EMPLOYMENT TRIBUNALS

Claimant: **Ms LR**
Respondents: **(1) Westminster City Council**
(2) Mr CC
(3) Mr AH

London Central (CVP) **27 March 2023**

Employment Judge Goodman
Mr R. Baber
Mr T. Robinson

Representation:
Claimant: **Laura Collignon, counsel**
Respondents: **Simon Harding, counsel**

RESERVED JUDGMENT

The claimant is ordered to pay the respondents' costs in an amount to be determined on detailed assessment.

REASONS

1. The claimant brought claims of unfair and wrongful dismissal, victimisation, sexual harassment, discrimination because of religion and belief, and disability discrimination against her employer and named individuals. Claims against eight of the individuals were dismissed at preliminary hearings, along with claims of age discrimination and protected disclosure dismissal. The remaining respondents are jointly represented. The tribunal dismissed all the claims following a seven day final hearing.

2. The reserved judgment with reasons was sent to the parties on 2 November 2022. On 24 November the respondent applied for costs under rule 76. This hearing was listed to decide that application.

3. The respondent had prepared a bundle for this hearing containing the pleadings and orders, their costs reports and bills, and some inter partes correspondence about costs, together wth the Land Registry entry for the claimant's [ropoerty.. The claimant added to this medical reports from Dr N

Yergar, consultant psychiatrist, of 8 and 14 February and 23 March 2023, a letter from a senior employment adviser supporting NHS patients' mental health, who had worked with the claimant since her suspension from work by the respondent, and recent correspondence from the GP, letters showing the deaths of two uncles in 2021 (one from Covid, the other murdered in Bangladesh) some more correspondence about the merits of the claim with a view to settlement from September 2022).

4. The claimant had prepared a witness statement of means and was briefly cross examined about her property.

Relevant Law

5. In the employment tribunal, unlike the courts, costs do not follow the event. Instead, there is a discretion to make an order when certain conditions are fulfilled.

6. Also unlike the courts, an employment tribunal can take account of the paying party's ability to pay, both when deciding whether to make an order, and when deciding how much – rule 84. On ability to pay, **Vaughan v London Borough of Lewisham and others UKEAT/0533/12** confirms an award may be made where a claimant might be able to pay in due course even if her present financial circumstances prevent it.

7. Rule 76 sets out the threshold conditions:

> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
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> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
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> (b) any claim or response had no reasonable prospect of success.

8. The amount of a costs order is governed by rule 78. The tribunal may order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; or may order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles.

9. **Abaya v Leeds Teaching Hospital NHS Trust UKEAT/O258/16/PA** confirms that this is a threefold test: first to ask whether one of the preconditions has been established, second to consider whether to exercise discretion to make an award, and third, how much to award

10. The purpose of a costs order is to compensate the receiving party for costs incurred, not to punish the paying party: **Lodwick v Southwark London Borough Council (2004) ICR 884.**

11. On what is meant by the words setting the threshold conditions, A**-G v Barker (2000) 1FLR 759** explains the terms *vexatious* and *abusive*:

> "The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

12. What is *unreasonable* will usually include having no reasonable prospect of success, or behaving in other ways that are unreasonable. A litigant in person should not always be expected to understand matters with the objectivity and knowledge of a professional representative, but litigants in person can still behave unreasonably – **AQ v Holden (2012) IRLR 648. 166**.

13. The amount of any award should be related to the "nature gravity and effect" of the conduct, though it is not necessary to relate specific costs to specific acts – **McPherson v BNP Paribas (2004) EWCA Civ 569; Barnsley MBC v Yerrakalva (2011) EWCA Civ 1255.**

14. When awarding costs to be subject to detailed assessment, the tribunal can cap the amount of costs - **Kuwait Oil Company via Al-Tarkait (2021) ICR 718**, or can order costs are paid for a defined period - **Swissport Limited v Exley 2017 ICR 1288**.

