Case Numbers: 1405833/2020
1406331/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondents**
Mrs Nura Aabe	Happy Care Limited (1)
	Mr Axmed Carab (2)
	Mr Ahmed Ibrahim (3)

RESERVED COSTS JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HEARD AT Bristol

ON 20 January 2023
and 15 February 2023
(discussion in chambers)

BEFORE: Employment Judge C H O'Rourke
Mrs D England
Dr J Miller

Representation:

Claimant: Ms N Gyane – counsel
Respondent: Ms S Chan - counsel

ORDER

The Respondents are, jointly and severally, ordered to pay the Claimant's costs in the sum to be ordered following Detailed Assessment.

REASONS

1. The Claimant seeks her costs in respect of bringing her claims. Her application of 13 January 2023 was heard on 20 January 2023, at which hearing both parties' counsel made written and oral submissions and judgment was reserved.

2. Following discussion by the Tribunal on 15 February 2023, the judgment was further reserved. This was because the Claimant's solicitors had provided submissions and documents to the Tribunal after office hours on the day before the Tribunal met and which therefore the Respondents would not have had the opportunity to consider, or respond to, prior to the Tribunal's discussion. Accordingly, the Respondents were given leave to make such response to those submissions, as advised, within seven days of receipt of such instruction from the Tribunal.

3. Unfortunately, despite the Tribunal giving that instruction on 15 February 2023, it was not actioned by the Tribunal staff until 14 March, with the Respondents then providing their response on 23 March 2023.

4. General Background. Reference is made to the Tribunal's reserved judgment on liability, of 14 December 2022, following the hearing of 21 to 25 November 2022, which found as follows:

   4.1 The First Respondent (R1):

   a. Automatically unfairly dismissed the Claimant and subjected her to detriment on the grounds of her having made protected disclosures;

   b. Directly discriminated against her on grounds of sex and religion;

   c. Sexually harassed her;

   d. Breached her contract of employment by failing to pay her pay in lieu of notice;

   e. Made unlawful deductions from her wages;

   f. Failed to provide her with a statement of terms and conditions of employment compliant with s.1 of the Employment Rights Act 1996; and

   g. Breached the ACAS Code of Practice on disciplinary and grievance procedures.

   4.2 The Second and Third Respondents (directors and shareholders of the First Respondent) (R2 & 3):

   a. Subjected the Claimant to detriment on the grounds of her having made a protected disclosure; and

   b. Directly discriminated against her on grounds of sex and religion.

c. Sexually harassed her.

4.3 The following claims were dismissed:

a. Indirect discrimination on grounds of religion;

b. Victimisation;

c. Breach of contract in relation to non-compliance with the First Respondent's complaints and disciplinary procedure (having been withdrawn by the Claimant); and

d. Arrears of holiday pay (having been withdrawn by the Claimant).

5. Remedy. The Claimant was awarded total remedy of £73,474.70.

6. Previous Costs Order. A costs order has already been made against the Respondents, on 1 December 2022, for £3037.80, in respect of the need to adjourn the first day of the substantive hearing.

The Application for Costs

7. The Claimant makes an application for her costs on the basis that the Respondents have acted vexatiously, abusively, disruptively, or otherwise unreasonably in the way in which the proceedings have been conducted. She also contends that there are aspects of the Respondents' response to the claims that had no reasonable prospects of success. She provided a bundle of documents relevant to the costs issue (numbered 'C1, 2 etc.).

8. The application is summarised as follows:

8.1 Numerous adverse factual and legal findings were made against the Respondents.

8.2 They advanced arguments, knowing them to be false and '*peddled an extraordinary, damaging and malicious reason for dismissal which was entirely false.'*

8.3 They adduced false evidence at the hearing and '*created documents after the event to support their case and concealed documents that may have assisted the Claimant's case'*, with, the Claimant considered, the sole purpose of attempting to '*mislead the Tribunal and discredit the Claimant'*. The Respondents also repeatedly failed to provide disclosure of documents, despite several requests, increasing costs for the Claimant.

