EMPLOYMENT TRIBUNALS

Claimant: Mrs M Carroll-Cliffe

Respondent: Pembrey and Burry Port Town Council

Heard at: **By video** **On:** **26 January 2023**

Before:

Representation
Claimant: In person
Respondent: Mr Bunting (Counsel)

RESERVED JUDGMENT

The unanimous decision of the tribunal is that the conduct by the respondent of part of the proceedings was unreasonable and in breach of Tribunal orders to the extent set out below. We exercise our discretion to make a costs order in favour of the Claimant in the sum of £1000.00 (one thousand pounds) plus VAT. The remainder of the Claimant's costs application is not well founded and is dismissed.

REASONS

Introduction

1. On 15 February 2022 the claimant made an application for a costs order. The application is made on three bases. The first is under rule 76(1)(a) that the respondent or their representative acted vexatiously, abusively disruptively or otherwise unreasonably in the way the proceedings or part have been conducted. The second is under rule 76(1)(b) that the response had no reasonable prospect of success. The third is under rule 76(2) that the respondent has been in breach of any order or practice direction.

2. We had before us a bundle of documents extending to 193 pages. That bundle contains the claimant's written application and the respondent's written response. We also heard oral submissions from both parties. We do not fully summarise those submissions in this Judgement. However, we took the full submissions into account in our decision making. We were able to complete our deliberations on the day. However, there was insufficient time to deliver an oral Judgement.

Legal principles

3. Rule 76(1) provides that a tribunal may make a costs order and shall consider to do so where it considers that (a) a party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceedings, or part of the proceedings have been conducted or (b) any claim or response has no reasonable prospect of success.

4. Under 76(2) a tribunal may also make such an order where a party has been in breach of an any order, or practice direction or where a hearing has been postponed or adjourned on the application of a party.

5. Rule 76(1)(a) makes provision for a two stage test. The first part of the test looks at whether a threshold criterion has been met, i.e. whether the respondent has acted vexatiously, abusively, disruptively or otherwise unreasonably in the conduct of the proceedings. That is sometimes called the threshold stage. If a tribunal is satisfied that the threshold criterion has been met, it is obliged by the rule to consider whether to exercise the discretion conferred on it by the rule to make a costs order. This is sometimes called the discretion stage.

6. Factors particularly relevant to the threshold stage include:

   6.1 Unreasonable has its ordinary meaning and does not mean something similar to vexatious (Dyer v Secretary of State for Employment UKEAT/183/38);

   6.2 The tribunal must bear in mind that more than one course of action may be reasonable (Solomon v University of Hertfordshire and another UKEAT/0258/18).

7. Factors particularly relevant to the discretion stage include:

   7.1 Costs orders are the exception and not the rule (Yerrakalva v Barnsley Metropolitan Council [2012] ICR 420 CA);

   7.2 The discretion must be exercised judicially, taking into account the facts and circumstances (Doyle v North West London Hospitals NHS Trust UKEAT/0271/11);

   7.3 The party claiming costs does not have to establish a direct causal link between the unreasonable conduct and the costs incurred (D'Silva v NATFHE UKEAT/0126/09). However, a cost award is intended to compensate the party to whom it is paid and not to punish the payer (Lodwick v Southwark London Borough Council [2004] ICR 884 EWCA. Causation can therefore be a potentially relevant consideration as part of looking at the whole picture; and

   7.4 The means of the paying party may be taken into account both in deciding whether or not to make an order and, if so, when considering how much to award (Rule 84)

8. Under 76(1)(b) (the response or part of it had no reasonable prospect of success) there are similar multi stages to the approach to be taken on assessment of a costs application. In Radia v Jefferies International Ltd UKEAT/0007/18/JOJ it was described as:

   8.1 Did the defence or part of it have no reasonable prospect of success at the outset?

   8.2 If so, did the Respondent know or ought to have known that at the time?

   8.3 When answering these questions the tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. It is a question of looking at the information that was known or reasonably available at the time, and considering how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked.

   8.3 The final question is whether a costs order is appropriate (as a matter of discretion), and if so in what amount.

9. Rule 76(2) is similarly discretionary.

10. Under Rule 78 the amount of a costs order made by us cannot exceed £20,000. Above that sum an order has to be made for payment of the whole or a specified part of the costs with the amount to be paid to be subject to detailed assessment

Application for costs under Rule 76(1)(b) – response or part of it had no reasonable prospect of success

11. The claimant says she expended £55,661.66 on representation in these proceedings, and she is seeking to recover of this £50,801.66 which are the costs she says she has expended since 14 November 2018 when she made a settlement offer to the respondent. As set out above, if we decided it was appropriate to award the claimant that specified part of her costs (i.e. cost of representation since 14 November 2018) then our role would be to make that decision, and then the sum would be assessed by way of detailed assessment.

12. On 14 November 2018 the claimant's solicitor sent a letter marked without prejudice and subject to contract. The letter said, amongst other things that the claimant would be willing to enter into a formal settlement agreement on terms which included payment in lieu of notice (3 months), an ex gratia payment equivalent to 18 months' salary with an equivalent payment of pension contributions into the pension scheme, payment for accrued but untaken holiday, an agreed reference, an agreed statement for leaving, and a contribution towards legal costs of £2500. Other than the legal fee contribution, there were no actual figures set out. This offer was made while the claimant was still in employment. She did not resign until 12 February 2019. It was also pre litigation. The claim form was not presented until 3 May 2019.

13. The respondent responded directly on 13 December 2018. Their letter had at its focus a desire to have a round table meeting and to focus on returning the claimant to the workplace [paragraph 225 Liability Judgment]. In relation to settlement, it said that instructions would be needed from the Town Council but that it was unlikely the Town Council would agree to any discussions based on the terms proposed in the claimant's letter. Matters then took their course as set out in the Liability Judgment.

14. During the course of the ensuing litigation, the respondent's solicitor wrote to the claimant's solicitor on 2 October 2020 in correspondence headed without prejudice save as to costs. The email said:

"As set out in our client's grounds of resistance and subsequence open correspondence, we remain of the view that your client will not succeed with her tribunal claims against the Respondent.

