EMPLOYMENT TRIBUNALS

Claimant: **Ms L. Waiwaiku**

Respondent: **Mr Mark Moss, as personal representative of the estate of Dr Paul Moss, formerly t/a North Shoebury Surgery**

Heard at: **East London Hearing Centre**

On: **8 November 2022**

Before: **Employment Judge Massarella**
Members: **Mrs G. Forrest**
Ms A. Berry (by CVP)

Representation
Claimant: In person
Respondent: Mr J. Searle (Counsel)

JUDGMENT ON REMEDY

The judgment of the Tribunal is that:

1. **the Tribunal refused the Claimant's application to reconsider its judgment on liability, *Polkey* and contribution because it was made out of time and there were no good grounds for extending time;**

2. **the Tribunal makes an award of compensation in the amount of £1610.66 in relation to the Claimant's unfair dismissal claim:**

3. **the Tribunal makes an award of costs of £1,000 in the Respondent's favour, having regard to the Claimant's unreasonable conduct of proceedings;**

4. **accordingly, the Respondent shall pay to the Claimant the sum of £610.66 (the compensation award minus the costs award).**

REASONS

1. The Tribunal gave an oral judgment at the hearing. The Claimant requested written reasons on the day.

Procedural history

2. The Tribunal's judgment on liability was sent to the parties on 11 January 2022.The Claimant's discrimination claims were dismissed. The Tribunal found that the dismissal was procedurally unfair; we went on to consider our conclusions in principle on *Polkey* and contribution, which were as follows:

> '<u>Conclusions: *Polkey*</u>
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> 259. We went on to consider what would have happened, had a fair procedure been adopted. We considered that we were well-placed to make that assessment, having heard extensive cross-examination of the Claimant in relation to a number of the allegations against her, and had the opportunity to observe the Claimant's attitude to being managed and to being given instructions, and the extent to which she showed insight into the concerns raised by the Respondent.
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> 260. We have set out our findings of fact as to the Claimant's conduct at the time above. We are satisfied that they demonstrate that: the Claimant made serious errors (paras 59-61, 64-76, 135); failed to take appropriate steps, when they were raised with her (para 135, 144 and 149); and refused to follow practices which she had been instructed to follow in relation to child immunisation (para 46), use of the CAT form (para 91 and 137), and the approach to travel vaccinations (para 93 and 139-141).
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> 261. We considered whether the Claimant might have changed her behaviour, if given an opportunity to do so, and concluded that she would not: she refused at the time to accept even minor criticism, or to acknowledge that it was proper for colleagues to draw errors or concerns to her attention (paras 64-76 and 86); she was unable to accept that any of her colleagues might be in a position to instruct or guide her, describing them as her subordinates (para 78) and lacking experience (paras 78 and 81); and she resorted to personalised invective when complaining about them (para 47).
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> 262. The attitudes which the Claimant displayed while in employment were, in many respects, replicated at the Tribunal hearing: she refused to accept that other clinicians had a duty to give her appropriate guidance (para 30), indeed she was dismissive about colleagues (para 39); at one point she even declined to accept that she was part of a team (para 87); she denied that things had happened, when they obviously had (paras 35, 39, 134, 139, 145), and alleged (without evidence) that documents, which were unhelpful to her case, were fabricated or had been tampered with (paras 32, 58, 135, 142, 147 and 149). Moreover, she was selective as to what she could and could not recall: when taken to a document

which did not support her case, she maintained that it was not reasonable for her to be expected to remember something which happened so long ago (para 139); on the other hand she had no difficulty recalling documents which she believed assisted her (para 52). She showed no insight as to why the matters that were being raised with her were serious.

263. This not only undermined her credibility as a witness, it also led us to the conclusion that the Claimant had little ability to reflect on her own practice, to change her approach or to acknowledge responsibility for her actions. We concluded that her relations with her senior colleagues had broken down beyond repair, and that the principal responsibility for this was hers. We are satisfied that the Respondent could not continue to employ someone who had shown herself to be effectively unmanageable. Ms Jobson was asked in oral evidence whether the surgery could continue to employ someone who would not follow practices and instructions. She replied that it could not, because the practice would not be able to function appropriately for the patients and their care.

264. We have concluded that that was a realistic assessment and that there was a 100% chance that the Claimant would have been fairly dismissed.