8.4 By both their behaviour in the hearing and in bringing members of the Somali community to the hearing, they were attempting to intimidate and 'shame' the Claimant.

8.5 The Respondents' and/or their solicitors' failure and delays in finalising and providing a properly constituted and legible copy of the bundle also increased costs.

8.6 The Respondent were afforded opportunity to settle these proceedings, through Judicial Mediation and costs warnings were issued, with which they did not engage.

8.7 The Claimant considers that she should be entitled to recover the entirety of her costs, which, subject to Detailed Assessment, stand at approximately £67,000 (inclusive of VAT).

8.8 As stated above, the Claimant's solicitors provided a response to the Respondent's email of 8 February 2023 (as set out in paragraph 7.7 below), on 14 February 2023, after office hours. It asserted that R2 & 3 had not been transparent in their disclosure to the Tribunal as to the means available to them to pay any costs order against them. *Inter alia*, it was asserted that they had not disclosed that they owned property abroad; that they had not disclosed all their bank accounts; that they had undisclosed income from other sources and that they were paid more by R1 than they were admitting. The Claimant also submitted that R1 has a policy of indemnity insurance in place which includes payment of compensation awards. It was further asserted that the Respondents were continuing to conduct the litigation disruptively and unreasonably.

Response to Application

9. The Respondents resist the application, on the following grounds:

9.1 An order for costs is 'the exception rather than the rule'.

9.2 The Tribunal should be conscious that costs have already been awarded to the Claimant, in respect of the need to adjourn the first day of the main hearing (in the sum of £3037.80).

9.3 No deposit order was made in this case, indicating therefore that the Response had reasonable prospects of success.

9.4 In respect of the Tribunal's legal findings in respect of the Claimant having employment status, it was not unreasonable of the Respondent to contest this matter. They had already made the concession that the Claimant was a 'worker' and the factors determining employment status

were not 'all one way', in what can be an exceedingly difficult question for tribunals. The position was certainly not unarguable.

9.5 Even if it were only found that the Claimant was a worker, she could still have brought her discrimination and protected disclosure detriment claims.

9.6 The Respondents' email responses to the Claimant's costs warnings and settlement overtures were polite and professional.

9.7 Following the costs hearing, the Respondents provided details of their income and outgoings, with filed accounts for R1 and evidence of earnings/dividends by R2 & 3, supported by bank statements [email 8 February 2023], indicating minimal disposable income.

9.8 Following the Tribunal granting the Respondents leave to respond further to the Claimant's late submissions of 14 February 2023, they did so by email of 23 March 2023. In summary, that submission stated the following:

9.8.1 It was admitted that the Respondents had failed to disclose an additional bank account of R1, but that was due to an administrative error by their solicitors and statements were now attached.
9.8.2 R2 & 3 denied ownership of any foreign property.
9.8.3 While R2 and R3 had received money from other companies, this was not income, but by way of repayment to them of loans they had made. R2 is no longer a director or shareholder of the relevant company.
9.8.4 Other sums they have received are relatively minor amounts.
9.8.5 R2 & 3 receive monthly salaries of £4000 from R1 and any supplemental amounts shown are by way of repayment of expenses, or payments made by them on R1's behalf, or bank-to-bank transfers '*designed to cover day to day business needs.'*
9.8.6 As to indemnity insurance cover for this litigation, R1's insurers had, to date, failed to confirm that cover would apply in this case. In any event, cover for legal costs is limited to £50,000 (as stated in a document from their insurers from August 2020) and which sum is already exhausted by the Remedy award.

The Rules

10. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").

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

12. Under Rule 78(1) a costs order may – (a) 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; (b) 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 …"

13. Under Rule 84, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

The Relevant Case Law

14. I have either been referred to or have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; FDA and Others v Bhardwaj [2022] EAT 97; Vaughan v London Borough of Lewisham [2013] IRLR 713 EAT; Brooks v Nottingham University Hospitals NHS Trust [2019] WLUK 271, UKEAT/0246/18; NPower Yorkshire Ltd v Daley EAT/0842/04; Radia v Jefferies International Ltd [2020] IRLR 431 EAT.