History of Proceedings

15. The claimant was dismissed in November 2020. She presented her first claim in June 2020, and the second claim in 21st May 2021. Case management hearings listed for August and October 2021 were postponed at the claimant's request so she could get legal advice. An open preliminary hearing to consider the respondents' applications to strike out claims or oppose deposit orders was listed for 15th December 2021. The claimant made two unsuccessful applications to postpone this hearing indefinitely. As a concession to uncertificated symptoms, it was converted to a remote hearing, but the claimant did not attend and produced a GP certificate saying she had a cough and sore throat. At the hearing Employment Judge Stout found the claimant had chosen not to attend, considered the deposit order applications in the claimant's absence, subject to evidence of means being provided later, and gave the claimant a strike out warning to show cause by 31st December why claims against all individual respondents other than CC and AH should not

be struck out. She made restricted reporting and temporary anonymity orders for four named respondents.

16. Employment Judge Stout did not make a deposit order on the unfair dismissal claim because it was "replete with allegations of unreasonable conduct in relation to the procedure adopted", and the procedure had taken a very long time. She did find that the claims of direct discrimination because of age, sex, race religion or belief, and disability were unfocused and weak, and should be the subject of deposit orders once there was evidence of means. The claimant asked for reconsideration and an extension of time. On 6th January 2022 Employment Judge Stout made deposit orders in the discrimination claims, the dismissal for protected disclosure, or unfair dismissal for any reason other than conduct. The claimant made further applications to reconsider. She also asked Judge Stout to recuse herself. She asked for the next open preliminary hearing listed on the 18th of March be postponed so she could obtain medication for a recent diagnosis of ADHD. These applications were refused.

17. The claimant attended the hearing on the 18th March. She explained she had not understood what the deposit orders meant, and her time to pay the deposits was extended by a further 14 days. The respondents' application to strike out the claims was refused on the basis that it was still possible to have a fair hearing, despite the claimant's failures to comply with orders. Judge Stout made unless orders that the claimant should supply her schedule of loss, specific disclosure of documents relating to loss, and identify the disability and its impact, and disclose her medical records. The claimant did not pay the deposits, so those claims fell away. She did comply with the unless orders. She made a rule 50 anonymity order for the claimant.

18. There was a further open preliminary hearing on the 6th May. Employment Judge Stout declined to make a deposit order or strike out the now clarified disability claims. She made orders about the claimant's use of recordings, including transcripts, and directed the claimant to identify her specific disclosure requests. The claimant applied to rescind the restricted reported orders and anonymisation orders made in respect of CC, AH and another. It was explained that must be left to the final hearing tribunal.

19. The judge drew up the list of issues at that hearing. The first respondent sent the claimant the substantial bundle of documents. The claimant then supplied further particulars of claim. Judge Stout revised the list of issues to incorporate those particulars.

20. Now the issues for the final hearing were clear, in August the respondent wrote a long letter explaining to the claimant why they considered her claims had no reasonable prospect of success and invited her to withdraw her claims so as to avoid their application for costs should she not succeed.

21. The claimant instructed solicitors, who wrote inviting an offer to settle of

£10,000. The respondent was not interested.

22. The hearing was due to start on 21st September. The claimant applied to postpone the hearing. A case management hearing was listed to consider that, and progress with preparation for hearing. At the hearing on the 12th September Employment Judge Stout refused the application to postpone. She made unless orders for the service of witness statements. The claimant was still seeking specific disclosure, and the judge made orders directing the respondent to set out what searches they had made for particular documents and for the claimant to update her schedule of loss.

23. The claimant applied to reconsider the decision not to postpone. That was refused. On the first hearing day, the claimant applied to postpone the start on the basis of difficulty with eyesight – she had damaged a contact lens and was awaiting updated prescription spectacles. That was managed by reversing the order in which witnesses would be called to give her more time to prepare. An application for 34 classes of additional documents was refused, particularly as the claimant had had opportunities to inspect collections of documents over periods up to two years but had cancelled the inspection appointment without rearranging it.