We do not propose to set out all of the weaknesses with your client's claims here, as we do not consider that it will be helpful at this stage to enter into protracted correspondence regarding this. However, we do wish to highlight the following:

- No qualifying "protected disclosures" were made by the Claimant. The alleged disclosures are wholly personal matters and clearly would not meet the threshold to be classed as being "in the public interest"
- Any event, it is nonsensical to suggest that the Claimant was subject to any detriment because of her alleged disclosure. There is numerous evidence showing that the Claimant was supported by the [Respondent] and her requests were considered fully. The Claimant's claims rest on the fact she wanted to be paid more than she was and her request was not granted. It is not reasonable to suggest that the Respondent should grant every wish of the Claimant and, when this does not happen it amounts to a detriment.
- The Claimant was not automatically unfairly dismissed
- there was no fundamental breach of the implied term of trust and confidence.
- the Claimant resigned of her own volition with immediate effect."

15. The email went on to refer to the costs both parties would expend in the litigation and said the respondent would be prepared to engage in reasonable and sensible without prejudice discussions but that the claimant needed to have a realistic view of her claims. It said the Claimant's schedule of loss was misconceived as to the prospects of success and the value, referring to a claim for back pay of £33,000 that it said the Claimant was not contractually entitled to. It referred to the Claimant not having mitigated her losses. The email then said:

"We continue to advise our client that it has excellent prospects of success in defending the claims of the Claimant. Notwithstanding this position, our client has instructed us to make an offer of a **drop hands agreement** to

the Claimant in full and final settlement of her claims. In turn, the Respondent will agree not to pursue the claimant for costs incurred in defending claims which have no prospects of success."

16. The offer was expressed to be a commercial one. The e-mail went on to say that if the offer is not accepted and the claimant went on to lose her claims, or was successful but was awarded a sum lower than the value of the offer, then the respondent reserved the right to bring the e-mail and offer to the attention of the tribunal on the issue of costs. The respondent said they would apply to recover their legal costs from the claimant until the date of the final remedy outcome on the basis that pursing the claims was misconceived.

17. The claimant's solicitor responded to say that they had tried on numerous occasions to enter into settlement discussions but had been ignored. They asked how the offer was a commercial one when no financial settlement offer had been made; it was just a request for the claimant to withdraw. The claimant's solicitor pointed out that the claimant could not be awarded a lower sum as no settlement sum had been offered. The respondent was asked to set out whether a financial settlement was actually being put forward and to make a clearer proposal. There is no suggestion that there was then a further response from the respondent's solicitors.

18. The claimant says in her application under Rule 76(1)(b) that the Liability Judgment identified numerous breaches of trust and confidence and unreasonable behaviour on the part of the respondent and that their continued defence of her constructive unfair dismissal and wrongful dismissal claim was without merit. She refers to bullet points 3, 4 and 5 in the respondent's solicitor's email. She refers to the drop hands offer made on the basis the respondent would not pursue costs against the claimant for claims they asserted had no prospects of success. The claimant says it appears the respondent was encouraged by their solicitors to continue defending these claims as the correspondence stated they had continued to advise their client that it had excellent prospects of success.

19. In relation to the bullet points in the respondent's solicitors email of 2 October 2020 relied upon by the claimant, her observation in respect of the third bullet point is incorrect. She did not succeed in her automatic unfair dismissal claim as that is the protected disclosure dismissal claim that was not successful. It is, however, correct to say that we did find that there was a fundamental breach of the implied terms of trust and confidence entitling the claimant to resign and treat herself as being dismissed, and her complaints of "ordinary" constructive unfair dismissal and wrongful dismissal did succeed.

20. The question therefore is whether the defence of those two claims (which turned on the same analysis) had no reasonable prospect of success from the outset and, if so, whether the respondent knew or ought to have known that at the time? We do not find that was the case.

21. There were 12 detriments in the whistleblowing detriment claim also relied upon as being breaches of trust and confidence albeit that they were relied upon in the alternative would not necessarily have been known to the respondent at the point they submitted their ET3 response form. There were 11 separate alleged breaches of contract (albeit there was overlap within allegations and between these and the whistleblowing detriment complaints, such that in our analysis we dealt with matters thematically). The claimant succeeded in respect of some allegations and not in others. Those that were successful are summarised at paragraph 252 of the Liability Judgment. We consider it is unrealistic to have expected the respondent, even as a professionally represented respondent, to have anticipated from the outset how all these individual elements would have evidentially panned out to result in the eventual analysis that the tribunal undertook when upholding the claimant's two successful complaints.

22. We did also look at the broad themes on which the claimant succeeded. One broad theme of the claimant's success was in relation to her treatment, at certain times by the Labour Councillors (albeit not all of these complaints were upheld). The respondent's stance at the time of the ET3 response was that the respondent was not responsible for the individual acts of Labour Councillors. By the time of the liability hearing that was not their position. Whilst it could be said as a matter of law that principle of vicarious liability may have had no reasonable prospect of success from the outset, these complaints were also defended on the basis that they happened long before the claimant's decision to resign. They would therefore require a "final straw" to revive them, which was the correct analysis.

23. A second broad theme was about the pay evaluation process. The delays with the job description were lengthy but were historic at the point of the claimant's resignation. We found the respondent had sought to bury and backtrack from the Egan pay evaluation report because its content was not as expected and unpalatable to the respondent. The respondent's defence had been that the re-evaluation was being done by the County Council, Mr Egan's report was there for background comparative analysis and they were waiting for the claimant to return from sick leave before discussing it with her. Having examined all the evidence (and the documentary evidence was limited), and making various inferences, we did not ultimately find this to be the case. But we did not find that Councillor Owens was deliberately lying. We cannot say that the respondent ought to have known from the outset that their evidence on this point was going to be rejected and that that their defence on this point had no reasonable prospect of success.

24. A third broad theme was about the handling of the claimant's grievance on the issues other than pay. We found that there were procedural failings in not giving the claimant the full report at the outset, and in not formally concluding the grievance process. However, it was within the context of the respondent having a misguided view of what they should and should not send, and being dependent upon what they thought Mr Egan was guiding them to do procedure wise. These were of course councillors who

were volunteers. We cannot say that the respondent ought to have known from the outset that their conduct in this regard was inevitably going to be found to reach the threshold of amounting to a breach of trust and confidence.

