EMPLOYMENT TRIBUNALS

Claimant:	**Ms H O'Keefe**
1st Respondent ("R1"):	**Gold Panda Limited**
2nd Respondent ("R2"):	**Mrs S Panwar**
3rd Respondent ("R3"):	**Pandeli Limited**
Heard at:	**Birmingham by CVP**
On:	**11 May 2023**
Before:	**Employment Judge Flood** **Mrs I Fox** **Mr K Palmer**

Representation

No attendance by the parties. Decision on the papers (as agreed) on the basis of previous oral submissions and subsequent written submissions.

JUDGMENT ON COSTS APPLICATION

1. The claimant's application for costs against R1 and R3 succeeds. The claimant is awarded and R1 and R3 are jointly and severally liable to pay the sum of **£8,370.98** towards the legal costs of the claimant.
2. The claimant's application for costs against R2 is dismissed.

REASONS

Background and relevant facts

1. By a claim presented on 22 October 2021 the claimant brought complaints of unfair dismissal; breach of contract (notice pay and failure to pay pension contributions); statutory redundancy pay; unlawful deduction from wages (outstanding holiday pay);failure to provide written reasons for dismissal; failure to inform and consult under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') and direct age discrimination.

2. On the final day of a four day hearing, the Tribunal gave oral judgment allowing the claimant's complaints for unfair dismissal, breach of contract, unlawful deduction from wages and failure to inform and consult but dismissing the claimant's complaints for direct age discrimination, redundancy pay and a failure to provide written reasons for dismissal and provided its reasons.

3. Ms Hampshire made an application for costs on behalf of the claimant at the conclusion of the hearing under rule 76(1) (a) of the Employment Tribunals (Rules of Procedure) 2013 ('ET Rules'). The Tribunal heard brief oral submissions from both parties and the hearing was adjourned for a reserved decision on the application for costs to be made not before 5 May 2023. The respondent was ordered to provide information on means (and the claimant to provide a further breakdown of the costs claimed) within 21 days. The parties were given a further opportunity to make submissions within 14 further days.

4. On 19 April 2023 the claimant submitted a costs schedule and costs application bundle. On 20 April 2023 the respondents submitted a schedule of income and expenditure in respect of R2 and a letter dated 19 April 2023 from Cobley Desborough, Chartered Accountants regarding the solvency of R1 and R3. The claimant submitted further written submissions on its costs application on 23 April 2023 and the respondents submitted their written submissions on the claimant's costs application on 25 April 2023. All of those documents were before the tribunal, together with the written reasons for the Tribunal's judgment sent to the parties on 5 May 2023 ('Reasons').

The Issues

5. The issues which needed to be determined were:

   5.1. Have the respondents acted unreasonably in the way the proceedings have been conducted (within rule 76 (1) (a) of the ET Rules?

   5.2. Should, in the Tribunal's discretion, a costs order be made?

   5.3. If so, how much should be awarded?

The relevant law

6. References to rules below are to rules under **Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**

7. Rule 74 provides:

> (*1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.*
>
> *(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—*
>
> *(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;….*

8. Rule 75 provides:

(1) A costs order is an order that a party ("the paying party") make a payment to—
(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative

9. Rule 76 provides:

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success; or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

10. Rule 77 provides:

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

11. The relevant part of rule 78 provides:

"*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;…."

12. Rule 84 provides:

"*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."*

13. A Tribunal must ask whether a party's conduct falls within rule 76(1)(a). If so, the Tribunal must then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party. It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of any award payable

14. **Gee v Shell UK Limited [2003] IRLR 82.** The Court of Appeal confirmed that

that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.

15. **McPherson v BNP Paribas [2004] ICR 1398**. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "*nature, gravity and effect*" of a party's unreasonable conduct.

16. **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420** - "*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.*"

17. **Oliver Salinas v Bear Stearns International Holdings UKEAT/0596/04/ DM.** The question of whether a costs order was exceptional or unusual was not significant, so long as the proper statutory tests were applied.

