EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114505/2019

5 **Members' Meeting held in Glasgow on 4 October 2022**

Employment Judge R King
Member L Millar
Member J McCaig

10 **Mr C Bannan** — **Claimant**
Represented by:
Mr R Byrom -
Solicitor

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Turners (Soham) Ltd t/a Lewis Tankers — **Respondent**
Represented by:
20 **Mr N Newman -**
Solicitor

JUDGMENT ON COSTS OF THE EMPLOYMENT TRIBUNAL

1. Pursuant to Rule 76 of the Employment Tribunal Rules of Procedure 2013,
25 the Tribunal makes a costs order in favour of the claimant on the grounds that parts of the response had no reasonable prospects of success and that the respondent's conduct in relation to those parts of the proceedings that had no reasonable prospects of success was unreasonable.

2. Under rule 78(1)(a), the Tribunal assesses the costs to be paid by the
30 respondent to the claimant at £11,514.

REASONS

Background

3. Pursuant to the Tribunal's judgment in favour of the claimant that he was unfairly constructively dismissed by the respondent and that it failed to make
35 reasonable adjustments for his disability, the claimant has presented a written.

application for costs in terms of rules 76(1)(a) and 76(1)(b) of the Employment Tribunals Constitution and Rules of Procedure (Regulations 2013).

4. The claimant’s application under rule 76(1)(a) is in the following terms:

“An application is made under rule 76(1)(a) on the basis that the respondent acted unreasonably in the conducting of proceedings by continuing with their defence as to the aforementioned two heads of claim. The respondent's defonco to the two heads of claim in question had no reasonable prospects of success for the reasons set out above. Considering all the facts known to the parties from the outset of proceedings, the respondent still continued with their defence. There was no new evidence produced by either party relating to these two defences that would not have been available to the respondent from prior to the commencement of proceedings, or that the latest by the preliminary hearing on disability status on 10-11 March 2021 (in relation to disability status itself for the reasonable adjustments claim), as to change the position of the respondent’s defence as to prospects of success. As a consequence, the claimant incurred expenses in the requirement to continue to pursue the heads of claim which remained opposed throughout proceedings. It is submitted that the respondent’s conduct in this regard was unreasonable in all the circumstances. ”

5. In respect of rule 76(1)(b) the claimant's application is in the following terms:

“An application is made under rule 76(1j(bj on the basis that parts of the respondent’s response had no reasonable prospects of success, specifically the defence to the claims of constructive unfair dismissal and failure to make reasonable adjustments for the claimant’s disability, contrary to section 21 of the Equality Act 2010. These are matters that the respondents should have reasonably known prior to presentation of the ET1. The respondent ought to have known that the response prepared by them to address these two heads of claims had no reasonable prospects of success. ”

6. The claimant’s application was supported by detailed written submissions and reference to authority, as was the respondent’s written application, both of which were fully considered by the Tribunal.

7. Both parties gave their consent to the application being determined without a hearing and therefore to that end the Tribunal met in person on 4 October 2022 to make its decision.

The relevant law

5 8. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that:

"(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,
10 *abusively, disruptively or otherwise unreasonably in either bringing 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. "*

9. In ***Opalkova v Acquire Care Limited EAT 0056/21,*** the EAT provided
15 guidance to Tribunals faced with deciding whether there has been unreasonable conduct. In such situations the position has to be considered separately in respect of each claim contained within the ET1 form or, as appropriate, the response to each of those claims.

10. It also clarified that the following questions were relevant to the test for
20 unreasonable conduct and for determining whether to make an order because a party's case had no reasonable prospect of success -

- Objectively analysed, when the claim or response was submitted did it have no reasonable prospects of success, or alternatively at some later stage as more evidence became available was a stage reached at
25 which the claim or response had no reasonable prospect of success? *This is the threshold test for making a preparation time order under rule 76(1)(b).*

- At the stage the claim or response had no reasonable prospects of success, did the relevant party know that was the case? *The answer*

to this question is relevant to the discretion of the question of whether a preparation time order should be made under rule 76(1)(b). It is also relevant to the threshold test when making a preparation time order on the basis of unreasonable conduct under rule 76(1)(a).