25. A final broad theme was the handling of the correspondence at the end, and in particular the letter of 29 January 2019. We do not consider that the respondent ought to have known at the time of their defence that the concerns we ultimately found about parts of what was said would inevitably have been found to be a breach of trust and confidence and a final straw. For one, the pleaded allegation was broadly put. It was said the respondent ignored most of what the claimant had raised but we found that not to be the case. It was then said that the responses to each proposed step made by the claimant were "either evasive, misleading, untrue, or completely outrageous. It became clear to the claimant that that respondent did not intend to assist her in resolving her grievance and provide a safe working environment." We did not find that the respondent had ignored what the claimant raised or that they were not trying to assist her in returning to work. The respondent at the point of filing their defence also would not have reasonably anticipated the finer analysis of individual points of the letter that we made in our Liability Judgment.

26. Some of the letter was misguided, such as redirecting the claimant to the Labour Councillors, but we accepted was born of the respondent wanting to set out that what Labour said was not their corporate position. Some of it was more serious such as the Mr Fox point. But whilst it could be said the respondent if it reflected, for example, on the truth of Mr Fox point, should have known it was an unsustainable statement, we have to place it within the context that the correspondence that was passing between the parties at the time, which was multifactorial. The correspondence came from a place where the respondent had been seeking to engage on steps to return the claimant to the workplace and hold a round table meeting rather than engage in lengthy combative letter writing. We found the respondent had been largely acting in good faith. We found that some of the claimant's demands had been unrealistic, unreasonable and not focused on assisting with a return to the workplace. Bearing this in mind together with the general way in which the point had been pleaded we do not consider that the respondent knew or ought to have known at the time that our eventual analysis would be what it was. From their perspective at the time of filing their ET3 response, they had an arguable basis on which to say they had been responding, on the whole, reasonably to the situation they were faced with, and in seeking to facilitate discussions to return the claimant to work, and they had a reasonable prospect overall of establishing there was no cumulative breach.

27. Even if we are wrong in any of the above analysis we would not have exercised our second stage discretion to award the claimant the costs of the proceedings founded on a complaint that the respondent's defence to the two successful complaints had no reasonable prospect of success. Here we have to look at the whole picture of the litigation. This was a hard fought piece of litigation on both sides. There were measures of success

and loss on both sides. The claimant did not succeed in some significant aspects of her case including the equal pay claim that was taken to a public preliminary hearing before EJ Frazer, in establishing she made protected disclosures, the protected disclosure detriment claim did not succeed on time limit grounds, the protected disclosure dismissal claim was unsuccessful, as were the two breach of contract pay claims. These are matters in respect of which the respondent will have likewise incurred significant legal fees in mounting their defence. At the remedy stage the claimant presented various arguments which were not resolved in her favour. These are not the kind of exceptional circumstances in which we consider it appropriate to award the claimant recovery of her legal costs in what is ordinarily a cost free forum. It was a case, as Mr Bunting put it, where the claimant was entitled to bring her claim, and the respondent entitled to defend it.

Rule 76(1)(a) – did the respondent or their representative act unreasonably in the way that the proceedings, or part of the proceedings was conducted?

Settlement

28. The claimant's first complaint is that the respondent did not engage with Acas at the outset or subsequently to consider any attempt at negotiation, despite attempts being made through solicitors. Acas conciliation, is however, confidential and is not a matter that is put before the tribunal, and there is both public policy principles and statutory force behind that. Moreover, Acas conciliation is entirely voluntary and again there are strong public policy principles behind this. The respondent was not compelled to engage and it is not appropriate for the Tribunal to delve into that process. We do not find that it amounts to unreasonable conduct on their part. Acas conciliation that took place before the ET1 claim form was presented would also fall outside the remit of Rule 76(1)(a) in any event as conduct that pre-dates the proceedings cannot be the conduct of the proceedings.

29. The claimant says the respondent acted unreasonably in not being prepared to consider a settlement prior to the commencement of proceedings. The claimant relies on her letter of 14 November 2018 summarised above. The respondent has not argued that the letter cannot be put before us at all as it is only marked without prejudice, and not without prejudice save as to costs. We have therefore considered it. As set out above, that offer had no monetary calculation within it. As part of these costs proceedings the claimant has attempted to, after the event, place a valuation on it at £38,903.89. She says that in the Remedy Judgment she was awarded £40,299.37. She says it was therefore unreasonable of the respondent not to have accepted the offer and she should be awarded the costs she incurred since 14 November 2018 at £50,801.66.

30. This is, however, an offer that was made before the claimant resigned at a time in which the respondent was trying to take steps to return her to work. It was an offer that was made before the claimant presented her ET1 claim form. At the time the claimant says the respondent should have accepted

the offer there were no proceedings. The non acceptance of the offer at the time the claimant says it should have been accepted cannot therefore amount to unreasonable conduct of the proceedings as there were no proceedings in train at the time. It is also a letter that was not marked "without prejudice save as to costs."

31. The claimant says that the respondent failed to respond to each and every approach made by her solicitors to canvass the possibility of settlement in the course of proceedings. She says that the respondent only made the drop hands offer and then ignored her solicitor's correspondence seeking clarification of what was being offered and seeking a clearer proposal.

32. In respect of the email of 2 October 2020, whilst it may be oddly worded in parts, its central meaning would reasonably have been clear to the claimant (herself a solicitor) and her solicitor. It was a drop hands offer, for the claimant to withdraw her claims with both parties bearing their own costs, together with an assertion that if the claimant persevered with her case, and was unsuccessful, the respondent would attempt to recover their costs. It was not an attractive offer and as we have said oddly worded in parts. But it was capable of being understood and the claimant's solicitor capable of giving advice about it. Neither its wording, or the offer itself was the unreasonable conduct of the proceedings. Its the kind of offer, in the cut and thrust of litigation, that a party makes to the other where they consider their own position is a strong one.

