EMPLOYMENT TRIBUNALS

Claimant: **Ms H E Biggs**

Respondent: **A Bilborough & Co. Ltd**

Heard at: **East London Hearing Centre**

On: **23 January and 23 March 2023**

Before: **Employment Judge Jones**
Ms M Long

Representation:

The Tribunal had written representations from both parties

JUDGMENT

1) ***The Respondents are ordered to pay towards the costs incurred by the Claimant in her case.***

2) ***The Respondents will be notified of a date for a detailed assessment of costs hearing to be conducted by an Employment Judge in accordance with the Civil Procedure Rules 1998.***

REASONS

1. The liability judgment in this matter was promulgated to the parties on 18 June 2020. This was the Claimant's application for costs arising from having to bring these claims and because of the way in which the Respondent conducted their defence to her claim. The Claimant has only claimed costs incurred in securing Counsel's attendance at hearings and Counsel's assistance in drafting documents. That included preparation and attendance at the remedy hearing on 21 and 22 May 2022. She is not claiming for her own time or for any solicitor's fees that she has also incurred in this litigation.

2. The Claimant's application for costs was made in two letters dated 17 June

2022, which were accompanied with relevant documents. The Respondent defended the application in its letter dated 16 September 2022 and the Claimant wrote again to the Tribunal on 14 October 2022. The Claimant's application was that the Tribunal should make an order for costs, by way of detailed assessment or in the alternative, by way of summary assessment, under Rule 78 of the Employment Tribunal Rules of Procedure 2013. She enclosed a Schedule of her Counsel's fees totalling just over £95,000. The Claimant submitted that the Respondent had been unreasonable or abusive in the conduct of the litigation and that in relation to the equal pay claim, they adopted a position that had no reasonable prospects of success.

3. The delay in producing this judgment has been caused by difficulty in arranging the hearing between the two members of the Tribunal to consider the Claimant's application, including the serious ill-health of one member of the Tribunal.

4. The Tribunal considered the following law in coming to its decision on the respondent application.

Law

5. As the Respondent submitted, the starting point is the basic principle that the Employment Tribunals do not automatically order one party to pay the costs which the other party has incurred in bringing or defending a claim. Costs do not follow the event in the employment tribunal. There are a number of important exceptions to the basic principle.

6. The relevant power to award costs is set out in Rule 76(1) of the Employment Tribunals Rules of Procedure 2013. Its states as follows:

76.- When a costs order or a preparation time order may or shall be made
(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, when 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
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> (b) any claim or response had no reasonable prospect of success; or
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> (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

subsection (1)(a) does not relate to conduct before the proceedings were brought. Prior conduct can be relevant to an assessment of whether it was reasonable to bring or defend the claim, but it cannot be treated as the act of vexatiousness or unreasonableness upon which an award of costs can be founded.

7. As stated in the case of *Beynon v Scadden* [1999] IRLR 700*, EAT*

> *"The proper test for the employment tribunal was not whether its order accorded with this authority or that but, ultimately … whether it was just to have exercised as it did the power conferred upon it by the rule … [The EAT] must not consider whether we would have ordered as the [employment judge] did but instead ask ourselves whether the employment tribunal took into account matters which it should not have done or failed to take into account that which it should have done or whether in some other way it came to a conclusion to which no employment tribunal, properly directing itself, could have arrived.*
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> *A party's conduct may straddle one or more of the adverbs used above and it will not be necessary to labour the distinctions between the different words."*

8. The Tribunal was aware that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the party ordered to pay the costs.

9. In the discrimination case of *Yerrakalva v Barnsley MBC* [2012] ICR 420, which was a case in which the application for costs had been made against the claimant; the Court of Appeal held per Mummery LJ that *'the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and 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.'*

10. In *Power v Panasonic UK Limited EAT 0439/04* Clarke J described the exercise to be undertaken by the Tribunal as a two-stage exercise. First, the tribunal must ask itself whether the paying party has acted unreasonably, vexatiously, abusively, disruptively, or brought a claim that was misconceived. If so, in the second stage the tribunal must consider whether to exercise its discretion by awarding costs against that party.

11. Conduct is '*vexatious'* for the purposes of rule 76 if one party brings a hopeless claim/puts forward a hopeless defence to a claim, not with any expectation of recovering compensation but out of spite to harass the other party or for some other improper motive (*ET Marler Ltd v Robertson* [1974] ICR 72). It was also in this case that Sir Hugh Griffiths said:

> *"Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants when they took up arms"*

12. Abusive and disruptive conduct was not defined in the rules. *Harvey* states that abusively bringing or conducting of proceedings will be close to vexatiousness in many cases and connotes the use of tribunal litigation for something other than, or in a way other than, its intended use within the judicial system.