5 • If the relevant party did not know that the claim or response had no reasonable prospects of success, should they have known?

11. The issues for the Tribunal to determine aro therefore whether:

® objectively analysed, when the response was submitted, did it have no reasonable prospects of success; or alternatively, at some later stage io as more evidence became available, was a stage reached at which the respondents ceased to have reasonable prospects of success?

- at the stage that the response had no reasonable prospects of success, did the respondents know that was the case?

- if not, should the respondents have known that the response had no 15 reasonable prospects of success?

- if it knew or should have known that its response had no reasonable prospect of success, did the respondent act unreasonably in continuing to defend the proceedings or part of the proceedings?

Submissions

20 *Claimant's submission*

12. In his submission the claimant asserted that certain relevant factual matters were known to the respondent prior to presentation of its response, specifically that -

In relation to the respondent's knowledge of the claimant's disability -

25 13. The respondent was in possession of the claimant's diagnosis of arthritis referring to pain and his having informed his managers about his pain and discomfort since October 201 6. Yet the respondent continued to deny that the respondent had knowledge of the claimant's disability or that he could have

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been placed at a disadvantage by the application of the pled PCPs, despite (1) the respondent accepting at the Preliminary Hearing on disability status that the claimant suffered from a progressive condition (arthritis) and (2) the respondent being in possession of the claimant's diagnosis referring to pain and his having informed his managers about his pain and discomfort since October 2016.

In relation to the constructive dismissal claim -

14. The claimant had repeatedly alerted the respondent to procedural issues in dealing with his complaints during his employment, including the alleged bias of Jemma Deans. In that respect the Tribunal had noted the respondent's failure to address the alleged bias of Jemma Deans, the respondent's failure to take statements from potentially relevant witnesses relating to the claimant's complaints, the respondent's inadequate investigation into the claimant's complaints regarding A despite knowledge of A's behaviour, and it had found that *"the respondent repeatedly and egregiously ignored"* the claimant's legitimate fears about A's conduct and his safety in the workplace and that this led to his resignation.

15. The respondent would have been aware of these acts or omissions by the respective individuals involved, and through the documentation, and indeed absence of production of documentation (such as failing to obtain witness statements), at the time of submission of the response to the claims.

On the matter of the failure to make reasonable adjustments -

16. The Tribunal had noted the respondent being in possession of the claimant's diagnosis referring to pain and his having informed his managers about his pain caused by work on the INEOS contract (ethanol work) since October 2016. It had determined that *"there was no reason why the respondent could not have taken the claimant off ethanol work and allocated him alternative duties from August 2017 when he produced to the respondent the report from Dr Patton. Allocating him such duties would not have been disruptive to the respondent's business. Such a step would have been practicable, and it would*

have removed the disadvantage he was at relative to non-disabled drivers who were tasked with ethanol work"

17. The claimant therefore submits it was clear that the respondent had knowledge of the various failures above that were relied upon for the claimant's constructive dismissal complaint. It knew it had no reasonable or proper cause for these failings. It was aware that the claimant resigned because of these failures. Furthermore, it knew of the claimant's progressive health condition and that it caused him pain from at least August 201 7. It was able to take steps to remove the disadvantage, as had been afforded by it to other drivers. Yet it failed to take these steps, thereby failing to make the required reasonable adjustment. The respondent knew it had failed to take these steps.

18. The claimant submits that the focus of the Tribunal's focus in assessing the application on this ground must be in relation to the defences to the two heads of claim relied upon only, and not the rest of the respondent's defence. The EAT in ***Opalkova*** had set out the relevant questions for a Tribunal to consider:

"Accordingly, there are three key questions. First, objectively analysed when the response was submitted did it have no reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospect of success?"

19. Addressing the first question, considering the respondent's knowledge of the facts referred to above, as confirmed by the Judgment, it could not be considered that the respondent had reasonable prospects of success with regards to these two defences.