33. The claimant also complains that the respondent did not in the course of proceedings make a better offer than that, or indeed go back and accept her November 2018 offer. There is an overlap here with the claimant's argument that the respondent's response had no reasonable prospect of success, hence why we addressed that point first, above. In our judgement, the respondent did not ought reasonably to have known that its defence to the constructive unfair dismissal claim, and wrongful dismissal complaints was inevitably going to fail in the way it did. Moreover, they were entitled to defend the other parts of the claim that they successfully did, including serious allegations of sex discrimination in the form of equal pay litigation and the numerous protected disclosure complaints. It was not unreasonable to defend the litigation and therefore not unreasonable to not make monetary offers to the claimant or to go back and settle in the terms the claimant outlined in November 2018. It also does not follow that the respondent should reasonably have anticipated a picture in which (a) they would lose the litigation in the way that they did, (b) that the claimant would end up receiving the sum she did in the Remedy Judgment (given the complex arguments there were about that), or (c) that they would reasonably anticipate the November 2018 offer was better than that which the claimant would be eventually awarded. Not only was the eventual Remedy Judgment award complex and multifactorial, the claimant there did not succeed in establishing the tribunal should use the pay figures she was putting forward, and the claimant is now, after the event, seeking to put a financial figures against the November 2018 offer that were never actually set out at the time.

Furthermore evidence as to, for example, mitigation efforts, lay in the hands of the claimant, not the respondent.

34. The claimant also complains that the respondent unreasonably and without explanation rejected judicial mediation. Judicial meditation is again an entirely voluntary and confidential process. Parties are not required to participate, or to give reasons for not participating or for pulling out. It is a condition of every judicial mediation that anything that is said in a mediation, or indeed not engaging or pulling out of a mediation, will not and cannot be used against that party. Again, there are very strong public policy reasons behind this. It cannot and does not amount to unreasonable conduct of the proceedings.

Disclosure of documents, and preparation of the hearing bundle

35. The parties agreed case management directions with a list of documents to be provided by 23 June 2020. The parties agreed an extension until 14 July 2020 when the claimant provided her list but the respondent did not. The respondent's list was not provided until 1 October 2020. The respondent's solicitor said at the time "Please accept our sincerest apologies for the delay in sending this list of documents over to you. As a town council, the COVID19 pandemic has been a primary concern of our client over the last few months as such it has taken longer than anticipated to obtain our client instructions during this time. Please find enclosed the respondent's list of documents for this case… We have recently requested our client to do one final full check of all potential disclosure documents which may be in their possession relevant to these proceedings. In the event that any further documents come to light, these will be disclosed to the claimant immediately…". The email then went on to request some copy documents from the claimant's list and to ask for mitigation documents from the claimant.

36. A case management hearing took place before EJ Moore on 15 October 2020. EJ Moore directed the parties to complete disclosure by requesting copy documents to be provided by 5 November 2020 with the parties to agree a joint bundle index by 26 November 2020. The respondent was to provide the first draft of the bundle index. The respondent was to give the claimant a copy of the final hearing bundle by 10 December 2020. Witness statements were to be exchanged 14 days before the hearing. The case was listed for final hearing by video on 15 to 27 January 2021.

37. The respondent did not provide the draft bundle index by 26 November 2020. The respondent's solicitors that day emailed the claimant's solicitors questioning the relevance of some of the claimant's documents and raising some other questions. The claimant's solicitors responded on 2 December 2020 stating that the documents "are currently referred to in the Claimant's drafted witness statement and therefore will need to be included in the bundle." The other queries were responded to. The claimant's solicitor referred to a request for disclosure made on 29 October 2020. The claimant's email sought disclosure of 14 documents (we do not know what these were) by 4 December and the remaining disclosure within 7 days. The email said: "Please provide a copy of your

current draft bundle index. If this is not received by 4pm on 4 December 2020, our client has advised that she will take over this task for you in order that there is no further delay to the case management orders." The email said the claimant's witness statement was 95% drafted with the exception of a final review and insertion of page numbers. The claimant sought reassurance the bundle would be with them by 10 December and that there would be no delay to witness statement exchange.

38. On 10 December 2020 the respondent's solicitors stated there had been delay in compiling the bundle, referring to a large number of documents remaining disputed and the time it had taken to construct the bundle digitally without access to office facilities (due to Covid restrictions). It was said that the claimant's requests for specific disclosure were extremely broad and many were protected under the Public Bodies (Admission to Meetings) Act 1960 that required review and advice, the implication being that this was also delaying finalisation of the bundle. The respondent's solicitors said that they did not accept they had a valid explanation from the claimant about the relevance of the disputed documents so they said they would add a separate section titled "Claimant disclosure: disputed relevance" or alternatively the claimant could better explain their relevance. A few additional questions were raised by the respondent's solicitors, with a sign off suggesting they were hopeful the parties could agree the bundle contents the following week.

39. On 16 December 2020 the claimant's solicitor emailed to say the respondent was in breach of the case management orders of EJ Moore as copy documents had not been provided by 5 November 2020. The email said that as the respondent's solicitors had not provided the bundle index by 26 November, the claimant had taken on responsibility and provided an index on 7 December 2020. It was said as the respondent had not provided the copy bundle by 10 December 2020 the claimant had produced the bundle over the weekend of 11 – 14 December 2020 and it was now with the claimant's solicitors for pagination. The claimant's solicitors said the bundle would be sent to the respondent's solicitors "shortly this week." It was suggested that statements be exchanged on 31 December 2020 as 1 January 2021 was a bank holiday.

40. The respondent's solicitors said that delay had been brief and no prejudice caused. They disputed the rationality of the claimant taking over preparation of the bundle stating: "As should be evident from our ongoing communications, we have been continually preparing the bundle over the last couple of months. We confirm that we have today received our client's instructions on the bundle, notwithstanding the below disclosure outstanding from the Claimant, and we will provide a draft bundle tomorrow, including all new disclosure that you have reasonably requested, that exists, that is in our client's possession and can be found upon a reasonable search." The claimant was asked for two wider email chains. The respondent's solicitors continued to press the claimant for an explanation of the disputed documents by reference to the list of issues. The respondent's solicitors also responded to the specific disclosure requests.

