECT OF A COSTS ORDER

The Respondent is ordered to pay the Claimant's costs in the sum of £2000.00 plus VAT within 21 days of the date of this judgment.

REASONS FOR RESERVED COSTS JUDGEMENT

1 In making her costs application the Claimant contended that the Respondent' conduct of the proceedings had been unreasonable, she relied on three bases, firstly, the Respondent's failure to respond to her claim; secondly, the Respondent's failure to attend the Preliminary Hearing on 25 January 2021; and thirdly, in putting her to the expense of having to respond to their application for a stay of proceedings for four months. The Claimant suggested that the Respondent had misled, or sought to mislead, the tribunal, in giving its explanation as to why the proceedings had not come to its attention by stating in correspondence that the address for the Government Legal Department, 102 Petty France, London SW1H 9GL, was not the correct address for the Respondent's lawyers and that their correct address was in fact 1 Horse Guard Avenue. The address 1 Horse Guard Avenue is contained in a letter dated 12 July 2021 from the Government Legal Department which states that the correct address for service for the Respondent is 1 Horse Guard Avenue, Westminster, London, SW1A 2HU , it does not

state that is the address for the government's lawyers. The address provided in the response to the claim however is in Newport, South Wales and not the address for the Government Legal Department who entered the response on the Respondent's behalf which it was accepted is indeed 102 Petty France.

2 At the hearing before me the Claimant gave evidence to support her contention that she had done some enquires of her own to establish whether the claim had been received at the White Chapel building address. It was suggested in cross-examination that she had not done enough and she ought to have gone further and emailed the HR department and, this would have avoided the hearing being ineffective on the 25 July 2021. The Claimant's response was that the HR department had ignored her up to that point, they had failed to deal with her grievance which she believes they had in effect ignored her for over year and they had, despite being given HR partner's email address to ACAS, simply declined to engage with ACAS and had not responded to any of the contact that ACAS sought to make during the early conciliation period and so she had not seen any point in doing that prior to agreeing to do so at the hearing in January at the request of Employment Judge Gardiner.

3 The Respondent called Adam Sales to give evidence, he is an HR business partner at the Government Digital Service. He had only been in post since January 2021 and therefore could not give evidence about the system in place when the claim was issued. his understanding was that until he sought to put in place a more robust system, the system was as set out in his witness statement. His explanation of the system in place was not out of kilter with that of the Claimant. When letters were received at the building they were sent to the Reception desk on the sixth floor, (although now GDS only occupies the seventh floor); if the letter was addressed to an individual then that individual would be notified and they would collect the letter. There was a series of shelves behind Reception where post was kept. However, during lockdown a secure room was used to store post waiting for someone to come and collect it. Mr Sales did not know exactly what would have happened to post if it was not addressed to a named individual. He recognised that this was not a good system and told me that the Respondent was looking to put a better system in place. Since being notified of these proceeding, Mr Sales had been into to check the post room and saw there were a number of letters in there, most of which were for named individuals. He thought it was somewhere just short of one hundred letters. Of the ones he looked at he only found one letter addressed to a non-named individual, he understood that letter to be related to another set of proceedings. He had not been able to find the letters from the tribunal in these proceedings. It was suggested, and, to his credit he accepted, that the fact that there was no system in place did indeed make it more likely that letters would go unclaimed and were more likely to get lost.

4 The Claimant understood the Respondent to be suggesting that the address at inconsistent with the Respondent's legal representative providing the address of 102 Petty France, which was the address to which the documents were sent. This has led the Claimant to suggest that the Respondent was trying to mislead the tribunal. She adduced evidence, [page 72-73 of the bundle] to the effect that 1 Horse Guard Avenue, Westminster was not the address published for the Respondent on the internet and that the address is only related to Cabin Office Legal, lawyers who provides advice only, not on litigation matters. It was the Claimant's contention that the fact that the proceedings had been served on Petty France Legal Department as well as on the White Chapel

building meant that it was incorrect for the Respondent to suggest that they had not been served properly.

5 I accept the Claimant was being honest in her account and that she explained her researches accurately.

6 Mr Chegwidden submitted that the Claimant ought to have done more to bring the proceedings to the Respondent's attention although he accepted that this is not a jurisdiction in which the parties are required to serve the proceedings and provide proof of service. He accepted that it is the Tribunal that sends notification of a claim by post and that Rule 90(a) of the Employment Tribunal Rules 2013 deems it to be delivered in the normal course of post, unless the contrary is proved.

7 The Claimant relies on Rule 76(1)(a). That rule provides that the tribunal may make a cost order where it considers that 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. For the purposes of the rules, a party's representative's conduct is attributed to the party, unless the parties seeks to specifically distance themselves from that conduct.

8 Mr Chegwidden confirmed that he is instructed by the Government Legal Department and his client was the Government Digital Service, who did not seek to distance themselves from the conduct of their representatives.

Relevant law

9 Rule 76(1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 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 the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospects of success.

10 Thus the Rules provide that a Tribunal must apply a two stage test: firstly, to determine whether the circumstances set out in paragraphs (a) or (b) of Rule 76(1) apply; if so, secondly the Tribunal must exercise its discretion as to whether a costs order should be made and, if so, for how much.

11 The Court of Appeal has stated in Gee v Shell UK Ltd 2003 IRLR 82 that costs in Employment Tribunals are still the exception rather than the rule. Importantly, costs are compensatory, not punitive; see Lodwick v Southwark London Borough Council 2004

IRLR 554.

12 In McPherson v BNP Paribas (London Branch) [2004] IRLR 558 the Court of Appeal held that in exercising its discretion to award costs, a Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct. It was also held in that case that unreasonable conduct is both a precondition of the existence of the power to make a costs order and is also a relevant factor to be taken into account in deciding whether to make a costs order and the form of the order.

13 In Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, a case decided in the Court of Appeal, Lord Justice Mummery said that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had. That case also decided that although there was no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that did not mean that causation is irrelevant.

Conclusion

14 The Respondent has acknowledged in evidence that it did not have in place a sufficient or suitable system for dealing with post at the time this claim was sent to it by the Tribunal. The claim and accompanying Tribunal correspondence were served on the department's office in Whitechapel, which is where the Claimant worked. I am satisfied that for a government department to have no satisfactory system in place for dealing with important correspondence, whether from Tribunals, other government bodies or elsewhere, is unreasonable. I went on to consider whether to exercise my discretion to award costs.

15 The Claimant's application is for the wasted costs that she incurred in instructing counsel to attend a preliminary hearing. The Claimant has been put to additional expense in paying for representation at two preliminary hearings, rather than what would normally be a single preliminary hearing. The Claimant's additional cost of representation at the second preliminary hearing were £2000 plus VAT for the attendance of counsel.

16 The Claimant also sought the costs of the Respondent's application for a stay. In making that application, she submitted that she had been put to additional costs through having to instruct Ms Ahmed to respond to the stay application. The Respondent submitted that this was something that was quite usual in proceedings where the grievance procedure was ongoing; it would not necessarily involve any costs to the Claimant in the normal course of proceedings and, it was only right that the Respondent should be given an opportunity to respond to claim once the outcome of the grievance was known.

17 The matters relied on by the Claimant to suggest that this was unreasonable conduct included conduct pre-dating the litigation and form part of the subject to the litigation, in that it is part of her complaint that the grievance was not dealt with timeously

and that it was neglected.

18 I do not find that the Respondent's conduct in applying for a stay amounts to unreasonable conduct of these proceedings. I have declined to make a costs order in respect of that application or the costs to the Claimant of having to respond to it.

19 I have found the Respondent's conduct in falling to respond timeously to these proceedings unreasonable and that this caused the Claimant additional expense. I am satisfied that in the circumstances it is just to exercise my discretion to award the Claimant costs. I have taken into account that the Respondent is a government department and is likely to be able to pay the sum sought by the Claimant albeit out of public funds. I have decided to award the sum of £2000 plus VAT, the total sum being £2400.

Judgment dated: 21 March 2022

Employment Judge Lewis