15. Arrowsmith v Nottingham Trent University [2011] ICR 159 CA; Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Kovacs v Queen Mary and Westfield College [2002] IRLR 414 CA; [Indemnity Costs]; Shield Automotive Ltd v Greig UKEATS/0024/10; Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06; Single Homeless Project v Abu [2013] UKEAT/0519/12; [VAT].

The Relevant Legal Principles

16. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "*It is nevertheless a very important feature of the employment*

jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had*." However, the Tribunal should look at the matter in the round rather than dissecting various parts of the claim and the costs application and compartmentalising it. There is no need for the Tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School, in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.

17. In FDA and Others v Bhardwaj it was held that: "*The citation of authority in applications for costs must be strictly constrained to those which genuinely establish a point of principle not apparent from the words of the rules themselves. Costs awards do not operate by precedent. They are fact specific and to be determined as summarily as possible. The expectation must be that nothing more than the words of the relevant rule require addressing before the ET exercises its discretion on the particular facts of the case. When the threshold requirements for an order for costs are met under rule 76(1)(a) and/or (b) of the 2013 ET rules, it by no means follows that, because it may make a costs order, it will proceed to do so. It has a discretion. The discretion is very broad, and it would require a clear error of principle to justify an appeal, whether for or against an order for costs. In a case involving multiple issues, it will often be unrealistic to hive off some issues from others when addressing whether costs should be awarded and, if so, in what amount. Most cases stand or fall as a whole, even though in many cases there will be some issues on which the losing party is successful or partly successful. Issue-based costs orders are on the whole to be avoided*.'

18. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "*Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the*

Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"

19. In Brooks v Nottingham University Hospitals NHS Trust, the EAT confirmed that dealing with an application for costs requires a two-stage process. The first is whether in all the circumstances the claimant has conducted the proceedings unreasonably. If so, the second stage is to ask whether the tribunal should exercise its discretion in favour of the claiming party, having regard to all the circumstances. In the case of reasonable prospects of success, the first stage is whether that ground is made out, and if it is, then to apply the exercise of discretion as to whether or not to award costs. When exercising that discretion at the second stage a tribunal can take account of reliance upon positive legal advice which had been received by the unsuccessful claimant, but positive professional advice will not necessarily insulate a claimant against a costs award. In the absence of any evidence as to the actual advice given, and the basis on which that advice was provided, it would be reasonable for a tribunal to assume that a legally represented claimant has been properly advised as to the risks and weaknesses of his or her case, and of the potential for an adverse costs order. Where privilege has been waived, such evidence would ordinarily need to explain the instructions given, the context in which the advice was provided, and the evidence considered.

20. There is considerable overlap between the two grounds in Rules 76(1)(a) and (b). This was analysed by HHJ Auerbach in Radia: [61] '*It is well established that the first question for a tribunal considering a costs application is whether the cost threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay. [62] … There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a) that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did. [63] in this regard, the remarks in earlier authorities about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure are equally applicable to this replacement threshold test*

in the 2013 Rules. See in particular Vaughan at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion. [64] this means that, in practice, where costs are sought both through the Rule 76(1)(a) and Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, are they, reasonably, to have known or appreciated that? [65] I should say something further about how the Employment Tribunal should approach an application seeking the whole costs of the litigation, on the basis that the claim "had no reasonable prospects of success" from the outset. It should first, at Stage I, consider whether that was, objectively, the position, when the claim was begun. If so, then at Stage 2 the tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering 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. However, it may have regard to any evidence or information that is available to it when it considers these questions and which casts light on what was or could reasonably, have been known, at the start of the litigation.'