265. The reason for that dismissal would have been in part for conduct, and in part for capability (performance); in our judgment the principal reason would have been a complete breakdown in the employment relationship (‘some other substantial reason’). For all the reasons set out above, we have concluded that the Respondent would have acted fairly in dismissing the Claimant for any of those reasons.

266. We have concluded that a fair process would have lasted two months: one month to complete the investigation stage and prepare a report; and one month to complete the disciplinary stage.

Conclusions: contribution and wrongful dismissal

267. We have concluded that the Claimant contributed to her dismissal by reason of her own blameworthy conduct. In reaching that conclusion, we had regard to all the matters summarised above at paras 260 and 261.

268. We have reminded ourselves of the authorities on apportionment in contribution. Although the extent of the Claimant’s blameworthy conduct is very great indeed, the extent of the procedural unfairness was also blameworthy and contributed to a very great extent to the dismissal; we have concluded that that should be reflected in the final award. In all the circumstances, we consider that it is just and equitable to reduce both the basic and compensatory awards by 60%.

Wrongful dismissal

269. For the same reasons, we are satisfied that the Claimant's conduct, summarised above at paras 260 and 261, taken together and viewed objectively, was such that it was likely to destroy, or seriously damage, the relationship of trust and confidence between employer and employee, all the more so because of the nature of her role, which was a position of trust. Given the extent of the errors identified, the Claimant's resistance to having them pointed out to her and her refusal to follow specific instructions, we have concluded that the Respondent could no longer have confidence in her ability to discharge her duties to the standard required. Because there was a breach of the implied term of trust and confidence, the Respondent was entitled to dismiss her without notice, and her claim of wrongful dismissal must fail.

Remedy

270. The Claimant is entitled to a basic award and a compensatory award. The compensatory award will be limited to her loss of earnings for a period of two months after the date on which she was dismissed (which was 21 December 2018). Both the basic and the compensatory awards will then be reduced by 60% to reflection our conclusions as to contribution. For the avoidance of doubt, the Claimant is not entitled to any award for injury to feelings, because her discrimination claims have not succeeded.

271. In the circumstances, we consider that the parties ought to be able to agree these two sums without the need for a further hearing, and we urge them to cooperate in doing so. If agreement cannot be reached, the parties must write to the Tribunal within 28 days of the date on which this judgment is sent to them, providing their dates to avoid from March 2022 until the end of the year, for a three-hour remedy hearing. Directions will be given when the notice of hearing is sent out.'

3. As we explain below, the Respondent attempted to agree the amount of compensation, but without success. The Respondent also made a detailed costs application, contained in a document sent to the Tribunal on 7 February 2022. A hearing was originally listed for September 2022 but was postponed owing to a listing clash and relisted to the earliest available date.

4. The Claimant provided a schedule of loss, the Respondent a counter-schedule.

5. The Claimant provided a lengthy statement and several hundred pages of documents. A small fraction of this material was relevant to the two issues before us; the remainder was an attempt to persuade the Tribunal to revisit its conclusions on liability. It was, in effect, a reconsideration application, which we rejected it because it was made some ten months out of time and after the EAT had rejected the Claimant's appeal; there were no good grounds for extending time.

6. The Claimant gave brief oral evidence as to her means and was briefly cross-examined.

Submissions on remedy

7. The Respondent set out its calculation by reference to the Tribunal's findings on liability. The Claimant adopted the same net weekly figure in her own schedule but then produced a calculation which disregarded the Tribunal's findings.

8. The Claimant claimed a 25% ACAS uplift. The Respondent argued for 10%, saying that there was at least 'some semblance of a disciplinary process': the Claimant was not simply told that she was sacked.

9. The Claimant claimed £1,000 in respect of loss of statutory rights. Mr Searle submitted that £350 to £500 would be more appropriate.

10. The Claimant submitted that she should be compensated for loss of earnings flowing from the fact that the Respondent had removed her smart card when it first suspended her. Mr Searle submitted that, even if the Tribunal were to conclude that any losses arose from that action, they arose in consequence of the removal of the smart card, not from the dismissal.

Findings and conclusions on remedy

11. We accept Mr Searle's submission that losses flowing from the removal of the Claimant's smart card were not losses flowing from the dismissal and so were not recoverable.

12. We accepted the core figures set out in the Respondent's counter-schedule. The net weekly earnings figure was the same figure used by by the Claimant in her own schedules of loss. The sums will then be subject to increase/reduction as appropriate.