18. **Vaughan v London Borough of Lewisham & Ors UKEAT/0533/12/SM –** it was not wrong in principle to make a costs order even though no deposit order had been made and the respondents had made a substantial offer of settlement (on an avowedly "commercial" basis). Nor was it wrong in principle to make an award which the claimant could not in her present financial circumstances afford to pay where the Tribunal had formed the view that she might be able to meet it in due course.

19. **Jilley v Birmingham and Solihull Mental Health NHS Trust UKEAT/0584/06/DA,** - if a Tribunal decided not to take account of the paying party's ability to pay, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision to award costs or on the amount of costs, and explain why. There may be cases where for good reasons ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means. There are also circumstances, for example, where a claimant is completely unrepresented, where, in the face of an application for costs, the tribunal ought to raise the issue of means itself before making an order: **Doyle v North West London Hospitals NHS Trust [2012] All ER (D) 205 (Jun) (UKEAT/0271/110).**

20. The respondent referred us to the authorities of **Dyer v Secretary of State for Employment** where it was concluded that whether conduct is unreasonable is a matter of fact for the tribunal; unreasonableness has its ordinary meaning and should not be taken by tribunals to be the equivalent of vexatious. This was accepted by the Employment Appeal Tribunal in **National Oil Well Varco v Van der Ruit UKEATS/0006/14/JW.** We were also referred to **McPherson v BNP Paribas [2004] ICR 1398 [40], [41**] where the Court of Appeal held that (the then) r14(1) did not require a party to prove that unreasonable conduct caused particular costs to be incurred, but required the tribunal to have regard to the nature, gravity, and effect of the unreasonable conduct when determine whether to exercise their discretion to award costs. The Court of Appeal further held, it is not punitive or impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. Further reference was

made to **Sunuva Ltd v Martin UKEAT/0174/17** where at [22] the Employment Appeal Tribunal expressed the view that this is still the position under the ET Rules.

21. The respondent also referred the Tribunal to the following provisions of the Companies Act 2006 ('CA'):

174 Duty to exercise reasonable care, skill, and diligence
(1) A director of a company must exercise reasonable care, skill, and diligence.
(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with–
(a) the general knowledge, skill and experience that may reasonably be expected of a person
carrying out the functions carried out by the director in relation to the company, and
(b) the general knowledge, skill and experience that the director has.

s1000 Power to strike off company not carrying on business or in operation
(1) If the registrar has reasonable cause to believe that a company is not carrying on business or in operation, the registrar may send to the company a communication inquiring whether the company is carrying on business or in operation.
(2) If the registrar does not within 14 days of sending the communication receive any answer to it, the registrar must within 14 days after the expiration of that period send to the company a second communication referring to the first communication, and stating–
(a) that no answer to it has been received, and
(b) that if an answer is not received to the second communication within 14 days from its date, a notice will be published in the Gazette with a view to striking the company's name off the register.

s1004(1)(d)
(1) An application under section 1003 (application for voluntary striking off) on behalf of a company must not be made if, at any time in the previous three months, the company has …
(d) engaged in any other activity, except one which is –
(i) necessary or expedient for the purpose of making an application under that section, or deciding whether to do so,
(ii) necessary or expedient for the purpose of concluding the affairs of the company,
(iii) necessary or expedient for the purpose of complying with any statutory requirement,
or
(iv) specified by the Secretary of State by order for the purposes of this sub-paragraph.

Conclusion

22. The claimant submits that R1 acted unreasonably in its attempts to be voluntarily struck off the Companies House register, knowing that it was a respondent to these proceedings, and that if struck off and dissolved, C's claim against R1 would be unable to continue. She points out that R1's first application for

voluntary strike off was published on 1 December 2021, a week after R1 and R2 filed ET3s. She suggests that this is an apparent breach of S1004 CA, namely "*engaging in any other activity*" not falling within the permitted exemptions, but in any event unreasonable behaviour. It is also suggested that the two further voluntary applications (which were opposed by the claimant) were further examples of unreasonable behaviour whilst the tribunal proceedings are ongoing. It is pointed out that this behaviour caused the claimant to incur additional costs associated with opposition to the strike off applications and unnecessary stress to the claimant.