21. With regard to costs warning letters, while it is good practice to warn a party of the weakness of his or her case where the other party may be minded to apply for costs should they succeed at the end of the case, the failure to do so will not, as a matter of law, render it unjust to make a costs order even against an unrepresented party. In Vaughan v London Borough of Lewisham, the EAT upheld a substantial order for costs against the claimant, notwithstanding the absence of a costs warning letter, and in doing so had regard to the likely effect such a letter would have had. Underhill P pointed out that the claimant had never suggested that she would have discontinued her claim if she had received such a letter, and, even if she had, such an assertion would not have been credible. The claimant was "*convinced, albeit without any rational or evidential basis, that she was the victim of a conspiracy and of a serious injustice, and it seems to us highly unlikely that a letter from the respondents, however well crafted, would have caused the scales to fall from her eyes*."

22. The EAT held in Growcott v Glaze Auto Ltd UKEAT/0419/11/SM that costs can be awarded if a reasonable offer is made to settle and a hopeless case is still pursued.

23. The same approach is to be taken in circumstances where the respondent has not applied for a deposit order. Underhill P in Vaughan also acknowledged that respondents do not always, for understandable practical reasons, seek such an order even where they are faced with weak claims, so that failure to do so "*is not necessarily a recognition of the arguability of the claim*." On the facts of Vaughan, neither the failure to seek a deposit order nor the failure otherwise to warn the claimant of the hopelessness of her claims was "*cogent evidence that those claims had in fact any reasonable prospect of success" and neither failure was "a sufficient reason for withholding an order for costs which was otherwise justified*".

24. Where a party has been lying this will not of itself necessarily result in a costs award being made, although it is one factor that needs to be considered. As per Rimer LJ in Arrowsmith v Nottingham Trent University it will always be necessary for the tribunal to examine the context, and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct. Nonetheless, to put forward a case in an untruthful way is to act unreasonably, see Kapoor v Governing Body of Barnhill Community High School.

25. Ability to Pay: With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu. The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay see Arrowsmith v Nottingham Trent University, which upheld a costs order against a claimant of very limited means and per Rimer LJ "*her circumstances may well improve and no doubt she hopes that they will*." One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means. The authorities also make it clear that the amount which the paying party might be ordered to pay after assessment does not need to be a sum which he or she could pay outright from savings or current earnings. In Vaughan v LB of Newham the paying party was out of work and had no liquid or capital assets and a costs order was made which was more than twice her gross earnings at the date of dismissal. Underhill P declined to overturn that order on appeal because despite her limited financial circumstances, there was evidence that she would be successful in obtaining some further employment. Per Underhill P: "*The question of affordability does not have to be decided once and for all by reference to the party's means at the moment the order falls to be made*" and the questions of what a party could realistically pay over a reasonable period "*are very open-ended, and we see nothing wrong in principle in the tribunal setting the cap at a level which gives the respondent the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the*

discretion: accordingly, a nice estimate of what can be afforded is not essential."

26. Insofar as it does have regard to the paying party's ability to pay, the tribunal should have regard to the whole means of that party's ability to pay, see Shield Automotive Ltd v Greig (per Lady Smith obiter). This includes considering capital within a person's means, which will often be represented by property or other investments which are not as flexible as cash, but which should not be ignored.

27. Under Rule 78(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000. Under Rule 78(1)(b) a costs order may order the paying party to pay an amount to be determined by way of detailed assessment, carried out either by the County Court or by an Employment Judge applying the principles of the Civil Procedure Rules 1998. Where the receiving party does not regard the limit of £20,000 to be sufficient an order for summary assessment should not be made in those circumstances, see Kovacs v Queen Mary and Westfield College.