    12.1. The Respondent calculated the basic award as £810.

    12.2. Net weekly pay was £251.60.

    12.3. The compensatory award consists of an award for loss of earnings in respect of two months' net pay of £2,180.54.

    12.4. We consider that an award of £500 to reflect loss of statutory rights is proportionate.

    12.5. The total compensatory award before adjustments is £2,680.54.

13. We then considered whether to award an ACAS uplift. There were serious breaches of the Code: the investigation of the matters which formed the basis of the disciplinary charges was inadequate; although a large volume of information was provided to the Claimant, it was not provided in a form which enabled her properly to defend herself at the time. The breaches were unreasonable and we conclude that it is just and equitable to award an uplift. We are persuaded not to award the full uplift of 25% because the Respondent did invite the Claimant to a disciplinary meeting with which she did not engage, walking out after around ten minutes. Taking everything into consideration, we award an uplift of 20%.

14. The uplift is £536.11 which, having regard to the totality of the award, we consider is not disproportionate.

15. The total compensatory award before reduction for contribution is £3,216.65

16. Adding the basic award of £810, the total before reduction is £4,026.65.

17. Applying the reduction of 60%, the Claimant is awarded £1,610.66.

18. That is the total award in respect of compensation. We go on to give our conclusions on costs below.

Costs: the law

19. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide as follows (as relevant):

> **(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;**
> >
> > **[…]**

20. Orders for costs in employment Tribunals are the exception, not the rule (*Gee v Shell UK Ltd* [2003] IRLR 82 CA *per* Sedley LJ at [35]). However, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied (*Vaughan v London Borough of Lewisham and others* [2013] IRLR 713).

21. The EAT in *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 held that the determination of a costs application is essentially a three-stage process (*per* Simler J at [25]):

> **'The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the Tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78.'**

22. Costs awards are intended to be compensatory, not punitive. The costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct (*Barnsley Metropolitan Council v Yerrakalva* [2012] IRLR 78). However, unlike the wasted costs jurisdiction, in exercising its discretion to order costs, the Employment Tribunal does not have to find a precise causal link between any relevant conduct and any specific costs claimed. Mummery LJ gave the following guidance at [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 my judgment in McPherson 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.'**

23. The failure by a party to take seriously, and to engage with, a reasonable offer of settlement, may be a factor which leads to a finding of unreasonable conduct (*Kopel v Safeway Stores plc* [2003] IRLR 753); *Peat v Birmingham City Council* UKEAT/0503/11).

24. According to the EAT in *AQ Ltd v Holden* [2012] IRLR 648, a Tribunal should not judge a litigant in person by the standards of a professional representative. They may well be embroiled in legal proceedings for the only time in their life and are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional adviser.

25. In deciding whether to make an order for costs, and if so, in determining the amount to be awarded, the ET is permitted but not required to have regard to the means of the party against whom the order is made (Rule 84).

Submissions on costs

26. Mr Searle made brief oral submissions in support of the written costs application, which we do not summarise as they are a matter of record. He argued that the Claimant persisted in pursuing discrimination claims which she knew, or ought to have known, had no reasonable prospects of success. She had repeatedly lied in her evidence and made repeated, serious allegations of fabrication without evidence, which was unreasonable conduct of the proceedings. Had the Claimant confined her case to unfair dismissal, it might have taken two days for the Tribunal to try it. She also refused reasonable offers of settlement, including offers in the period leading up to the remedy hearing which were equal to, or more than, the amount she could receive in the light of the Tribunal's findings.

27. The Claimant relied on her written submissions, most of which were an attempt to re-argue the case on liability and/or to argue that she was entitled to claim loss of earnings, in particular having regard to the confiscation of her smart card. She argued that a costs award should not be made because of the unfair procedure the Respondent adopted in dismissing her. She submitted that she was entitled to reject the Respondent's offer of settlement because it did not reflect her loss of earnings. She rejected what she described as the Respondent's 'version of the [Tribunal's] Judgement in calculating my compensation. The solicitor has restricted my loss to 2 months' salary and then reduces that two months' salary by 60%'. She asked the Tribunal to reject that 'interpretation'.

28. The Claimant gave brief oral evidence as to her means. Dealing first with her earnings: her state pension is £623 per month; her NHS pension £423 per month; she receives no state benefits; she has no savings or investments; she

owns her own home, which has a value of between £400,000 and £600,000, with a mortgage of £225,000. As for outgoings: her monthly mortgage payment is £997; she spends £223 per month on utilities; £40 per month on council tax; she does not have a fixed budget for food.