23. The claimant submits that R3 acted unreasonably in failing to object to its compulsory strike off, despite knowing it was a respondent to these proceedings and failing to notify the claimant of the compulsory strike off to allow her to oppose it. It is submitted that it is inconceivable that R3 did not know of the compulsory strike off until the afternoon of 29 March 2023, because R3 would have been notified twice before a notice was posted in the Gazette on 27 December 2022. That notice provided that R3 would be struck off no less than two months after the date of the notice, leaving R3 with the impression that it would be struck off in February 2023.

24. It is pointed out that R2 and Mr A Panwar were the two sole directors of R3, and as such would have been aware of the compulsory strike off order, and ought to have acted upon this knowledge to preserve the status of R3 given it was involved in active litigation. It is also suggested that the respondents acted unreasonably in failing to reveal R3's identity until 8 April 2022 and then applying to have R3 removed from the proceedings in its skeleton argument submitted in advance of the hearing.

25. The claimant suggests that the attempts to remove R2 as a party to the proceedings at the hearing held on 8 April 2022 were also unreasonable. The claimant also submitted that the respondents made untrue representations during the tribunal hearing in particular in relation to its intentions around the transfer of the claimant's employment and its attempts to comply with information and consultation obligations. It was suggested that the position of the respondents relating to the TUPE transfer constantly shifted and that this unreasonable behaviour made it more difficult for the claimant to prepare her case. It is also alleged that the respondents failed to genuinely engage in settlement discussions, offering sums significantly lower than those shown in a counter schedule of loss with no explanation; consistently refusing to move on low offers and refusing to engage in a genuine manner. It further suggests that the refusal of the respondents to agree to the inclusion of a term on the judgment that R1 would not dissipate assets until the payment of the claimant's remedy was unreasonable conduct.

26. The claimant sought an order for costs in the sum of £18,756.47 (breakdown of costs shown in the Claimant's Schedule of Costs). This includes all the claimant's legal cost occurred before the first day of the hearing, 27 March 2023; legal costs incurred from 27 March 2023 to date; disbursements being Counsel's fees; and the anticipated costs in respect to restoring and winding up R3.

27. The respondent submits that the costs application against R2 should be dismissed in its entirety as no successful claim was found against her. It states that none of the behaviour in relation to the striking off of R1 or R3 was unreasonable, alleging that R1 was well within its rights to submit an application,

and the employment tribunal has no jurisdiction to determine whether R1 breached its obligations under the CA. It suggests that the strike off application had no effect on the proceedings, as all parties were present to give evidence and R3 was ultimately found to be jointly and severally liable. It submits that costs incurred opposing voluntary strike off of R1 were not incurred in the course of employment tribunal proceedings and should not be awarded. It is suggested that R3 never claimed it was unaware of the strike off application until 29 March 2023, but had simply been made aware on this date that R3 was to be dissolved. It suggests that neither R3 or R2 were under a duty to notify the claimant or the tribunal of any notices, or to oppose them as suggested by the claimant, but that the claimant and her representatives had been appropriately notified by the relevant notice in the Gazette on 27 December 2022. It is suggested that a prudent and reasonable representative should have checked information publicly available on Companies House.

28. The respondents dispute that its witnesses gave untrue evidence or made untrue representations, but were stating their version of events to the tribunal-based in some instances on misunderstanding by the respondent, in particular of the effect and consequences of TUPE. It is denied that applying to remove respondents is unreasonable conduct, given particularly that all claims against R2 were dismissed and contending there was no duty on R1 or R2 to apply to add R3, and this was subsequently done by the claimant. The respondent deny that they conducted settlement negotiations unreasonably, but always believed they had reasonable prospects of defending this case.

29. The respondents dispute some elements of the cost schedule. It states that it is unclear whether all the costs claimed by virtue of the damages based agreement are properly incurred. It questions why costs incurred from 27 March 2023 have been claimed separately (even though this includes the hearing itself). It challenges the inclusion of costs related to striking off matters and suggests it is excessive to claim for the costs of having two legal representatives attend the final hearing alongside counsel.

Have the tests within Rules 76 (1) (a) been met?

30. The initial question we considered is whether any of the respondents acted unreasonably in the way that the proceedings have been conducted under rule 76(1)(a). We accepted the submissions of the claimant summarised at paragraphs 22 and 23 above and conclude that R1 and R3 acted unreasonably in relation to their actions around compulsory strike off in relation these proceedings. Both R1 and R3 were parties to an ongoing legal claim, and armed with that knowledge to then make an applications for R1 to be struck off, or fail to object to the striking off of R3, we were satisfied amounted to unreasonable behaviour in "*the way that the proceedings (or part) have been conducted*" within the meaning of rule 76 (1) (a). This was irrespective of any obligations under the CA. Even though the claimant became aware of the applications in relation to R1 and took appropriate action, and even though the applications in relation to R3 were a matter of public record, we conclude that:

30.1. R1 acted unreasonably in applying to strike off R1 on or before 1 December 2021 (and on two other occasions) when proceedings against that entity in the Employment Tribunal were underway.

30.2. R3 acted unreasonably in failing to provide an objection to the compulsory strike off of R3 on or after 27 December 2022 when proceedings against

that entity in the Employment Tribunal were underway and with a hearing in those proceedings imminent.

30.3. R3 acted unreasonably in failing to notify the claimant of the proposal to strike off R3 on or around 27 December 2022 when proceedings were underway and a hearing imminent.

30.4. R3 acted unreasonably in not notifying the claimant (and the Tribunal) of the imminent dissolution of R3 until the evening of 29 March 2023 once all evidence and submissions in the final hearing were complete

31. We have taken into account the guidance of the authorities above and have taken the ordinary meaning of the word 'unreasonable' and find as a fact that the above conduct was unreasonable in the context of ongoing Tribunal proceedings. No evidence has been adduced as to the reason why these steps were taken (or not taken) and also why R1 and R3 apparently had no assets at the time the steps were taken. R1, and then from April 2021, R3 were operating the business of the Marlbank Inn, a business which appears to have still been in operation at the time the steps were taken. R1 and R3 have provided no explanation as to what entity this business was now being operated out of and if it had been transferred elsewhere why this was the case and what happened to it. R2, the director of both R1 and R3 is still receiving an income and has disclosed no information about where this income is derived from. Given these gaps in information provided, we have inferred that the steps set out above were taken to potentially avoid liability for any successful claims made by the claimant against R1 and R3. The findings of fact made at paragraph 14.16 of the Reasons remind us of a previous occasion when R1, finding itself in financial difficulties and unable to meet its liabilities, took the decision to transfer its business to R3 to continue operating the Marlbank Inn. The respondent states that the respondents are "*well within their rights*" to take such actions and whilst that may be the case, this does not mean it cannot be found to be unreasonable conduct in the context of these proceedings. We find it was unreasonable to take the steps taken (or fail to take) them within the meaning of Rule 76 (1) (a) of the Rules.

32. However we accept the submissions of the respondent in respect of the matters submitted by the claimant summarised at paragraph 25 above. It was not unreasonable for R2 to attempt to remove herself as respondent. The only live claim against R2 was the discrimination claim (which was also brought against the other two respondents) and in any event was ultimately unsuccessful. We were not satisfied that the representations made by the respondents during the hearing (around the TUPE transfer) amounted to unreasonable conduct and accept the respondent's contention that much of what was said was the result of misunderstanding or lack of awareness. We also are unable to find that the actions of the respondents during the settlement discussions amounted to unreasonable conduct. Although the claimant was successful in the majority of her complaints, she was unsuccessful in the discrimination complaint and other matters. The respondents were entitled to defend the claim and their failures to reach an agreed settlement on these matters was not unreasonable conduct. Similarly, failing to agree to the addition of a term regarding non dissipation of assets in the judgment was not unreasonable conduct. The Tribunal has no power to make such an order so such a term would have to be the result of a settlement between the parties.

Should a Costs Order be made?

33. Having found that the conduct of R1 and R3 falls within rule 76 (1) (a) the Tribunal had to then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against them.

34. In considering whether a costs order should be made, we conclude that this behaviour, in particular its actions in relation to R3 (given what was known about R1) caused significant unnecessary cost and has also led to a state of affairs which means the claimant may be unable to enforce the awards that have been made. Therefore the submission that these actions did not prejudice the hearing or claim are not correct. There was no good reason why the impending strike off of R3 was not disclosed to the claimant or the tribunal until the evening off 29 March 2023, after all evidence and submissions had been heard. The claimant may have chosen to take action or reduced her exposure to costs has she been informed of the situation with R3 in a timely fashion. Even absent a legal duty to disclose this information, given the history in relation to the corporate applications, and both parties obligations as set out in rule 2 of the ET Rules to assist the Tribunal to further the overriding objective and to cooperate generally with each other and with the tribunal, we have concluded it is appropriate to exercise our discretion to award costs.

How much should be awarded?

35. In terms of how much should be awarded by way of a costs order against the respondent, we have considered the Costs Schedule submitted by the claimant and the submissions made by the respondent. As per the Costs Schedule we have split our considerations into four sections. Firstly we conclude that the costs incurred before 27 March 2023 under the terms of a Damages Based Agreement were reasonably and necessarily incurred. However we also take into account that the claimant was not successful in all the complaints made in her claim and accordingly, in our discretion we have reduced the costs award in this element by one third. We do this on the basis that approximately one third of the claimant's overall claim was her complaint of age discrimination (with the TUPE complaints and the unfair dismissal (and associated breach of contract/unlawful deductions complaints) forming the two other main elements. We therefore award the sum of £5294.98 for this element.

36. Secondly we looked at the costs claimed which are said to have been incurred post 27 March 2023. We accepted the submissions of the respondent that there were some elements of these costs that were perhaps incurred over and above what was strictly required. We have therefore discounted the costs of attendance at the hearing of the two legal representatives attendance at the hearing (on the basis that counsel was representing and was able to take a full note). We include the sum of £40 plus VAT in respect of the time incurred by E Margetts attending on the claimant's representative and compiling documents on 29 March 2023 but not the other matters of attendance at the hearing. We do not make any award in respect of the time incurred by T Nyoka which was predominantly for attendance at the hearing and dealing with matters not directly associated with the proceedings. In relation to time incurred by M Michaloudis we award costs in relation to time incurred other than in respect of the following entries relating to the Companies House matters:

    Email MM1 to Counsel Re: Your Communication with Companies House, Ref: NUM2459045X-Gold `Panda Limited - £30.00

Email RFB LLP to Companies House opposing strike off of Pandeli Limited - £150.00

Email MM1 to Jacob Tidy Re: Pandeli Limited strike off - £30.00

Email MM1 to Counsel Re: Strike off of Pandeli Limited - £30.00

Email MM1 to Jacob Tidy Re: Strike off and Pandeli - £30.00.

We have also decided not to award sums for time incurred in relation to the claimant's reconsideration application, which was in large part unsuccessful. This means the sum of £930 plus VAT remains as potentially part of the award which when added to the £40 plus VAT amounts to £970 plus VAT. We have added VAT to this sum (£1164) and then applied the same reduction as above in respect of the unsuccessful discrimination complaint, making this element being awarded at £776.

37. Thirdly in respect of disbursements, we conclude that Counsel's fees should be awarded subject to the same third discount in relation to the discrimination complaint, leaving an award of £2300. Fourthly we have determined that it is not just and equitable and have decided in our discretion not to award any sums in respect of the anticipated costs of restoring R3 to the register and winding it up. Whilst we have every sympathy that the claimant finds herself in and no doubt costs will be incurred, these have yet to be incurred and we are unable to conclude that they are sufficiently related to the proceedings before the Employment Tribunal.

38. We have considered the information provided to us about the means of R1 and R3 in determining how much should be awarded. There was scant information indeed about the position of R1 and R3 and in particular what has led to R3 in particular finding itself in the position it is and what has happened to the business of the Marlbank Inn. The means of R2 whilst not directly relevant, are something we have considered, given that R2 is the director and at all times the controlling mind of R1 and R3. She has assets and ongoing income which may mean that funds are available for the payment of any awards made against companies she remains a director of. On this basis even if R1 and R3 are unable to be in a position to meet the award at this time, those entities might be able to meet it in due course (as per the guidance in Vaughan above).

39. For these reasons, we make the Order in favour of the claimant and order that the sum of £8,370.98 is paid by R1 and R3 on the basis of joint and several liability.

Employment Judge Flood

12 May 2023