Conclusion

28. Unreasonable Conduct. Have the Respondents conducted the proceedings unreasonably? We consider that in the circumstances of this case, they have, for the following reasons:

28.1 As set out by the Claimant in her application and subsequent submissions, the Respondents advanced arguments, knowing them to be false and '*peddled an extraordinary, damaging and malicious reason for dismissal which was entirely false.'* As set out in the liability Judgment, R2 & 3 concocted an allegation that the Claimant had withdrawn care provision from a female disabled client because that client and her live-in partner are lesbians and then accordingly dismissed her for that apparent act of homophobia. As we have found, this was a lie that was not only used to attempt to justify the Claimant's dismissal, but was sustained through to the final hearing, including the calling, at the last minute, of an additional witness, R2's wife, in a desperate (and failed) attempt to bolster it. We consider, applying Arrowsmith and Kapoor that such conduct on the Respondents' part can only be described as unreasonable. The lie went to the core of much of the Claimant's case, to include her claim of automatic unfair dismissal, formed a large part of the detriments she claimed in respect of her claim of protected disclosure and at least an aspect of her claim of direct religious discrimination.

28.2 The Respondents' conduct of the litigation was also unreasonable, in the following respects:

28.2.1 As found by the Tribunal, they adduced false and fabricated documentation at the Hearing (paragraphs 14.b.iii & iv liability judgment). In particular, despite being directly ordered by the Tribunal, on the first day of the substantive hearing (having failed to comply with a previous order) to disclose the metadata of various disputed documents, in order that the truth of their date of origin could be established, requiring compliance, or if not, '*a detailed explanation of why this is not possible, and a chronology of the efforts made to obtain it.'*, they failed to adequately comply. R3 asserted, in a supplementary statement that he had only been aware of the original request in June 2022 (despite it being made in January 2022 [C5]) and that by that time the computer on which he had produced the documents had misfunctioned, in March 2021 and been recycled. This did not explain, however, how the contested documents had since then been produced for inclusion in the bundle and when questioned on this point, he said that they had '*been saved on a folder that I had created'*, thus indicating that in fact the documents' properties were obtainable, but for reasons of their own, the Respondents did not wish to disclose this information. We agree with the Claimant's submission that this can have been done only with the intention to '*mislead the Tribunal and discredit the Claimant'*.

28.2.2 R2 and 3's evidence was found to be, on several occasions, evasive and to contain multiple '*glaring inconsistencies'* (14.a & b.i & ii of the liability judgment).

28.2.3 The Claimant has provided evidence of correspondence indicating unreasonable delay by the Respondents in complying with Tribunal orders, or lack of engagement by them, which can only have increased the costs incurred by the Claimant. These delays include provision of the schedule of loss [C2 – by that point two weeks' late]; repeated failures to comply with correspondence [C8] (and repeated apologies by Rs' solicitors for that failure [example C9]); three-week to two-month delays in responses, requiring chasing-up [C11, 12 & 30]; continued failure to agree the contents of the bundle, resulting in a strike-out warning, in respect of non-compliance with orders and failure to actively pursue [C14, 17, 38 & 44] and notice by the Tribunal that a costs order could be considered at the conclusion of the final hearing [C21];

28.2.4 The Claimant's solicitors warned as to costs, in respect of the issue of employment status, in January 2022 [C5&8].

28.2.5 The Respondents declined, in December 2021, to further participate in judicial mediation, but only at a point where the Claimant had already drawn up, as requested, a without prejudice schedule of loss, for mediation purposes [C3].

28.2.6 It is the case that during the Hearing, R2 & 3 had to be reprimanded by the Tribunal for their disrespectful behaviour (giggling, talking and smiling to each other) during the Claimant's evidence. While the Claimant also contends that the Respondents attempted to intimidate or 'shame' her by bringing along various members of the Somali community to the Hearing, we had no evidence before us to conclude that such persons were in attendance for that purpose (none of whom behaved in any adverse way before us) and we bear in mind the public nature of such hearings.