41. Some terse emails were then exchanged between the solicitors with there being competing versions of the bundle produced sent to the other party on 17 December. The respondent's solicitors email timed at 14:20 on 17 December said that the index highlighted in blue documents which had been disclosed at the request of the claimant, and items in green "are further documents our client has found in its possession which it believes to be relevant to this case." The claimant says that she was not able to open the index until 18 December as the document download was password protected.

42. At 10:51 on 18 December 2020 the respondent's solicitors asked for confirmation that the bundle was agreed so that a paginated version could be finalised and provided. The respondent's representative said she was about to go on leave until 29 December so it would be preferrable to send it out that day. The claimant's solicitor responded to say that the claimant was still reviewing the index and it would not be agreed by 12 o clock that day. The email highlighted that there were 53 documents highlighted in blue and 18 documents highlighted in green that had not been previously disclosed and other new documents which had not been highlighted at all. Concerns were also raised that some of the claimant's documents had been omitted and some of her documents remained segregated as disputed, and some documents had been re-labled without explanation.

43. The claimant says that there were two completely new sections containing 386 pages and one of the new sections were job evaluation notes she had been requesting since 2017. She says that on top of the two new sections there were 46 other new documents highlighted in green and many more new documents that had been added without being highlighted. She says, for example, this included the second version of the internal panel's full report.

44. The claimant says that there were hundreds of pages of meeting minutes that were not relevant and had not been requested but were highlighted in blue, suggesting that the claimant had requested them when that was not the case.

45. On 21 December 2020 the respondent provided a different version of the hearing bundle and index, saying it was the final paginated bundle. The claimant says there was another new section containing 94 pages called "Paul Egan additional disclosure" and with the layout being rearranged without explanation.

46. The claimant says that this version also removed two groups of her documents without explanation and she had to reinstate them within her own supplementary bundle.

47. The claimant particularly complains that the respondent included in the final hearing bundle only the 4 page short version of her grievance letter. She says that the respondent insisted until 2 days prior to the start of the final hearing that this version was the correct one. She complains that the respondent was therefore alleging that her version was false and she was lying about a document which the claimant says was a very serious and

distressing allegation for her, particularly because of her professional reputation. She says that the respondent only conceded the longer 9 page version was genuine when her barrister pointed out the references in other documents to the 9 page letter, such as within Mr Egan's report.

48. On 31 December 2020 the parties exchanged witness statements. The claimant's solicitor sent a supplementary bundle index and a supplementary bundle saying it contained documents omitted by the respondent once the claimant had crossed checked her disclosure against the "further expanded hearing bundle which differs to the index you sent on the 18 December 2020." The respondent objected to this saying it was unnecessary and it appeared a large quantity were already in the bundle.

49. On 4 January 2021 the respondent's solicitors responded to the claimant's supplemental list of documents asserting that only 6 documents were in fact not within the bundle and that 3 of these had not been sent to the respondent previously by the claimant. It was accepted that 2 documents appeared to be missing from the bundle, but that their omission was not deliberate and that the claimant could have highlighted this and ask for their insertion.

50. The respondent's solicitors expressed uncertainty about three items in the claimant's supplemental bundle which they said seemed to be a duplication of the first. This was a reference to the 4 page grievance letter, the 9 page version and a marked up version. The respondent said: "The bundle contains the version of the document handed to the Respondent by your client. The hard copy that was provided was photocopied and is contained in the bundle. It appears that this document was duplicated in the initial list of documents provided in mid 2020, however, in light of your client's comments, please could you explain why your client has a different version of this document than that provided to the Respondent on 12 March 2017?"

51. On 5 January the respondent's solicitors emailed again about the supplementary bundle and with some updates to the main bundle. They said their previous comments (that related to the two versions of the grievance letter) also applied to the resignation letter and that: "Our client is only aware of one letter of resignation being handed to Bob John and this is the copy contained in the bundle. Once more, in light of your client's comments, please could you explain why your client has a different version of this document than that provided to the Respondent on 12 February 2019?" On 6 January 2021 EJ Jenkins conducted a case management hearing. He directed that the bundle and the supplementary bundle both be filed.

52. On 13 January 2021 the parties' barristers had an email exchange about various matters relating to preparation for the final hearing. The respondent's counsel said: "I now have instructions that the version of the complaint letter which R received was the 9 page one at p1376 (which I think we already knew). I have not had a conference with my witnesses yet, but I presently understand that where MT's statement refers to p437, he is incorrect, i.e. he should be referring to p1376. (As I say, I have not

yet heard this from the horse's mouth as yet). And obviously the correct resignation letter is the one in the supplemental bundle at A78. Regarding the latter, those instructing me have confirmed as follows:

> "As discussed, please see the letter enclosing our client's original documents dated 21 March 2019. The original copies were kept in the office. When this dispute arose, we were able to obtain the hard copy of the file (we have been working remotely since March 2020 with no access to the office). The Claimant's representative asked that the resignation letter be placed in the preliminary hearing bundle, forwarding us a copy of the same (enclosed – which was sent to her by the Claimant). As we viewed the document to be irrelevant for the PH, it was just added without dispute. Due to remote working, the relevant aspects of the PH bundle formed the basis of the main bundle. We had no reason to suspect it was an "incorrect version" until it was raised by the Claimant after witness statement exchange, therefore did not think to review the hard copy sent by our client until that point…"."

53. The claimant's counsel said he reserved the right to ask some of R's witnesses why they had said in their statements that the letter sent on 12 March 2017 was the 4 page one, where they got the different version from and why it was still being disputed until that day, and whether the original version had been edited by them at all. He pointed out that this was one of the two alleged protected disclosures and he was concerned witness statements were written saying it was just a complaint about personal issues with Mr Fox.

54. On 14 January 2021 the claimant's solicitor emailed asking why the longer, signed version of the grievance letter had not been disclosed and why the respondent had previously been insisting the 4 page version was the correct one. It was asked, amongst other things, where the 4 page version had come from and why two versions had been disclosed by the respondent in a bundle on 1 October 2020 but with an index just referring to one of them.