Findings and conclusions on costs

29. We are not persuaded that the race claims had no reasonable prospects of success from the outset. We have not upheld them but that is a different matter. Discrimination cases are fact sensitive. We note that there was no strike out application or application for deposit order and that the Respondent was prepared to make significant offers before the trial on liability in an effort to settle the claims, although we acknowledge that there was likely to have been a commercial element to those offers. The claims were not misconceived in the sense of being conceptually unsound.

30. The Claimant succeeded in her unfair dismissal claim. Although offers were made to settle her claims globally, there was no offer to concede that the dismissal was unfair. From a procedural perspective it obviously was. The exploration of the unfair dismissal case took up a significant part of the hearing.

31. As to whether the Claimant conducted the proceedings unreasonably by lying in her evidence, it is right that we found her to be a poor witness who lacked credibility. We came short of concluding that she was deliberately dishonest; rather, we concluded that she had absolutely no insight into her conduct, no ability to reflect on her own practice or performance, and no ability to accept that she had done anything wrong any stage. Those attitudes appeared to us to be ingrained. In short, we concluded that she was simply incapable of accepting the truth, where it departed from her own very high estimation of her own abilities.

32. However, we agree that the Claimant conducted herself unreasonably at the hearing in one respect: in defending serious (and entirely proper) allegations of poor performance and misconduct put to her in cross-examination, she went further than mere denial in self-defence, she resorted to repeated, and serious, counter-allegations of fabrication against former colleagues, which had no reasonable basis.

33. In our judgment the Claimant also behaved unreasonably by not engaging seriously with the Respondent's various offers to resolve the issue of remedy without a hearing in the light of the Tribunal's clear findings and conclusions. On 31 August 2022, the Respondent offered the Claimant £2,724 in settlement of the compensation due to it under the terms of the Tribunal's judgment (although it reserved its right to pursue its costs application). The Respondent was explicit in its correspondence with the Claimant that they considered (correctly) that this was more than she could recover at a hearing.

34. The Claimant made no reasonable counter-offers at any point. Instead, she pursued claims in successive schedules of loss for sums of £165,053 (and 1 June 2022) and £83,369 (on 23 October 2022). There was no rational basis for maintaining those claims because they relied on the Tribunal ignoring its own clear findings and conclusions in its judgment on liability.

35. Having regard to all these factors we have concluded the threshold for a costs order has been met. We are satisfied that the Claimant has acted unreasonably.

36. We then stood back and considered whether it was appropriate to exercise our discretion to award costs and concluded that it was. We took into account the fact that the Claimant was a litigant in person and lacked professional expertise. However, in our view, her unreasonable conduct was not a result of lack of legal expertise or experience, it was a result of pure intransigence on her part, a refusal properly to consider the Respondent's reasoned offers and to apply common-sense.

37. We then then turned to the question of the amount of the award. We have concluded, in particular, that the Claimant's obduracy in the period between the judgment on liability being sent out and this hearing caused the Respondent to incur costs, which it would otherwise not have incurred. The Respondent provided a spreadsheet of costs incurred throughout the proceedings, without identifying with any clarity what costs flowed from the Claimant's unreasonable conduct, and what costs might have been incurred in any event. Mr Searle was unable to assist us further.

38. Consequently, we focused on the costs of Counsel's attendance at the hearing today, which was a brief fee of £2,000 plus travel expenses (from Manchester) of £404. Given his level of call we are satisfied that these fees were reasonable. His attendance, indeed the need for a hearing at all, was caused in large part by the Claimant's refusal to apply her mind to what she might actually recover at the remedy hearing, based on our conclusions in the earlier judgment and her persistence in making misconceived arguments, effectively inviting us to reopen the case on liability.

39. We have decided to take into account the Claimant's means, even though we were sceptical as to some of her evidence. On the face of it, her outgoings exceed her income, with nothing left for essentials such as food, which we think implausible. Nonetheless, we accept that she is a person of limited means and for this reason we considered it just and proportionate to award £1,000 as a contribution to the Respondent's costs, to be paid out of the award of compensation. For the avoidance of doubt, we do not consider it would be just to extinguish the award on remedy altogether.

40. Deducting the costs award from the remedy award, the Respondent is ordered to pay to the Claimant the sum of £610.66.

Employment Judge Massarella
Date: 28 November 2022