13. Unreasonable conduct is defined by reference to its ordinary meaning and is separate from and wider than the concept of '*vexatious'* conduct *(Dyer v Secretary of State for Employment UKEAT/183/83 (unreported)).*

14. The reasonable prospect of success limb in rule 76 was addressed in the case of *Opalkova v Acquire Care Ltd* [2021] 8 WLUK 265 in which HH J Tayler in the EAT held that the correct approach to considering the issue of whether the case had reasonable prospects of success was to consider whether the respondent's defence to each of the appellant's 6 complaints had a reasonable prospect of success separately, rather than considering the defence is a whole. He further set out the following as a correct approach:

> *'Accordingly, there are three key questions. First, objectively analysed when the response was submitted did it have no reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success, did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospects of success?*
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> *In considering whether the respondent should have known that a response had no reasonable prospects of success, the respondent is likely to be assessed more rigorously, if legally represented.'*

15. Rule 78 (1), states that a costs order may: –

16. 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;

17. order the paying party to pay the receiving party the whole of 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 a County Court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles.

18. It gives the tribunal the power to cap the amount of cost to be awarded upon detailed assessment, alternatively, make award of costs based on particular issues or relating to certain parts of the proceedings *(Kuwait Oil Co v Al-Tarkait* [2021] ICR 718).

19. The tribunal has discretion in Rule 84; as follows: *In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amounts, the Tribunal may have regard to the paying party's (or, where wasted costs order is made, the representative's) ability to pay.*

20. The tribunal therefore has a discretion to consider the paying party means and its decision on whether or not to consider means, should be recorded with brief reasons. However, we had no submissions on the Respondents' ability to pay.

21. The Tribunal drew the following conclusions from the case management hearings, the liability hearing and judgment, and the remedy hearing. The Tribunal also considered the written submissions from both parties. These findings will be divided into the areas on which the Claimant focussed in her application.

Findings of facts and conclusions

22. At the start of this assessment of the application, the Tribunal can confirm that the remedy judgment was not meant to compensate the Claimant for the conduct of the litigation. It was simply to address her hurt feelings and losses arising out of the discrimination she suffered. A remedy judgment is to compensate the Claimant for the injuries suffered and arising from the discrimination during the work relationship and to compensate for the losses arising from the unfair dismissal.

23. Therefore, it is incorrect to say that the Claimant has already been compensated at all for some of the matters covered by her application for costs.

24. The Tribunal's remedy award did not contain an element for aggravated damages.

Threats of costs

25. The Claimant brought four claims in the Tribunal. The first was issued on 4 October 2017. One month later, on 2 November 2017, the Respondent wrote to the Claimant threatening her with costs if she continued to pursue her complaints of Equal Pay and sex discrimination. The letter did not say why it was considered that a costs order would be appropriate and made no statement about the strength of the Claimant's case. It simply stated that the Respondent considered that the claims were out of time and had no reasonable prospects of success and that the Respondent had already incurred costs between £10,000 and £15,000 in defending the claim to date. It is likely that those figures were put in the letter to intimidate the Claimant rather than an accurate assessment of reasonable costs incurred as at that date. We say this because at that date, the Respondent had not yet submitted its response to the Tribunal. The response was submitted on 14 November. Even if it was an accurate assessment of the legal costs incurred to date, the fact was that the equal pay claim was not out of time and the Respondents were aware at the start of this litigation that the Claimant and Mr Heane (KH) were doing like work and that their pay had been equalised in October 2015. The only issue was whether it should have been equalised at the time they were both promoted and the payments backdated. The Respondents have never defended the Equal Pay claim on the basis that the Claimant and Mr Heane were not doing like work. The Claimant therefore had a valid claim for Equal Pay from the beginning of these proceedings and to suggest otherwise was unreasonable conduct.

26. Although it is common for solicitors to threaten costs if a party does not withdraw a claim/response, that is usually accompanied with an assessment of the claim/response and an indication of the weak points of the other party's position. There was no such analysis here. The threat of costs was based on a position which the Respondents knew at the time was untrue. In its response to the costs application, the Respondent does not explain, on what basis it was considered that the claim was out of time or how it had come to the conclusion that there were no

reasonable prospects of the claim succeeding, so that it was reasonable to make those statements in the letter.

27. It is this Tribunal's judgment that making this threat at this stage of the litigation, knowing what the Respondents knew and without any demonstration that they had read, understood or assessed her claim, was unreasonable and vexatious conduct by the Respondent.