24. Procedure at the final hearing is set out in the judgement and reasons sent to the parties on the 2nd November. The claimant was unrepresented, and underprepared, which made slow progress at times, but it was possible to conclude the hearing within the time allocation. Such difficulties with unrepresented litigants are not uncommon.

25. Our conclusion from this review is that the claimant was slow to accept the orders and direction of the tribunal, appeared reluctant to prepare for hearings, and made repeated postponement applications. Some of this could be attributed to human nature – avoiding difficult tasks, for example, reading the disclosed documents, or sending a schedule of loss - and the tendency to put off the evil day, where an unwelcome decision might be made, by making postponement applications on flimsy grounds. Tribunals see this not infrequently. If the claimant has ADHD that could be a component, say in working through sequences of documents, even when the subject matter was very familiar to her, but it is not easy to understand how attention deficit leads to enormously detailed critiques and explanations. These factors led to more case management hearings than is usual even in complex discrimination claims, where one case management hearing and one open hearing, if there is a strike out application, are routine. The final hearing was held later than otherwise because the first case management hearing was twice postponed so the claimant could get advice (though she did not). It was however possible to hear the case in the time allocated for the final hearing without postponement.

Ability to Pay

26. After being dismissed by the respondent the claimant found work in the

NHS as a management accountant at £42,000 per annum, but the offer was withdrawn when they heard from the first respondent that she had been dismissed. In September 2021 she got a job as a schools financial advisor at around £40,000 per annum. This ended on 25th July 2022 when she failed probation due to poor work performance. She no longer applies for jobs because she is concerned that she cannot obtain a satisfactory reference from either former employer. She lives with her parents(as she did hen employed by the first respondent) in their council flat. Her father works part time as a cook and pays the rent. The claimant pays for food, fuel, and makes contributions of £50 to council tax, £64 for water, £30 for travel, £36 mobile phone, £63 for landline phone, Sky and broadband, and puts aside £157 per month for contact lenses and the dentist, and general expenditure of £350-600 on her credit card. Her mother is a housewife and in poor health. The claimant helps look after her grandparents, doing their shopping twice a week.

27. The claimant owns a flat in Croydon which she bought in 2014 for £189,000. There is no mortgage. Her rental income is £980 per month. She pays service charge, insurance and for repairs, leaving her £584. She told the tribunal (it is not mentioned in the witness statement) that other members of the family had helped with money for the flat, and that her share was probably about half. There is nothing on the Land Registry entry recording other interests. She has about £2,000 savings. These figures come from the witness statement- there are no bills or other documents.

Other Personal Factors

28. The claimant said she had been badly affected in her preparation by her uncles' deaths in 2021, and in summer of 2022 by the death of a friend.

29. In the final judgement the tribunal recorded that a diagnosis of ADHD had been made by Dr N. Yergar, on the basis of a consultation by zoom on 1st March 2022, following which he claimant was to start a trial of medication, but there was no further contact (or treatment) until after the judgment and costs application. The claimant contacted Dr Yergar in January 2023, saying she would like to start treatment, explaining the difficulties she had with the tribunal proceedings. In a follow up appointment on 23rd March 2023, also virtual, she explained she had suffered side effects of the initial medication Concerta X. She had been switched to Methylphenidate IR but (Dr Yergar recorded) she had not collected the prescription from the pharmacy, or started the medication. The current plan is that the claimant will contact Dr Yergar's clinic when she is ready to start medication.

30. The claimant also now suffers pain and numbness in the hands and left leg. Her GP has diagnosed Reynauds syndrome (capillary damage) and attributes the pain to stress.