29. Reasonable Prospects of Success. While the Claimant contended that the Respondent should not have contested the issue as to her employment status, as their response on that point had no reasonable prospects of success, we consider, conversely, as argued by the Respondents that such issues are almost never straightforward and that, bearing in mind the lack of documentation and the Claimant's status as a director and shareholder of R1 that there was at least an arguable case on their part as to her not being an employee. They did subsequently concede, albeit belatedly, at the October 2022 case management hearing (so, about six weeks in advance of the final hearing) [C56] that the Claimant was a worker. However, in respect of their resistance to the claims of automatic unfair dismissal, large elements of the claim for protected disclosure and an aspect of the religious discrimination claim, the Respondents will have known from the outset that, as their resistance to these claims was largely based on an untruth on their part about the reason for dismissal and was supported by fabricated documents that such arguments will have had no reasonable prospects of success, unless, of course, the Tribunal failed to detect such deception, which it did not. Applying Radia, therefore, the Respondents knew that those elements of their defence to the claim had no reasonable prospects of success, and it would be entirely contrary to the interests of justice to excuse them from this state of knowledge due to their reliance on false evidence.

30. Discretion as to making of an Order. We considered whether or not, bearing in mind the Tribunal's wide discretion in such matter (Npower Yorkshire) and applying the guidance in Monaghan and Brooks that the costs threshold

having been reached that it is appropriate in this case to make a costs order and we do so for the following reasons:

30.1 While noting that 'costs are the exception rather than the rule' (Gee), this is, to our mind, one of those exceptional cases where a costs order is appropriate.

30.2 While the authorities referred to above indicate that the telling of untruths does not automatically lead to justifying a costs order, the level of deceit in this case, going to the core of a large part of the claim, supported by fabricated documents and sustained throughout the progress of this claim and the final hearing, must merit an award of costs.

30.3 The Respondents had access to professional legal advice throughout this matter and therefore it must be assumed that they withheld the truth of their position even from their own advisors. Had the truth been disclosed to the advisors then the only option for the Respondents would have been to settle the Claimant's claims, to which as is clear from the correspondence, she was willing to do, but which option they dismissed. Early settlement would clearly have greatly reduced the Claimant's costs.

30.4 It cannot be in the interests of justice to permit litigants to defend against claims that they know are not well-founded, but instead hoping to mislead the Tribunal by use of false evidence, without facing the costs consequences of their actions.

30.5 The Respondents' contention that as no deposit order was applied for, it can be assumed that their response had reasonable prospects of success, might have merits, if that response was based on the truth (or at least their perception of it), but as we have found, it was not. We also note, applying Vaughan that the failure to apply for a deposit order does not necessarily invalidate a subsequent costs application. This would be particularly so the case in these circumstances, bearing in mind the relative complexity of the claims and the highly disputed facts, thus rendering it difficult for any Tribunal to come to a view on the merits of a deposit order, without effectively hearing the case in its entirety.

31. Ability to Pay. We deal with this matter relatively briefly, finding, on balance that the Respondents will have the ability to pay such amount of costs as is determined following detailed assessment and we do so for the following reasons:

31.1 We note the evidence that has been provided by the Respondents on this point. However, in view of our previous findings as to their

credibility and unwillingness to make full (or honest) disclosure of documents, we see no reason why the documents they now disclose should be considered complete or persuasive, particularly bearing in mind the Claimant's solicitors' criticism of them.

31.2 Applying Arrowsmith, it is clear that R2 & 3 have been relatively successful businessmen and there is, therefore, no reason to assume that, if they cannot pay any such order now, they will not be able to do in the future.

31.3 The Claimant will not be 'able to get blood from a stone' and if the Respondents contend that the final costs ordered are beyond their means then the Claimant will need to pursue such payment through the County Court. That process will permit for detailed enforcement proceedings, to include the full disclosure of evidence as to means and if necessary oral evidence, thus ensuring that the Respondents' circumstances can be fully taken into account, in determining what amounts can legitimately be paid, over, potentially, a considerable period of time.

Order

32. Accordingly, the Respondents are joint and severally ordered to pay the entirety of Claimant's costs, subject to detailed assessment.

33. The matter will now be transferred to the appropriate Employment Judge, for such assessment, from whom further directions will follow, in due course.

Employment Judge C H O'Rourke
Date: 19 April 2023

Judgment and Reasons sent to Parties: 2 May 2023

FOR THE TRIBUNAL OFFICE