55. The claimant's solicitor's email also asked questions about the two versions of the resignation letter, and about various other things. The respondent's representative responded to say: "It appears that your enquiries in relation to the 12 March 2017 letter are matters of evidence and I do not intend to respond to them in correspondence. I would comment that both of us have asked the other to explain why there are two versions of the 12 March 2017 document. Both of us were acting in accordance with our instructions at that time.

    You are, however, of course, well aware how the anomaly has arisen in relation to the 11 February 2019 letter. This is seemingly because you disclosed the wrong document in preparation for the substantive preliminary hearing. You and I then both failed to pick up on this. I did not send you the correct, signed, version, because I understood that the correct version was already in the bundle i.e. the version you disclosed to DWF on 3 December 2019."

56. In our judgement the respondent's conduct of the disclosure exercise in the course of the proceedings did amount to unreasonable conduct of the litigation. There was a significant delay between June and October 2020 which went largely unexplained other than the reference to the pandemic in the email of 1 October 2020. If the respondent had given full disclosure at that point then it may well be that we would not have found that the conduct met the threshold of being unreasonable (when considering the gravity and effect) because there would have still been time for the claimant to properly review the disclosure without being placed under unnecessary pressure.

57. But what, in our judgement, tips this over the edge is that the respondent's disclosure was incomplete. This was foreshadowed (indicating to us that it is likely they knew this was the case) in the respondent's representative's email of 1 October 2020 which said they had asked their client to do "one final full check." The claimant then on 17 December 2020 received at least a further 386 pages of additional documents (and potentially more as she talk about receiving 46 other documents and other new documents). On 21 December 2020 the claimant then received again a bundle with an additional 94 pages added and with the layout being re-arranged.

58. This was some 4 weeks or so prior to the start of the final hearing. The claimant and her representatives were "dumped" with a significant amount of additional documents to review. It was disruptive and stressful and would have been made more so by the fact that the Christmas break was fast approaching where most people take leave, and there are bank holidays meaning that in reality the preparation time available for the final hearing was significantly less. We have not been given an explanation as why there was so much late disclosure. That the late disclosure did not lead to the postponement of the final hearing does not mean that it did not amount to unreasonable conduct. It caused additional work for the Claimant team and stress for the Claimant. It was exacerbated by what by itself would probably not amount to unreasonable conduct, in the respondent shifting around the structure of the hearing bundle.

59. The delay in producing the bundle was in reality largely a knock on effect of the disclosure delays. We did take into account the claimant's stance on explaining why some of her disputed documents were relevant was distinctly unhelpful. To proffer an explanation that the documents are referred to in the claimant's witness statement did not help the respondent understand their relevance. Some of the documents were things like Christmas cards which would not have been self explanatory (and indeed probably not needed in any event). But the respondent did not help themselves by not asking the questions until 26 November (the day the joint bundle index was due) and in reality, as already said, the disclosure difficulties were going to hold things up anyway unless a draft bundle was produced that was then potentially subject to significant amendments.

60. We did not consider that the respondent's suggestion (and structure then adopted) of moving the disputed documents off to a different section was

unreasonable. It is a direction the tribunal often makes when parties are in dispute to make sure that a bundle is ready for the hearing. The claimant seems to consider that it meant her documents were segregated into some section with lesser evidential value, but that is not how tribunals view bundles. We simply look at the documents we are asked to look at by the parties. Likewise, tribunals are not concerned with the labels given to documents in an index, we are concerned with the substance of the documents themselves.

61. The pressure to get the claimant's team to agree to the bundle on the morning of 18 December 2020 was unreasonable, albeit we appreciate it was due to the respondent's representative's impending period of annual leave and desire to get it done before she went, if she could.

62. In relation to the two versions of the grievance letter, in our judgement, this blew up as such a big issue because it happened so close to the hearing date because of the delays in disclosure and the preparation of the bundle. If the issue had come to light earlier in the litigation the parties would have had more time to liaise about it prior to completion of the bundle and the preparation of witness statements and it is the kind of point that is usually resolved in that way, particularly where both parties are represented.

63. The actual construction of the two versions of the grievance letter cannot be directly before us in this costs application because the two versions were already in existence before these proceedings were commenced. It cannot therefore amount to the conduct of these proceedings. We know this because the subsequent police investigation informed the claimant that both versions had been attached to the respondent's letter to their solicitors of 21 March 2019 which pre-dates the presentation of the ET1 claim form.

64. What is before us is the handling of those two versions which is a separate issue to the provenance of the documents themselves. We know, as just stated, that the respondent had sent both versions to their solicitors from the outset. Mr Egan when conducting the grievance investigation had also always had the longer version of the grievance. It appears the longer version was also known about when the ET3 response form was completed as paragraph 32 of the grounds of resistance refers to the grievance, in part, alleging that the claimant had been undermined by councillors. The claimant told us at the costs hearing that the longer version had been in the bundle for the equal pay hearing. We also know from the claimant's solicitor's email of 14 January 2021 that both versions had been disclosed in a bundle on 1 October 2020 but that the accompanying index only referred to one of them. As Mr Bunting said, on the face of it what appears to happen by the time of the preparation of the final hearing bundle is that only the 4 page version is inserted by the respondent's solicitors who have by then, on the face of it, become unaware of the second longer version, and have not recalled that they previously had it, which fed into their mistaken preparation for the final hearing by both them and their client. In a document heavy case it is the

kind of occurrence that happens in litigation, and as already stated the parties are usually able to liaise as part of getting the case ready for hearing (even if that just involves both versions being put in the bundle). It is a document that the claimant would always have noticed was not the version she had submitted and that she would have therefore raised an issue about. It is not something therefore as a stand alone point we would find to meet the threshold of unreasonable conduct of the litigation (albeit it is unfortunate) because these kinds of document disputes do happen and can lead to errors where things are considered to be duplicates when they are in fact not. But again, as stated, it was compounded here by the delays in disclosure and bundle preparation, and therefore forms part of the unreasonable conduct of the litigation in that context. It caused the claimant team additional work and the claimant stress.