31. The employment adviser explains in her report that It had been difficult to work with the claimant as she had "poor organisational skills and would

frequently send me masses of paperwork without having put them into any order. She struggled to meet deadlines imposed by her union rep, employer or myself but often expected me to respond to a tight schedule. She wrote long and overly complex statements I found it difficult to follow. She had offered advice about how to make these more accessible. She recalls the claimant's fluctuations in mood during suspension from work, and two bouts of COVID. Although not herself a clinician, she recognises the claimant's behaviour as typical of others with ADHD.

Submissions

Respondent

32. The respondent applies for costs on the basis that the claimant has acted unreasonably and vexatiously in bringing the proceedings, or part thereof, or in its conduct of proceedings, alternatively the claims had no reasonable prospect of success. It is argued that the unfair dismissal and wrongful dismissal claims were seriously misconceived, and bringing and continuing the claims was unreasonable. The respondent argued that the claimant waited a year before making any allegation against CC, and only after the complaint had been made about her by AH, CC and another. It was a serious allegation, of sexual assault, and she had involved the police. The tribunal had found both that it was misleading, and that the claimant knew that. The claimant had not retracted her allegation, but doubled down on it by her reports to CC's professional body and AH's new employer. The tribunal was reminded that the protected actin the victimisation claim was found in bad faith. She had used allegations of assault against her colleagues as a sword rather than a shield and had used that sword: "frequently and combatively". She repeated her allegations in the grounds of appeal to the EAT. The fact that she knew the allegations to be untrue made her claims "obviously vexatious and unreasonable". It was said that she had set out to destroy two others in order to defend herself, and a tribunal should therefore grant costs, even in a discrimination case. There was a societal interest in preventing claims brought vindictively.

33. On conduct, the respondent argues that her reluctance to engage with proceedings meant it took longer to come to court. She had asked for more time to pay a deposit and then not paid it. She had applied to postpone almost every hearing, even the first day of trial. She would do nothing for a long period and then send a flurry of letters to the respondent.
34. The schedule of loss is said to have been hyper inflated and unrealistic (over £200,000 for injury to feelings split between the different heads of claim). She insisted on material being added to the bundle even while complaining it was too large (as Judge Stout had commented).

35. On whether the conduct of proceedings was reasonable, the respondents argue that they have tried throughout to discourage the continuation of meritless claims by seeking a strike out, seeking deposit orders, and (by letter 18th August 2022) an offer to drop hands, costs then standing at around £30,000. The respondents point to there being 5 preliminary

hearings, that the claimant has applied on more than one occasion to have both preliminary and final hearings postponed, failed to attend preliminary hearings, has been unhelpful in correspondence, and objected to the anonymity orders being made for AH and CC. Her claims against 8 named respondents had been struck out.

36. Responded argues that the claimant has ability to pay. Her description of her circumstances reads as that of a victim, not a perpetrator. The claimant has brought any difficulty on herself.

37. The responded seeks a detailed assessment. The bill amounts to £68,250 in total. This is based on an extremely modest (for central London) hourly rate of £85, as conducted by a local authority solicitor. Counsel's fees are £16,460.

Claimant

38. The claimant had prepared a usefully thorough analysis of the law. It was argued that respondent in its application lacked precision, and was not prepared to say in what way any conduct caused costs to be incurred. We were reminded that costs are compensatory not punitive.

39. Some of the claimant's shortcomings in preparing for hearing and in conducting the hearing were common to litigants in person and in addition the claimant had ADHD. Her conduct did not meet the threshold of unreasonable.

40. As for prospects of success, it was argued that there were never *no* prospects of success in the claim. Employment Judge Stout had declined to make a deposit order on the unfair dismissal claim. The discrimination claims against a AH and CC had gone ahead. We were reminded that what is clear after the event may not have been clear in the dust of battle. The tribunal has the benefit of hindsight.

41. If we considered the threshold had been met, we were invited to exercise discretion not to make an order. The claimant was impeded by her ADHD, the bereavements, struggling with the new job, a downturn in her father's finances, and worried that if a judgement debt was registered against her because of the costs award, that would impede her ability to qualify as an accountant. It had been possible to complete the final hearing.

42. On ability to pay, we were invited to consider how small were the household's streams of income. The claimant was now struggling to find employment. She might find it difficult to get a mortgage on the flat so as to pay any sum ordered. We were invited to set a cap if an award was to exceed the summary limit of £20,000.

43. Invited by the tribunal to comment on whether applying to rescind the anonymity orders for CC and AH suggested vindictiveness, the claimant pointed out that she was no longer seeking to have these overturned.

Discussion and Conclusion

44. The tribunal considered carefully whether we did benefit from hindsight. It is true that the discrimination claims were not struck out against the remaining respondents, but current case law means that it is very difficult to strike out an Equality Act claim at a preliminary stage unless it is clear that it will not succeed even if the claimant can prove what is set out in the claim form, or if there are incontrovertible contemporary documents to disprove what the claimant asserts. The clear direction is that of there is any despite of fact, the evidence must be heard and tested. That can mean that weak cases can go through to final hearing. Much depends on what the claimant, rather than the judge at an interlocutory hearing, knows about the facts on which he or she relies.

45. This was an unusual sexual harassment case, in that the tribunal was supplied with an enormous amount of contemporary documents in the form of the messages and texts exchanged throughout the period of alleged harassment. We reviewed them carefully and had concluded that neither AH nor CC was a predator. The claimant had made the running. She only made her allegation defensively during investigation of their complaint about her. Their complaint about her was, in our finding, justified. Hers about them was not. If the claimant had been honest with herself she would have known this all along. She must have known how very serious these allegations were. Those she accused could have lost their jobs and would have found it difficult to find another one. The fact that she only made the allegation when being investigated about the respondents complaint was telling, especially when she had gone on trying to make friendly contact after the alleged assault.

46. We considered what part ADHD may have played. We concluded that if the claimant did have ADHD, nothing about that condition, to our knowledge, affects a person's judgement, or their knowledge of what is true and false. ADHD might have slowed down her ability to read through the messages and texts to remind herself what she had been doing and saying at the time, but cannot have obscured her own memory of events the year before her colleagues lodged their grievances about her. When the respondent got IT to find them all the messages, they discovered that the claimant's account had been misleadingly selective. The first tribunal claim was presented very soon after she made her allegation of sexual misconduct, but more than a year after it was said to have occurred. By the time of the second claim she had seen all the material on which the respondent relied, as well as having her own knowledge of what had occurred.

47. The same applied, but subject to different case law, with respect to the argument about the unfair dismissal claim not having been struck out, so it must have had prospects of success. Employment Judge Stout, deciding not to strike out as a preliminary issue, identified that the process had taken a long time, and the claimant had made many allegations of poor process. When we heard the evidence on this, we identified that delay not down to COVID was attributable to the claimant wanting her own

grievance to be decided first, and to her own requests for postponements. We were also able to deal with the detail of the process. These were facts known to the claimant from the very beginning, if not to Employment Judge Stout at a preliminary hearing.

48. Thus we find that the claimant crosses the rule 76 threshold of bringing the claim unreasonably. We considered whether we should make an order to pay costs. She knew, even if the tribunal did not, until it heard the evidence, that it was not true that CC was a sexual predator. She also knew that making false allegations and vindictive behaviour (contact with the new employer and the professional body) were reasons for the dismissal. Bringing proceedings against them personally for harassment (not just the employer for the dismissal) was unreasonable knowing what she knew, and, had she reread them, knowing what the contemporary documents showed. It seemed to us that her actions stemmed from jealousy and anger at rejection of her attempts at romantic relationships.

49. It also seemed to us that the claimant's objection to anonymity orders for CC and AH, whether at the interlocutory stages or at final hearing, was vindictive behaviour of similar character to her pre-dismissal contacts with AH's new employer and CC's professional body. It was an attempt to damage them further. Wanting their names to be published in connection with an allegation of sexual misconduct which she knew to be untrue suggests a misuse of the proceedings, an element of abusive behaviour.

50. While it is important that Equality Act cases are taken seriously and heard, to control a social evil, it is also important that it is not misused. Given the claimant's own knowledge of what had happened, her claims against the named respondents were misuse.

51. We considered the claimant's personal circumstances. She has been unwell with Covid and now pain and numbness. She has had the usual difficulties of a litigant in person mastering unfamiliar processes. She was isolated – she wanted hearings in person so that her parents would not be aware of proceedings if held remotely, though her father accompanied her to the hearing today. There has been financial constraint. On professional qualification, we note that she was at a very early stage, and has in any case lost skills and ground through changing jobs and now being unemployed. Nor do we have evidence on how the relevant professional body would view a judgment debt if paid. We did not consider these were grounds for not making an order.

52. Turning to conduct of proceedings, we would not order full costs on the basis of the claimant's conduct of proceedings, although if she had not met the rule 76 threshold on bringing the claim, we would have considered making ordering payment of some costs for some of the conduct of it. It puzzles employment tribunals that from time to time claimants bring claims but then seem reluctant to have them decided. There is no doubt that the repeated postponement applications, and additional hearings because the claimant had not attended, or wanted matters reconsidered, or had not

complied with orders, were unnecessary, and undoubtedly increased the costs incurred by the respondent. Determined case management meant that they were decided.

53. We considered whether to order summary assessment. On the one hand this would not do justice to the respondent, which had through no fault of its own had to incur considerable costs defending claims which on our finding the claimant knew to be without merit. On the other, we could see that for three years the claimant has had a difficult time, through her own making or not. She has to find a way to get back into the labour market - perhaps a period of agency work could provide her an opportunity to improve her employment history and move on - and she has suffered anxiety through legal proceedings. We considered making an order limited to £20,000 on summary assessment so as to bring these proceedings to an end and enable her to focus on life after litigation. A detailed assessment will prolong the proceedings by the need to draw a detailed bill, settle and reply to points in dispute, and so on. We decided however that making a summary order was unlikely to bring proceedings to an end. On past form, the claimant would apply for reconsideration or an appeal. She has already notified an appeal, with a very detailed annotation of the judgement, which will mean proceedings last a year or more longer. She will be able to bring the detailed assessment process to a halt by making an offer to pay costs, and might be able to negotiate a reduction. As we have no confidence that an order of summary assessment *would* help the claimant move on, it would be an injustice to the respondent to limit costs payable to them on these grounds.

54. We could not identify any reasons for applying a cap on basis of means. The claimant's two bedroom flat in Croydon was purchased in 2014. At a rough estimate it may now be worth £250,000. Her assertion that other family are entitled to some of the money only emerged on cross-examination, and she was reluctant to identify the proportion. Even if the market value is still only £189,000, and even if we believe that there is an unwritten constructive trust to account to other family members for half the money, that still leaves her with £95,000, which is enough to cover the respondent's full bill, if allowed on assessment. It is true that the claimant relies on income from the property to live on while she is unemployed, but if she did have to sell now, there would be money to spare to live on until back in employment. She is not without earning capacity. She may not have to sell, as she may be able to obtain a loan, or the respondent may be prepared to defer payment and register a charge against eventual sale of the property.

55. Nor did we consider it right to allocate a proportion to the Equality Act claims rather than the unfair and wrongful dismissal, on grounds that a hearing of those alone would have been shorter and simpler. The claimant knew the respondent's reasons for dismissal were justified. Nor were we able to identify any reason to limit the period for which costs should be payable.

56. For these reasons, but Clement is ordered to pay the respondents' costs, their bill to be the subject of a detailed assessment by an employment judge. Further directions for that will be given by separate order.

Employment Judge Goodman
Dated: 28 Marc 2023

JUDGMENT AND REASONS SENT to the PARTIES ON

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. 28/03/2023

FOR THE TRIBUNAL OFFICE