20. While the respondent may seek to argue that certain facts were in dispute. the EAT stated in ***Radia v Jefferies International Ltd EA T 0007/18*** that:

"the mere fact that there were factual disputes, which could only be resolved by hearing evidence, and fact finding, arising from the final Hearing, does not necessarily mean that the Tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, nor that it cannot conclude that 5 *the complainant could or should have appreciated this from the outset. That still depends on what they knew, or ought to have known, were the true facts, and what view they could reasonably have taken of the prospects of the claims, in light of those facts."* [para 69].

21. In assessing whether the claim had no reasonable prospects of success, the io Tribunal was not to consider whether the party genuinely or sincerely believed that the claim was well-founded, but whether they had reasonable grounds for believing that. Put another way, did the claim, objectively, have reasonable prospects of success: ***Scott v Inland Revenue Commissioners [2004] ICT 1410, para 46.*** The respondent may argue that it considered it had 15 reasonable grounds for its belief on prospects, but it is submitted this simply cannot be supported by assessment of the facts.

22. The respondent knew, or ought to have known, what the true facts in this case were from the outset, which is supported by the parts of the Judgment relied upon above. There was no new evidence produced by either party relating to 20 these two defences that would not have been available to the respondent from prior to the commencement of proceedings, or at the latest by the Preliminary Hearing on disability status on 10-11 March 2021, as to change the position of the respondent's defence as to prospects of success.

23. Addressing both the second and third questions posed by ***Opalkova,*** it was 25 submitted that the respondent at least ought to have known that the defences had no reasonable prospects of success, if it did not so already, no later than 11 March 2021. The respondent is a large organisation, with a HR department and was legally represented by an experienced solicitor throughout the Tribunal proceedings; relying upon ***Opalkova*** at para 26, where the EAT 30 stated: *"In considering whether the respondent should have known that a response had no reasonable prospects of success, a respondent is likely to be assessed more rigorously if legally represented".* There can be no doubt

that the respondent would have known that, at the start of proceedings, its acts or omissions had resulted in liability in relation to the respective two heads of claim and, therefore, it would have no reasonable prospects of defending them.

5 ***In respect of the Rule 76(1)(a) application -***

24. The claimant refers to ***Moshweu v Elysium Healthcare No 2 Ltd. ET 3401976/2015,*** a case involving insufficient investigation by a respondent during internal procedures, in which the Tribunal found that -

"Throughout the matter, the Respondent had advice from well-known
io *Solicitors and had any sensible enquiry or investigation been made into the circumstances of the Claimant's dismissal and had an honest view been taken about the prospects of the Claimant's success, the Respondent and those advising it would inevitably have been led to the conclusion that the contents of the response had no reasonable prospect of success. The result is that the*
15 *Claimant has been put to substantial costs in circumstances where a proper assessment of the merits of the case ought to have made that wholly unnecessary. It is correct therefore to make a costs order in favour of the Claimant in relation to the conduct of the case, up to and including the full merits hearing. It should have been obvious to the Respondent at a very early*
20 - *stage that its response had no reasonable prospect of success. "* [para 18]

25. Albeit the factual circumstances of the complaint were different from ***Moshweu,*** there were similarities in the conduct relied upon, as well as the analysis and conclusion of the Tribunal, for the Rule 76(1)(a) and 76(1)(b) applications that warranted there an award of expenses up to and including
25 the full merits hearing. Applying the same analysis to the facts in the case would lead the Tribunal to the same outcome.

Details of expenses sought

26. The respondent's actions, relied upon for both applications, resulted in additional legal costs for the claimant, including advice to the claimant, the
30 calling of additional witnesses and preparations of their statements, as well

as cross-examination preparation and submissions to advance the opposed two heads of claim.

27. The chargeable time incurred in the claimant's instruction of his representative from 29 June 2021 until the end of the final hearing was that being £30,377.16 including VAT, albeit, the claimant was only charged £23,040.20 including VAT. Considering the nature of the claims, the number of witnesses involved and the length of the hearing, this total expense was reasonably incurred.

28. The claimant had advanced four heads of claim that were dealt with at the final hearing. The defences to two of those four claims had no reasonable prospects of success. On that basis it would be proportionate and reasonable to compensate the claimant with an award of 50% of the total costs incurred in the bringing of the proceedings, namely £11,514. The respondent is a large company, with various sites across the UK, such sum is affordable and within the means of its ability to pay.