65. The claimant also complains that the respondent insisted that the 4 page version was the correct one until 2 days before the final hearing and that the respondent was alleging that her version was false and that she was lying. We do not find that this is what the respondent was doing; it is the interpretation that the claimant has placed upon it. The respondent's solicitors' email of 4 January 2021 reflects their apparent misunderstanding and mis recollection at the time of having two different versions of the letter, so they are asking the claimant's side to explain why they have a different version. In the tribunal's judgement, it was a reasonable question (given the respondent's solicitors misunderstanding at the time) not an accusation that the claimant was a liar. Both parties were asking the other (as they were also for the resignation letter) where the two versions had come from. The respondent's counsel's later email of 13 January shows that it was only more recently that the hard copy of the respondent's file including the original correspondence of 21 March 2019 had been accessed. Again it is the kind of question that one party asks of the other in litigation when this kind of situation emerges. For the respondent, the picture was also confused because the second version of the resignation letter (which was another point of dispute at the time) had been tracked from their perspective to having originated from the claimant and the claimant's solicitor at the time of the equal pay hearing. This latter point was not disputed by the claimant in this costs process.

66. The claimant complains that despite the respondent accepting that the 9 page letter was the genuine one, she was still cross examined by the respondent's counsel along the lines that the 4 page version had originated from her. The claimant says that this is totally false and could only have been an effort to mislead the tribunal. We do not find that was unreasonable conduct of the proceedings by the respondent. Both parties were questioning how the two versions of the grievance letter had come about. The parties considered it relevant. There was a basis for the respondent to question whether the claimant had produced the shorter version of the grievance letter given what had happened with the two versions of the resignation letter. The claimant had been in work at the time of her grievance letter so it was not an impossibility that she had, for example, saved an earlier shorter draft. To be clear that is not a finding that she produced the shorter version. It is simply an observation that the

questioning was not the unreasonable conduct of the litigation. The claimant was herself represented by counsel at the hearing who was fully able to look after her interests.

67. We have found there was unreasonable conduct of the proceedings by the respondent in respect of the disclosure exercise and its knock on effect on bundle preparation. We turn separately below to the question of the exercise of our discretion. We first, however, deal with some other allegations of unreasonable conduct raised by the claimant in her application.

Late disclosure of the full investigation report of Mr Egan

68. The initial delay in providing the report until 1 February 2019 cannot amount to unreasonable conduct of the proceeding as it in fact pre-dated the proceedings. Thereafter the additional elements complained about were provided on 1 October 2020. They are therefore caught by our general observations on delay made above.

Internal Panel's full investigation report

69. The claimant complains that she was only given one version of this (and not the second) on 1 February 2019. Again any failure in that regard as at 1 February 2019 pre-dates the proceedings and cannot amount to the unreasonable conduct of the proceedings. During the course of the litigation the second version was not disclosed until 17 December 2020 as part of the hearing bundle. That delay was the unreasonable conduct of the proceedings, as dealt with more generally above.

Witnesses

70. The claimant complains that the respondent changed their witnesses at a late stage. She says that the respondent said at the case management hearing on 15 October 2020 that they would be calling Councillor John and Mr Thomas from Carmarthenshire County Council. She says that statements were not exchanged for these potential witnesses and that the respondent failed to answer a query about this. She complains that this "tactic denied the Claimant the opportunity of adducing evidence from these witnesses." On 7 January the claimant's solicitor emailed about various administrative matters including a question as to why Mr Thomas and Councillor John were not being called.

71. We do not consider that this amounts to the unreasonable conduct of the proceedings. A party is always at liberty to ultimately decide not to call a witness. This would have been apparent to the claimant when statements were exchanged on 31 December 2020 and which was a directions order which had not been subject to delay. There is no property in a witness; the Claimant would always have been able to call Councillor John as her own witness if she wanted to do so (or indeed Mr Thomas). She is a solicitor herself and by this time was fully represented by experienced solicitors and counsel. She could at that point have made an application to rely late on a statement from Councillor John or apply for a witness order for him if she had wished to do so. There were no applications in this regard made

to the tribunal. The respondent would not have been obliged to answer a question as to why they had not called Councillor John or Mr Thomas as that was their privileged information. We do not consider that it was a tactic that deprived the claimant the opportunity of adducing evidence from these witnesses. She knew they were not the respondent's witnesses as of 31 December 2020. She was being advised by experienced professionals. She had the opportunity to make whatever application she so wished.

72. The claimant also complains that the respondent's counsel in closing submissions falsely claimed that she had said at the case management hearing that she would be calling Councillor John but had seemingly decided not to call him but nonetheless rely on his correspondence. Mr Bunting said at the time of the liability hearing he thought he had read that somewhere but he may have it wrong. As discussed at the costs hearing, the case management agenda filed by the claimant's solicitors prior to the October hearing anticipated that the claimant would be calling Councillor John as a witness. We accept that it is likely that is where Mr Bunting got that information from and lay behind his submission. We do not consider it meets the threshold for being the unreasonable conduct of the proceedings.

Minutes

73. The claimant complains that the bundle was cluttered with minutes she had not asked for but that the respondent had, in preparing the bundle, identified they had been included at her request. To the best the tribunal could understand it there had been a request for some minutes but not all that were provided and put in the bundle. We would not find this amounts to unreasonable conduct in itself; it is the type of thing that crops up in litigation. But it was again a knock on effect of the delays in disclosure and bundle preparation because it left the claimant with so much to wade through with time pressures upon her.

Staff Handbook

74. The claimant complains that the Grounds of Resistance at paragraph 22 said: "The Claimant's employment was subject to a number of documents including the Respondent's Staff Handbook, which includes the Respondent's disciplinary, grievance, stress management, sickness absence and anti-harassment and bullying policy". She says that this was asserted right up until the start of the final hearing but during the hearing it was conceded that an Employee Handbook had never been adopted by the Respondent, nor were there any employment policies in place during the Claimant's employment.

75. To the tribunal's best recollection, the evidence at the hearing was that the employee handbook and associated documents had not been adopted, but that the draft documents were there on a shelf in the office which potentially could have been referred to in their draft and unadopted format. Grounds of Resistance are filed relatively early in proceedings. It is not unusual for granular detail on a particular individual evidential point to be

somewhat different by the time a case has come out of the hearing process. Otherwise, there would be no point in having case management orders and hearings and cases would be decided on the pleadings. These things happen fairly often in litigation and happen to both claimants and respondents pleadings. Litigation is not a counsel of perfection. It also has to be placed within the context of how central the point is (or is not) to the main points to be decided in the case. This was not a central plank of the case. We do not consider this example amounted to the unreasonable conduct of the proceedings.