Amending claim/adding new claims

28. The second claim was issued on 23 January 2018, the third on 29 March 2018 and the last on 23 June 2018. The 1st claim made complaints of disability discrimination, harassment, victimisation, a claim for Equal Pay and the unlawful deduction of the difference in wages. The Claimant was still employed at that stage. The 2nd claim was a complaint of unfair dismissal/automatic unfair dismissal on the grounds of making protected disclosures. The Claimant had just been dismissed, on 18 January 2018. She sought interim relief as part of the second claim. The third claim centred on post-termination discrimination. The fourth was to add further allegations of discrimination and to make a claim for aggravated damages as a result.

29. The Claimant submitted an application to amend her first claim on 5 December 2017. EJ Brown decided that the application to amend would be considered at the 1st preliminary hearing (PH) on 15 January 2018. The Respondent wrote to the Tribunal on 12 December 2017 opposing her application on the grounds that the amendments sought were substantial and because it believed that she should have gone through the ACAS early conciliation process again in order to be able to bring a complaint of disability discrimination. The hearing on 15 January was before EJ Warren, who allowed the amendment, as the alternative would have been for the Claimant to have to issue a fresh claim. EJ Warren set the final hearing down on dates in September 2018.

30. As issues developed at work, the Claimant wanted to amend her claim to add in new allegations, but the Respondents refused to agree to her amending her claim, which necessitated the Claimant issuing a fresh claim every time something occurred which she wanted to bring to the Tribunal. Each subsequent claim complained about matters that had recently occurred. The next hearing in the case was the interim relief hearing on 8 February 2018 before EJ Hyde. The application for interim relief was refused and the two existing claims were consolidated. The parties were also informed that as the September dates were inconvenient to both parties, the hearing would be relisted to dates in October 2018.

31. The next PH was before EJ Brook on 13 July 2018. The third claim was treated as amendments to the existing consolidated claims. Both parties told the Judge that they anticipated that there was likely to be further allegations of unlawful conduct arising out of the internal dismissal appeal process, which was at that time ongoing. Although disputed in their response to the costs' application, we find it likely that the Respondents complained at that hearing that the Claimant had made multiple claims and that they opposed the addition of the most recent one. We say this because EJ Brook included an order in the case management summary, which made it clear that any further allegations of unlawful conduct should be included

as amended particulars. He was pre-empting any further argument about whether the Claimant could simply add new allegations or whether she was required to issue a fresh claim and go through the ACAS process each time. EJ Brook wanted to end any further argument on that issue. He also gave a date by which those new allegations should be served on the Respondent. The dates for the final hearing were expanded to 10 days and fixed for dates in October 2018.

32. Based on the above, it is this Tribunal's judgment that the Respondent took an obstructive and unreasonable approach to amendments during the life of this case. This was unreasonable conduct causing unnecessary stress and worry to a litigant in person, who, although a solicitor, was not an employment lawyer and who was personally funding and dealing with this case.

Disclosure and bundles

33. The matter came before EJ Hyde again on 1 and 2 October 2018. Although the listing had been for the final hearing to be conducted from 1 October, that did not happen, it is contended, for two reasons. Firstly, the dispute relating to disclosure and privilege issues took up two days of legal argument and secondly, because EJ Hyde had a conflict as she had previously worked with one of the Respondent's witnesses. The witness was also a non-legal member of the London South Employment Tribunal, where EJ Hyde previously sat.

34. EJ Hyde recorded the following in the reasons for her orders:

> *4. A dispute between the parties about the contents of the bundle and the Claimant's witness statement crystallised shortly before the start of the hearing. This was addressed by this Tribunal (EJ Hyde sitting alone) at the outset of the hearing. The parties preferred on balance that the privilege and disclosure issues should be determined before the substantive hearing commenced and anticipated that it may be necessary, depending on the outcome, for a different Tribunal to be convened to deal with the substantive hearing. During discussions with the parties on the first day, it then also became apparent that the Judge had a potential conflict in that she was familiar with and had sat with a witness for the Respondents to be called in the substantive hearing, in the London South Tribunal.*
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> *5. In all the circumstances, it was agreed by the parties on the first day that this Tribunal would deal with the preliminary issues in relation to privilege/disclosure and the contents of the Claimant's witness statement. Thereafter, this Tribunal would have no further dealings with this case.*

35. There does not appear to have been any discussion on the conduct of the litigation up to that date, in the hearing. At the beginning of the day on 1 October, it was envisaged that another judge might continue the liability hearing after EJ Hyde's decision on the privilege/disclosure issue. EJ Hyde did not make any criticism of either party in her decision and the orders she made regarding disclosure and privilege.

36. However, a deeper dive into the Tribunal file confirms that the Respondents

prepared the trial bundle for the hearing and included in it many documents that referred to without prejudice exchanges between the parties. The Claimant's witness statement was drafted by reference to the agreed bundle. She considered that the Respondents had included those documents because they had waived privilege on them but apart from stating that they had not, the Respondents did not explain why they believed that she was wrong. There was clearly an issue to be addressed about whether privilege had been waived but despite the Claimant raising it in correspondence with the Respondents in the summer of 2018 and the Respondents' Counsel hinting in the Brook PH that there was a preliminary issue that would need to be resolved before the substantive hearing; the Respondent did not apply for such a hearing or write to the Tribunal about the matter. Either party could have applied for a preliminary hearing or wrote to the Tribunal about this but as it was the Respondent's position that privilege had not been waived and that therefore references would need to be kept out of the documents/bundle, it was in their interests to address this, in good time, before the final hearing. The Claimant believed that the Respondent had waived privilege and therefore the documents were fine as they were.

37. It was not until the afternoon of 27 September, 1 working day before the scheduled start of the final hearing, that the Respondents' solicitor wrote to the Tribunal to say as follows:

> *'It appears there will be some preliminary issues to deal with at the commencement of the hearing. The Claimant refers to "without prejudice" and privileged communications in her statement, such communications have not been waived by ourselves. Consequently these matters should not be before the Tribunal. We are writing to the Claimant separately regarding this but it is likely such matters will need to be dealt with on Monday'*

38. The Respondents' Counsel, Mr Self also wrote to the Tribunal to confirm that he had referred to the existence of this issue at the Brook PH and that as far as his clients were concerned, the hearing could not proceed without these matters being addressed. He suggested that the Tribunal could arrange for a different judge to be reading into the papers while the first addressed the privilege issue. This was unrealistic as there were numerous parts of the Claimant's witness statement and the documents that the Respondents wanted to be redacted and removed from the bundle and the Respondent knew that the Claimant was going to oppose such an application as she had indicated this in correspondence with the Respondents' solicitor some months earlier. Her attempts to discuss this with the Respondents' solicitor earlier in the year had proved unsuccessful. The Respondent would have known that it was unlikely that legal argument and deliberation would only take a day. In the end it took 2 days and EJ Hyde's judgment was delayed and sent to the parties in February 2019. That delay was not the fault of the Respondents but leaving this matter until the 11th hour, when it had been flagged many months earlier, was their responsibility.

39. The delay in raising an issue which the Respondents clearly had with the documents, when they had been aware of it for some time, was unreasonable. This was so especially as the Respondents were always legally represented by experienced Counsel and a senior solicitor. The Respondents would have been aware that the Claimant was self-funding this litigation and that a hearing to deal

with the without prejudice matters would have added to her expenses. She had been seeking clarification of the Respondents' position about the *without prejudice* documents since at least July, if not before.

40. Ms Cheal was away for part of the period of time during which the bundle was to be prepared but this was a fact that had been discussed at the Brook PH and the Judge addressed this matter with the Respondents. The Respondents chose to await her return from leave and then prepared the bundle with minimal input from the Claimant, which meant that she had to ask for some documents to be included at the end. That was something that could have been avoided if the preparation of the bundle had been a joint process.

41. This was the background to the 2-day preliminary hearing on 1 and 2 October 2018. The Claimant incurred considerable costs in preparation for the hearing in October, costs that were essentially wasted by the postponement of the final hearing while EJ Hyde considered her judgment on the privilege/without prejudice issue. In her application she submits that costs of £35,000+VAT were incurred. The Claimant had to instruct new Counsel to represent her when the matter came up for hearing again in 2019. It is the Claimant's position that this was a deliberate tactic by the Respondents, to wait until the last minute to raise this as they knew that it would give rise to an adjournment and by so doing, they would test whether she had the resources and the wherewithal to be able to continue with the case. We are not able to say whether it was deliberate although the timing is and issue. In its response to this part of the costs' application, the Respondents denied that it was deliberate and suggested that this was a normal part of the back and forth of litigation. However, given that the Respondent has been assisted and advised by senior Counsel and an experienced senior partner in a firm of solicitors before and all the way through this litigation, it is difficult to see how the error of putting documents in a bundle, which they also claimed were privileged documents, arose.

42. The issue of the privileged documents should have been raised by the Respondent months earlier than it had. As already stated, this matter was highlighted at the Brook hearing by the Respondents' Counsel, Mr Self. It was clearly something that needed intervention by a Judge as the parties were not in agreement. The Claimant suggests that if the Respondent had explained its position to her, she may have agreed it. That was also possible and another reason why it should have been raised earlier, which could have saved time, costs and delay.

43. Had this matter been raised in a reasonable time after the Brook PH, the only issue that would have arisen on 1 October would have been EJ Hyde's conflict with one of the Respondent's witnesses, which could have been addressed at the start of the hearing and another judge substituted so that the matter could still have proceeded on the listed dates.

44. In those circumstances, it is this Tribunal's judgment that the Respondent conducted the litigation unreasonably in relation to the privilege documents, disclosure, the preparation of the trial bundle and the timing of raising the issue regarding the privilege documents – leaving it to the eve of the final hearing - thus derailing it and causing the Claimant to incur considerable costs in terms of Counsel's fees.

Equal Pay claim

45. In relation to the Equal Pay claim, the Respondents' argument against the costs' application is that there was an arguable defence in relation to the material factor defence and therefore, their defence had reasonable prospects of success and was not vexatious.

46. We have already addressed the Respondents action of threatening costs at the start of the case, before they had even set out their defence, and the allegation in that letter that the claim had no reasonable prospects of success.

47. In relation to the separate point about the Respondent's defence to the claim, we find, as stated in the liability judgment, that the only issue to be determined by the Tribunal was whether there had been a material factor that operated to disapply the sex equality clause in the Claimant's contract, at the time the Respondent decided not to pay her the same wage as KH on promotion, from which date it is agreed that they were doing like work.

48. During her employment, the Claimant was given many different reasons by the directors for the difference in pay and later, the Respondent's refusal to make up the difference in pay from the date of promotion, even after they increased her pay. There was no evidence that at the time of the Claimant and KH's promotion, the directors considered their wages and came to a reasoned conclusion that the Claimant should be paid less because the Respondent funded her MBA. The funding of the MBA was not in their mind and not mentioned at the time of her promotion and not subsequently, until she complained and brought a grievance.

49. In the litigation, the Respondents' position was that the material factor for the difference in pay had been the payment to fund the MBA and also market forces. It was never explained to the Tribunal how market forces which existed at the time of KH's recruitment, even if they existed as we had no evidence of them; could continue to influence the level of pay after a number of years had passed. We were also not told how that was still a relevant consideration, once they were both promoted to the same post, many years later. The Respondents' agreement to increase the Claimant's wage to match KH's suggested that they agreed she should have been paid the same wage from the start. It was agreed that they did like work.

50. The funding of the MBA was unrelated to wages and at the time it was agreed, was not put to the Claimant as an adjunct or supplement to her wages. It was not mentioned until much later, in response to her grievance. At the time the Respondents agreed to fund the MBA, it is likely that it was seen as a benefit to the Respondents to employ someone with that qualification as well as a benefit to the Claimant. It is unlikely that something thought about after the event and only mentioned when there is a complaint, could be considered to be a material factor.

51. In response to this part of the application, the Respondent says that *"the funding of the MBA was relevant to the Respondent's decision not to award back pay after equalising the pay, as it felt that the historical difference could be justified at the time that the request for back pay was made".*

52. It is this Tribunal's judgment that this is not a material factor defence but a case of the Respondents belief that having, as they perceived it, spent money on the Claimant in the past, they were not going to pay her the back pay. The Claimant's reason for seeking equal pay has always been that she did like work with KH. The Respondent agreed that she did. On that basis, she should have had equal pay from the day of appointment to the post of associate director. The Claimant refers in her application to a section of Tolley's Discrimination in Employment, which deals with the point. This was not referred to in the liability judgment as it was not part of either party's submissions, but the statement is applicable in an assessment of the reasonable prospects of the Respondent's defence. *"It is therefore no defence for an employer to argue that, when looked at as a whole, the claimant's contract or pay is no less favourable than the comparator's because the claimant is entitled to certain benefits…..to which the comparator is not entitled."* There cannot reasonably be one argument for the equalising of the Claimant's pay with that of KH in 2015 and a different argument in relation to the backpay. Either she was entitled to equal pay for that job, in comparison to KH, or she was not. If she was entitled to equal pay, it would be for the whole of the time she did that job, until much later when her performance surpassed KH's.

53. In the circumstances, it is this Tribunal's judgment that the Respondents' defence to the Claimant's equal pay claim had little or no reasonable prospects of success, and the Respondent simply decided by the time of the litigation that they had spent a lot of money on the Claimant and did not want to spend anymore. That was not a material factor defence.

54. The Respondents' insistence in pursuing this argument was unreasonable and vexatious. As we stated in the liability judgment, if this matter had been resolved between the parties, there is a strong likelihood that there would not have been a claim and that working relationships would not have fractured as they did.

<u>Delay in agreeing quantum and judicial mediation</u>

55. Judicial Mediation is a voluntary process. Parties are not compelled to enter into judicial mediation.

56. It would have been in all parties' best interest if they had agreed to enter into judicial mediation and the process ended with an agreement.

57. The Respondents were incorrect in their statement that equal pay complaints are unsuitable for judicial mediation. It is likely that the Respondents felt strongly about the equal pay claim and would never have contemplated entering into judicial mediation with the Claimant, with any intention of settling it. That is clearly not the same as it being unsuitable.

58. The refusal to enter into judicial mediation was not unreasonable behaviour in the context of Rule 76(2) of the Employment Tribunals Rules of Procedure 2013.

59. As far as the documents and disclosure required for the remedy hearing is concerned, that was a long process for the Claimant and required her to enter into detailed correspondence with the Respondent's solicitor and with the Tribunal,

before the Respondent complied with their duty of disclosure.

60. It was reasonable for the Claimant to request to see documents supporting the figures which the Respondent put in their spreadsheet in response to her remedy claim.

61. The Respondents are correct when they state that the Claimant has had compensation in relation to the delay caused by the failure to disclose documents in relation to aspects of her remedy, by way of interest running at the judgment rate. However, that does not compensate her for the time, stress, and frustration that such a long-drawn-out process caused her. Ms Cheal confirmed in the Respondents' response that there were 30 emails between them on this issue. We find that this was mainly due to the Respondent's approach, which was to - in reality, refuse to make good the shortfall in pay - to refuse to disclose information, to propose that performance related pay paid to the Claimant during 2017-2018 should be part of the equation, to refuse to provide any pension loss calculations and then refuse to include pension losses; all until a few days before the remedy hearing.

62. The judgment in July 2020 ordered the Respondent to make good the shortfall in relation to the equal pay forthwith. Although there was an appeal and an application for reconsideration, they did not interfere with and were not about the judgment on the equal pay issue.

63. The Respondent states in its response that the Claimant "*maintained an argument that she could go back more than 6 years (contrary to s.132 Equality Act 2010) until a couple of days before the remedy hearing."* The Claimant disputes that she took this position beyond one discussion with Mr Self in 2020. The Respondent produced no evidence to support their assertion.

64. It is our judgment that the delay and considerable correspondence required, the time, stress and frustration that the Claimant experienced in dealing with this issue alone, even after the liability judgment was given, was because of the Respondents' unreasonable conduct of its defence to the equal pay issue. This is a matter covered by rule 76 and it is in our judgment, further unreasonable conduct by the Respondent in this litigation.

<u>Not telling the truth</u>

65. The Tribunal did not accept some of the evidence given by individual Respondents in the hearing. However, we did not make judgments that they had lied as opposed to misunderstanding or misremembering what had happened. Even if witnesses knowingly did not tell the truth, which could accurately be described as lying, it does not necessarily amount to unreasonable or vexatious conduct, although it is clearly undesirable, especially from legally qualified witnesses, after having taken solemn oaths. Not all of the Respondents were legally qualified, but all gave evidence on oath.

66. The Tribunal does not hold that any evidence which we found unlikely or to be untrue to be unreasonable conduct such as would warrant an order for costs.

<u>Abuse of Process</u>

67. The Claimant's application also refers to a number of instances of what she entitled abuse of process. These are covered in paragraphs 40 – 47 of the application and the Respondent replied to those in its response. Ms Cheal did not number her paragraphs.

68. The Claimant sets out a detailed account of the issue of redaction of the witness statement and bundles, which was an issue at the Hyde hearing. It is unlikely that EJ Hyde would have ordered the parties to redact documents before she had made her decision on the privilege issue. It is more likely that she encouraged the parties to, as Ms Omambala is reported to recall, to try to agree on the possible redactions to the Claimant's witness statement in anticipation that she might be able to deliver her judgment promptly.

69. This Tribunal was not the Tribunal conducting that part of the proceedings and EJ Hyde's minutes of the hearing do not address this issue as, in the end, her process took longer as she reserved her judgment on the privilege issue.

70. The Respondents do not respond to this particular part of the application with any degree of particularity and instead, suggest that the Tribunal would not be able to determine between the different versions without hearing evidence and that misunderstandings are bound to happen in complex litigation.

71. This was and indeed continues to be complex litigation. Most of the parties in this case are legally qualified and as we have said more than once in these reasons, the Respondents have had legal advice and assistance from senior legal practitioners throughout these proceedings. If the Respondent had redacted the documents, it would appear to be a simple matter to have provided those to the Claimant when she asked. Ms Cheal declined to do so, and it is not clear whether this was because she could not find them at that moment and was too busy to look for them, she did not think it important enough to do so or that she realised that she had not actually redacted them and did not want to admit that to the Claimant after having stated on 3 June 2019, that this had been done. It is possible that this is a misunderstanding, and that Ms Cheal extrapolated the discussion between Counsel in the Tribunal side room on redactions to the Claimant's witness statement; as actual redactions having been done to the bundle.

72. Whatever is the truth of the matter, as it stands at present, it is our judgment that although this was not helpful and clearly added to the Claimant's negative experience of this litigation, it was not an example of unreasonable conduct of the litigation by the Respondents to the extent that leads us to consider ordering them to pay costs.

73. We would say the same in regard to the Respondent's failure to comply with Tribunal directions. This frequently happens in litigation and usually, parties are able to agree extensions of time between themselves, without the involvement of the Tribunal. The Claimant provides a list of missed dates in paragraphs 50 and 51 of the application, none of which are denied by the Respondents in their response. There were extensions to those deadlines and sometimes, the Respondent did not comply until after the new date which had been agreed. This was likely to have caused the Claimant stress and frustration and difficulties with managing her time as she was in effect, acting as her own solicitor in this litigation,

together with her own busy job, along with childcare responsibilities. However, that is not evidence that the Respondents deliberately failed to comply with Tribunal orders in an attempt to interfere with the Tribunal process or to prevent a fair hearing. When we started the hearing in June 2019, there was no submission that a fair hearing was not possible, due to the Respondents' actions or the way in which they had pursued their defence to the claims.

74. In the circumstances, it is not appropriate to consider this as unreasonable conduct to the extent required for the Tribunal to consider a costs order under Rule 76(2) of the Employment Tribunals Rules of Procedure.

Conclusion

75. It is this Tribunal's judgment that the Claimant has made a strong case that the Respondents conducted their response to her claims unreasonably and vexatiously in a number of aspects as set out above.

76. Given that the Respondents conducted their defence in this way, the Tribunal next considered whether it should exercise its discretion to award costs against them.

77. At this stage of the process, the Tribunal considered that the Respondents had been represented throughout this case, as we have said more than once above. The Respondents unreasonable conduct did not happen because of a lack of understanding on their part. It is not helpful for us to speculate on their motives.

78. It is our judgment that it was not for lack of understanding or unfamiliarity with employment tribunal proceedings that the Respondents threatened the Claimant with costs as the first response to her claim, when they had not yet filed a response and were unlikely to have even assessed her claim. Even if they had, there was no assessment of her claim set out in the threatening letter. It did not give the Claimant any information on how they decided that her complaint was out of time or why they had they been advised that it had no reasonable prospects of success. The letter gave no information and simply threatened serious costs as an opening salvo in the Respondents defence. The Respondents position on the equal pay claim in particular is likely to have been carried over from their position internally, where the Claimant was described as *hostile and litigious*, simply because she brought a claim in the employment tribunal, after exhausting the Respondents' internal process, in order to be given the equal pay, to which she was entitled.

79. That was unreasonable conduct and conduct likely to have discouraged a less able Claimant from pursuing a legitimate and ultimately successful claim, without any visible assessment or reason.

80. The Respondent's conduct of their response to the equal pay claim was unreasonable as set out above in its initial response of threatening the Claimant with costs without any evidence of assessment; in pursuing a defence which changed along the way and which had little to no reasonable prospects of success; and after the liability judgment - in delaying the provision to the Claimant of the information necessary for her to be able to properly assess the Respondents offer - and in refusing to pay it when ordered to do so by the Court until a few days before the remedy hearing.

81. In this Tribunal's judgment, the Respondents response to the equal pay claim was vexatious. As stated above, vexatious conduct is putting forward a hopeless defence to a claim without any expectation of being successful or for some other improper motive (*Marler Ltd v Robertson* above). The Respondents knew that the defence to the equal pay claim was unlikely to succeed as they had already equalised the Claimant's pay with KH. They had already accepted that they did like work and had done so at least from the day of promotion to the post. The issue was about the money that was owed to her from the date of her promotion to the date that her pay had been equalised with KH's. The Respondent refused to pay her that sum because it considered that it had already spent enough money on her and because the relationship had begun to turn sour. That is not a material factor defence and was highly unlikely to succeed as one and it is likely that the Respondents knew that, at least by the start of the hearing.

82. The Respondent also conducted their defence to the claims unreasonably in their attitude to the addition of new claims/amending the existing claim, which meant that the Claimant had to issue a new claim after each event at work as set out above. Also, they behaved unreasonably in the way that the bundles were prepared with privilege documents and then leaving it until 27 September to raise their admissibility with the Tribunal. We do not say that those documents were deliberately put in there, but it is also the case that Mr Self raised the issue of privilege documents with EJ Brook and the Claimant much earlier, in July. The Respondents were therefore aware that they considered that these documents were likely to be privileged and that as the Claimant did not agree with them on that, this was a matter that needed to be referred to the Tribunal, as soon as possible. By making the referral at the last minute, the trial dates in October were lost and the Claimant had substantial costs thrown away.

Consideration of the Respondents financial means

83. There were no written submissions regarding the Respondents means.

84. The Respondents are a successful, corporate entity and senior partners/directors of that entity.

85. In the circumstances, taking all the above and the findings in the liability judgment into account, is this Tribunal's judgment that the statutory threshold has been met and it is appropriate to exercise its discretion as set out in Rule 76(1)(a) and (b) of the Employment Tribunals Rules of Procedure 2013, to award costs against the Respondents.

The Tribunal then considered the amount of the award that is payable - how much costs to order the Respondents to pay?

86. The Claimant limited her claim to the Counsel's fees incurred in pursuing her claim. She has asked for all of those costs. She has not asked for reimbursement of solicitor's fees or for any other costs, including for her own time.

87. Our judgment is that the Respondent should be ordered to pay her costs

incurred in instructing Counsel to pursue the equal pay claim, including any work advising her in chambers or otherwise about the Respondent's threatening letter at the start of the case, in preparation and attendance at the first PH and pursing it at the liability hearing. Also any Counsel's fees incurred in assisting her to pursue getting the documents relating to the offer to settle that claim and any other work done by Counsel up to the payment made just before the remedy hearing. The Respondents must also pay the Counsel's fees incurred in dealing with the Respondents' attitude and the resulting extra work required to bring additional claims/amend the initial claim. Lastly, the Respondents must pay the costs wasted when the hearing in October 2018 had to be relisted. If the matter of the privilege documents had been raised in August/September 2018 and therefore well before the October hearing dates, the cost of Counsel to attend a PH and deal with that would have been considerably less than the costs the Claimant paid as a brief fee for the October listing – which was for a 7 day final hearing – and which she had to pay again for the relisted hearing in June 2019. It is our judgment that the difference is to be another starting point for assessment of the amount to be paid by the Respondent.

88. The Claimant has produced proof that she has incurred Counsel's fees of £94, 598.00 in total in pursuing her claim, plus VAT.

89. In respect of the amount of costs claimed, the Tribunal made the following observations: This litigation was complex and protracted. It is our judgment that given that the Claimant was not an employment solicitor, that the law around equal pay and other aspects of discrimination are complex and that this area of work was completely new to her, these Counsel fees were properly incurred.

90. Rule 78(1)(a) of the Employment Tribunal Rules 2013, referred to above, gives the Tribunal the power to award costs to the receiving party up to £20,000. It is our judgment that the costs due to the Claimant exceed that figure.

91. 78(1)(b) gives the Tribunal the power to award the receiving party the whole or a specified part of the costs, with the amount to be paid to be determined by way of a detailed assessment either conducted by a county court or by an Employment Judge. Although such assessment will usually be done on a standard basis, the Tribunal could order that it be done on an indemnity basis and is not under a duty to put a cap on it.

Judgment

92. The Tribunal's judgment is that, looking at the whole picture of what happened in the case, the Respondents conducted their response to this claim unreasonably in the ways set out above, and that it is therefore appropriate to order them to pay costs towards the Claimant.

93. The Respondents have not been ordered to pay all of the Claimant's costs.

94. The costs incurred in relation to the matters set out above, must be assessed. The file will be passed to the appropriate Employment Judge for costs payable by the Respondents to be assessed and the parties will be contacted as soon as a date is set for that to be done. Parties will be notified whether that will be done at an attended hearing or by way of written representation.

95. It is our judgment that the Respondents should pay towards the Claimant's costs. How much they will have to pay will be determined by the appropriate Employment Judge by way of detailed assessment applying the principles in the Civil Procedure Rules 1998. The parties will be contacted by the Tribunal regarding that process in due course.

Employment Judge Jones
Dated: 16 June 2023