Respondent's submission

29. On behalf of the respondent Mr Newman submits that to suggest that the Respondent ought to have known that the relevant defences had no reasonable prospect of success at the outset is misguided. The Claimant (and his representative at the time) had struggled to articulate his claims at preceding Preliminary Hearings. In particular, it was intimated at one stage that the claim of a failure to make reasonable adjustments was to be withdrawn. This head of claim remained not fully pleaded in its final form until the List of Issues was finalised shortly before the Final Hearing.

30. The Claimant's mindset as set out above was relevant when considering the Claimant's applications. Even if the Respondent had withdrawn parts of the defence the matter would still have proceeded to a Full Hearing and evidence of all those witnesses who attended would still have been required.

31. It was important to note the sums sought by the Claimant within his Updated Schedule of Loss - £318,207.87. It was relevant to consider the Claimant's mindset in this regard as that was a relevant factor for the Respondent to

consider when deciding whether to proceed. At no stage had the Claimant's representative issued a cost warning to the Respondent or make an application for Strike Out.

32. The Court of Appeal has confirmed orders for costs in employment tribunals remain the exception, rather than the rule - *Gee v Shell UK Ltd [2003] IRLR 82.* It is a high hurdle for an applicant to overcome. See also *Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255; [2012] ICR 420 (3 November 2011).*

On the matter of the unfair constructive dismissal claim, the respondent submits that -

33. It would be unreasonable to expect the Respondent, in light of the reasons relied upon by the Claimant for his resignation, to have reached the conclusion that its defence had no reasonable prosect of success, particularly as one of his stated reasons for resigning had been disability discrimination, which he had maintained throughout the entire proceedings. Considering the Tribunal's findings, which upheld this aspect of the Respondent's defence, it cannot sensibly be said that the Respondent ought reasonably to have known it had no reasonable prospect of success.

34. The Claimant asserts that the Respondent was repeatedly alerted to procedural issues by the Claimant and relies upon the alleged bias of Jemma Deans. Whilst recognising the Tribunal's findings in respect of the Respondent's investigations, several of the Respondent's witnesses did give consideration to this issue such that it was reasonable to proceed on the basis that Jemma Deans' relationship with "A" was considered to some extent.

35. The Claimant highlights the Tribunal's findings in respect of addressing alleged bias of Jemma Deans deficiencies in statements not being taken, deficiencies in the investigation, and the Claimant's fears about A's conduct and his safety.

36. The Respondent recognises the Tribunal's findings on these matters but contends that when considered in the context of the Claimant's claim of

constructive unfair dismissal (noting as above that it included elements of alleged disability discrimination being relied upon by the Claimant) it cannot be said that it ought reasonably to have known it had no reasonable prospect of success.

5 37. The Tribunal's findings on these issues do not result in an automatic assumption that the defence had no reasonable prospect of success and the Respondent contends that notwithstanding those findings it was reasonable to proceed to a Hearing to have the entirety of the evidence considered.

38. An employer's failure to carry out an investigation in a manner expected by a
10 Tribunal may, as in this case, contribute to a finding of Constructive Unfair Dismissal but that does not equate to there being any basis to finding that the claim had no reasonable prospect of success from the outset or that,the Respondent ought to have known that the defence had no reasonable prospect of success at some other point.

15 39. This was not the type of case whereby a Respondent had acted so poorly that its defence was doomed to failure. There were arguable grounds to proceed with the defence as referred to during the Hearing, including the need to test the Claimant's own evidence.

40. The Tribunal are also reminded of its findings that, at least to an extent, the
20 Claimant and "A" were both culpable for acts of misconduct and this must be relevant when considering whether the Respondent ought reasonably to have known the defence to this part of the claim had no reasonable prospect of success.

Reasonable adjustments

25 41. The Tribunal had upheld part of the Claimant's claim of a failure to make reasonable.adjustments (in respect of taking the Claimant off Ineos work in August 201 7, but not in relation to the provision of a chair). It cannot therefore sensibly be found that the Respondent ought reasonably to have known the Claimant's reasonable adjustments claims had no reasonable prospect of

success in circumstances where part of the Claimant's claim was rejected by the Tribunal.

42. The Claimant appears to assert that the Respondent was in possession of the Claimant's arthritis diagnosis since October 2016. For clarification, the Claimant did not have a diagnosis at that time. The Respondent was aware of the Claimant suffering some pain and discomfort from 2016 but initially this did not prevent him from carrying out his duties and latterly accommodations were made following further advice being received.

43. The Claimant further asserts that the Respondent continued to deny it had knowledge of the disability or any disadvantage. This should be considered in the context of the Respondent's understanding that the Claimant was able to continue working on the Ineos contract to some extent when assessing whether the Respondent ought reasonably to have known the Claimant's reasonable adjustments claims had no reasonable prospect of success. It was also relevant to consider that disadvantage was relevant to the part of the reasonable adjustments claim that was rejected by the Tribunal.

44. The Respondent contends that whilst it is of course accepted that the Respondent did not remove the Claimant entirely from Ineos duties, they were reduced from August 2017 and latterly he undertook no Ineos work. Whilst the Tribunal found thatthe Claimant should have been formally removed from the Ineos work, the Respondent understood this to have happened on a practical basis. It was reasonable to have this issue considered at a Hearing. This is relevant when considering whether the Respondent ought reasonably to have known this part of the defence had no reasonable prospect of success.

45. Knowledge of the Claimant's disability does not automatically result in the conclusion that the Claimant's reasonable adjustments claims would have no reasonable prospect of success. The conclusions on knowledge are the first stage. The Tribunal must also consider the Claimant's application in respect of disadvantage, and also what adjustments were or were not reasonable. It was reasonable for this issue to be considered at the Hearing.

Approach

46. The question of whether the Respondent ought, objectively analysed, to have known when submitting the defence whether it had no reasonable prospect of success must be considered in the context of the Claimant's pleaded case, which was confused at best. This appears to have been accepted by the Tribunal and by the Claimant's former representative. The Respondent submits that at no stage did circumstances change such that it ought reasonably to have known the relevant defences had no reasonable prospect of success.

47. It is correct that certain facts were in dispute and the Respondent notes the Claimant's reliance upon ***Radia v Jefferies International Ltd EAT 0007/18.*** The.principle of ***Radia*** is not disputed but in the circumstances, it is submitted that it adds little to the required analysis under this application, especially in light of a core central dispute on the facts of the Constructive Unfair Dismissal claim (namely the reliance on there being disability discrimination at play).

48. ***Radia*** also reminds the Tribunal that it must consider how, at the earlier point when a defence is lodged, the prospects of success in a trial that was yet to take place would have looked.

49. The Tribunal must assess whether the Respondent had reasonable grounds for the belief in having prospect of success ***- Scott v Inland Revenue Commissioners [2004] ICT 1410, para 46.*** In all the circumstances of the case, notwithstanding the passages of the Judgment highlighted by the Claimant in his application, the Respondent submits that it did have reasonable grounds for the reasons referred to above.

50. As to the second and third questions set out in ***Opalkova*** the Claimant relies on the Preliminary Hearing on 11 March 2021 . The Tribunal are reminded that this considered disabled status and Jurisdiction (both reasonable matters for the Respondent to raise) not the entirety of the Claimant's claims, which was not fully clarified until much later following the Preliminary Hearing in August 2021 and the provision of the final List of Issues. The Respondent did not

know that the defence had no reasonable prospect of success and in all the circumstances of the case nor should it have done so.

Rule 76 (1) (a) application

51. The Respondent contends that this application should be rejected. The Respondent relies upon its submissions in respect of the Claimant's application under Rule 76(1)(b) in respect of the assertion that the defences had no reasonable prospect of success.

52. The Tribunal are reminded that according to the EAT in ***Dyer v Secretary of State for Employment EAT 183/83 (20 August 1983),*** *"unreasonable"* has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious".

53. ***Moshweu v Elysium Healthcare No2 Ltd ET3401976/2015*** is not binding and not sufficiently similar to present facts to assist the Tribunal, especially given that part of the Claimant's application under Rule 76(1)(a) relates to the reasonable adjustments claims.

54. The Claimant provides no further basis as to why it is alleged that the Respondent's conduct was unreasonable beyond cross-referencing to his Rule 76(1)(b) claim without further specific submissions as to unreasonableness.

55. There has been no finding of dishonesty made against any of the Respondent's witnesses and no finding of evidence being fabricated which might support an application for costs - ***Ioan v Darcy Lou Limited ET/ 240001/15.*** Even in cases where there has been dishonesty this will not necessarily be sufficient to found an award of costs and costs should not automatically be awarded simply because a party has knowingly given false evidence, reinforcing the submission that it is a high hurdle to overcome - ***HCA International Ltd v May-Bheemul EAT 0477/10 (23 March 2011), paragraph 40 and Kapoor v Governing Body of Barnhill Community High School EAT 0352/13 (12 December 2013).***

Amount of expenses claimed -

56. The Table of Invoices produced by the Claimant is not in dispute, although the respondent disputes that it should pay the courier fee sought in the event an award is made.

57. The Respondent notes that the Claimant's approach to seeking costs incurred in the relevant period is to adopt the approach of reducing by 50% the total amount charged to the Claimant. This approach takes no account of the fact that the Respondent successfully defended part of the Claimant's reasonable adjustments claim and that there were key allegations in support of the Constructive Unfair Dismissal claim, as referred to above, which were not upheld.

58. The *"Chargeable Time 29.06.21 to 04.03.22"* document does not provide sufficient detail to enable further analysis of the actual time spent on each disputed head of claim. Based on the information available, it cannot be said that 50% of the time spent on the matter related to the two heads of claim relied upon by the Claimant (which by way of reminder were not wholly successful in any event as set out above).

59. A significant amount of the time incurred appears to be in respect of general case management/preparation rather than specific to the relevant heads of claim. There are certain entries which simply state *"Amalgamated Transactional Work"* which provide no explanation as relevance or otherwise.

60. If the Tribunal were minded to grant the Claimant's application, the sums claimed by the Claimant are unreasonable. The Claimant does not advance an argument that the Hearing would have been reduced in length and the Respondent contends that all of the witnesses cited by the Claimant would still to varying degrees have been required as noted above. Accordingly, if an award is made, it should be for a nominal sum only.

Discussion and decision

61. The Tribunal firstly reminded itself of the issues to be determined, as set out above. It also reminded itself that while the claimant succeeded in his claims

for unfair constructive dismissal and disability discrimination in relation to the respondent's failure to make reasonable adjustments, it failed in relation to his claims in terms of sections 13 and 15 of the Equality Act. However, an award of costs is only sought in respect of those parts of the claim that were successful.

The constructive dismissal claim

62. So far as this claim is concerned the Tribunal found that the respondent had failed to provide a safe working environment for the claimant, leaving him exposed to bullying, harassment and death threats from a colleague; that it failed to deal with his grievance against his manager, Miss Deans; that it failed to conclude a grievance against his colleague A; and that it failed to facilitate his return to work following a period of sickness absence.

63. An uplift of 25% was applied to the claimant's compensatory award for unfair dismissal in circumstances where it found that while the respondent had significant resources available to it, including a dedicated HR department, it failed to conduct its grievance procedure in a reasonable manner, in particular in relation to communication with the claimant in respect to his grievance about the 16 July 2018 incident and its failure to identify and interview relevant witnesses in connection with his 15 May 2019 grievance. These are matters relied upon by the claimant in his application that the respondent's response (or at least part of it) had no reasonable prospects of success.

64. In all those respects, the Tribunal had no doubt that the respondent had, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. It therefore had no reasonable prospect of successfully defending the claimant's constructive dismissal claim.

65. The Tribunal also has no doubt that the facts upon which it made those findings would have been known to the respondent during the claimant's employment. Furthermore, and significantly for these present purposes, the respondent would have been aware at the point of the claimant's resignation

and therefore also when it submitted its response, of his reasons for resigning. Those reasons were clearly articulated by him in his resignation letter as being related to its failures to address his grievances and his concerns about his safety in the workplace, which ultimately led to the finding that he was unfairly constructively dismissed.

66. The Tribunal agrees with the claimant’s submission that it is significant that no additional documentation relevant to the constructive dismissal claim was presented by the respondent during the proceedings. All the relevant documentation as well as the evidence contained in the witness statements presented by the respondent and upon which the Tribunal formed its view were available to the respondent during the claimant’s employment and therefore also when it submitted its response.

67. In the circumstances, on an objective view of the evidence the respondent’s defence to this claim had no reasonable prospects of success when its response was submitted.

The reasonable adjustments claim

68. In relation to the reasonable adjustments claim, the Tribunal also found that the respondent knew or ought to have known by August 2017 that the claimant was likely to be placed at a disadvantage, because of his disability in relation to work on the Ineos contract and that it failed to take steps that would have removed his disadvantage by enabling him to work without pain and discomfort in circumstances where other work was available that he could have done at the time, which would not have been disruptive to the respondent’s business. On an objective view of the evidence the respondent’s defence to this claim had no reasonable prospects of success.

69. Once again, in respect of this head of claim, no additional documentation was presented by the respondent during the events of the proceedings. All of the documentation as well as the evidence contained in the witness statements presented by the respondent and upon which the Tribunal formed its view were available to the respondent at all times during the claimant’s employment and therefore when it submitted its response.

70. In the circumstances, on an objective view of the evidence the respondent’s defence to this claim had no reasonable prospects of success, when its response was submitted.

Should the respondent have known that its defences to the two’successful claims
5 had no reasonable prospects of success?

71. Since the presentation of the claim, the respondent had advice from experienced solicitors. The Tribunal concludes that if proper enquiry had been made into the circumstances of the claimant’s dismissal and its reasonable adjustments claim when its response was submitted, and if the
io respondent had accepted an honest view about the prospects of the claimant’s claim, the respondent and those advising it would inevitably have been led to the conclusion that its response had no reasonable prospects of success.

Did the respondent act unreasonably by continuing to defend the claims that were
15 successful?

72. Yet the respondent continued with its defence to ail parts of the claim when it
• should have been clear to them, had they accepted the reality of the situation, that they had no reasonable prospects of defending either the reasonable adjustments or the unfair constructive dismissal claim.

20 73. In those circumstances its decision to continue to defend those parts of the claim was unreasonable. As a result, the claimant was put to substantial costs in circumstances where a proper assessment of the merits of its case would have made that unnecessary.

74. It is correct therefore to make a costs order in relation to the respondent’s
25 conduct of the case up to and including the merits hearing in circumstances where, in terms of Rule 76(1)(b) it should have been obvious that the respondent knew or ought reasonably to have known when proceedings were raised that its response had no reasonable prospects of success and, in terms of Rule 76(1)(a) that in continuing with its defence, it acted unreasonably.

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The amount of costs to be awarded

75. The claimant has presented copy invoices, which confirm that the claimant was charged £23,040.20 including VAT for chargeable time. He has submitted that having advanced four heads of claim up to and at the final hearing and having been successful in two, where the defences.to those claims had no reasonable prospects of success, it would be proportionate and reasonable to compensate him with an award of 50% of the total costs incurred in the bringing of the proceedings. The claimant also submits that the respondent has the means and ability to pay that sum.

76. The Respondent's dispute with the sum sought by the claimant is not that the overall £23,040.20 including VAT of chargeable time is excessive, save for an objection to a courier fee. Rather, it does not accept, absent a more detailed breakdown of the work carried out, that 50% of that fee is properly attributable to the two claims in question.

77. Having considered these competing submissions, the Tribunal was satisfied that the claims in which the claimant* was successful would have taken up most of the preparation time. They plainly dominated the final hearing time, the majority of which was taken up by evidence and submissions about them and most of the documentary evidence the Tribunal was referred to was relevant to those claims.

78. In the circumstances, the Tribunal finds that the claimant's approach to his valuation is reasonable and proportionate.

79. In terms of Rule 78(1) it therefore makes an award in the sum of £11,514, which the respondent is ordered to pay to the claimant.

Employment Judge: **R King**
Date of Judgment: **21 November 2022**
Entered in register: **21 November 2022**
5 **and copied to parties**