Internal Grievance conclusions

76. The claimant complains that paragraph 35 of the Grounds of Resistance said: "The Respondent investigated the Claimant's grievance and having considered all the evidence determined that the grievance was without merit and should not be upheld. The Claimant was provided with a copy of the investigation report." The Claimant says that neither version of the final report concluded that her grievance was unfounded and that she was not given a copy at the time. As mentioned above, she says she had one version on 1 February 2019 and the second version on 17 December 2020.

77. We agree that none of the versions of the internal grievance investigation concluded that the grievance was without merit and should not be upheld. It was also not correct to say the claimant received the reports at the time they were produced. The grounds of resistance were incorrect in this regard. It was a more important point than the staff handbook and we have been given no explanation why it happened. We would consider it to meet the threshold of being unreasonable, however, it is not something that, by itself, we would use our discretion to award costs for, because we have no indication at all that it actually caused the Claimant to incur a particular element of costs. By itself it would not be appropriate to result in the Claimant being awarded all her claimed costs.

Omission of Claimant documents

78. The claimant complains that some of her documents were omitted resulting in the need for a supplementary bundle to be prepared and filed.

79. In fact, some of the documents were in the bundle but had been disconnected from the main document they were annexed to. There is never a perfect solution to that scenario as the options are to put documents in twice (which makes the bundle unnecessarily long), move the annexes and place them in the chronological bundle (which helps with the chronological understanding of the case but can leave the appendices unclear), or leave them as annexes (where they are then not in the chronological documents), or remove them and place a schedule of annexes in the bundle setting out where the attachments can now be found in the bundle. The supplemental bundle also arose out of the disputes and confusion about the differing versions of the grievance and resignation letters. Again, if there had been earlier disclosure of documents by the respondent and earlier production of the bundle the

parties would have been able to sort these things out and therefore this relates back to the findings of unreasonable conduct we have already made in this regard.

Outstanding disclosure

80. The claimant complains that the respondent still had outstanding disclosure by the time of the liability hearing. That was not identified to us and no application was made about it at the liability hearing. We therefore cannot find on what is before us that there was unreasonable conduct of the proceedings based on this point.

Discretion to award costs?

81. We have found that there was unreasonable conduct on the part of the respondent in undertaking disclosure and the preparation of the bundle. The claimant is seeking the vast majority of the legal costs she incurred in this case. The amount claim does not necessarily have to be causally linked to the unreasonable conduct but that question of causation can be a relevant consideration in the broad discretion that we have.

82. We do not exercise our discretion to award the claimant the costs that she is seeking. Our reasoning for this is similar to that set out above in relation to rule 76(1)(b). This was litigation where both parties had measures of success and measures of loss. The respondent was entitled to defend the claim and successfully defended the protected disclosure, equal pay, and breach of contract (wages complaints). The case always needed to go to hearing and preparation for that hearing would always have needed to be done. To award the claimant the full costs she is seeking would be penalising the respondent out of proportion to the unreasonable conduct in question. The claimant pursues her costs application on the basis that the respondent had an unreasonable mindset throughout the proceedings that coloured everything that they did, including as the claimant would term it, the clinical removal of pivotal documents and the manipulation of the proceedings. That no doubt reflects how the claimant views things but it simply does not reflect the findings of fact that we made in this case.

83. We do consider it appropriate to award the claimant a sum that broadly reflects the additional work that her solicitors would have undertaken. The disclosure would always have had to be reviewed whenever it was provided, and the bundle checked with correspondence passing about it about it. A substantial element of the work done in checking disclosure, checking bundles, cross referencing bundles, and pulling together the supplementary bundle was also done personally by the claimant rather than her legal team. This is understandable as she was seeking to keep her costs down, but the rules do not allow us to make both a preparation time order and a costs order, and it is a costs order that the claimant has applied for.

84. But there would have been additional work done by the solicitors in corresponding with the claimant, with the respondent, and with counsel and in conferring with the claimant about the situation and developments. The disputes about, for example, the two versions of the grievance letter

and the resignation letter probably sucked up a fair amount of time in circumstances in which it probably would not have done if it had all come to light at an earlier time. We do not have a breakdown of the solicitors time spent activity by activity. All we have is the spreadsheet at [89] which shows the claimant incurring £322.50 fees in November 2020, £976.50 in December 2020 and £3418.50 in January 2021. But not all of that work will have been due to the unreasonable conduct in question. The run up to a hearing is a busy time in any event, and much of the work (such as reviewing disclosure etc) would have had to be done some time. We also have no evidence before us to say that the issues gave rise to additional counsel's fees rather than being part of the brief free and refreshers charged in any event. Doing the best we can on the information available we decide to award the claimant the sum of £1000 plus VAT to reflect, very broadly, the additional solicitors costs it is likely the claimant incurred through the late disclosure and impact upon the bundle preparation and final hearing preparation. In relation to the pleading point about the internal grievance investigation, we have already said we can see no basis on which to say that by itself caused the claimant to incur costs so we make no additional award in that regard.

Rule 76(2) – breach of an order or practice direction

85. Again we have a wide reaching discretion to award costs for breach of a tribunal order. Employment Judges deal day in and day out both in hearings and in interlocutory paperwork with complaints about breaches of tribunal orders and they do not generally result in an award of costs. Much of the time, particularly where both parties are represented, they are encouraged to work together to get things back on track. It is a moot question whether the lack of compliance with the agreed case management orders of May 2020 were in fact "orders" where they had only been approved by a Judge. That point is better looked at under 76(1)(a). In relation to EJ Moore's orders there was a lack of provision of copy documents by 5 November 2020, a draft index to be agreed by 26 November 2020 and a hearing bundle by 10 December 2020. In terms of exercising our discretion to award costs and if so in what amount, we would undertake the same analysis with the same outcome as set out above in relation to rule 76(1)(a).

Employment Judge R Harfield

Date 7 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 8 February 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche