EMPLOYMENT TRIBUNALS

Claimant: Dr F Donaldson

Respondent: Cwm Taf Morgannwg University Health Board

Heard at: Cardiff **On:** 5 June 2023

Before: Employment Judge Harfield

Representation
Claimant: Did not attend
Respondent: Mr Walters (Counsel)

COSTS JUDGMENT

The claimant is ordered to pay the respondent the amount of £20,000.00 (twenty thousand pounds) in respect of the respondent's costs on the basis that the claimant's claims had no reasonable prospect of success and the claimant acted unreasonably in the bringing and the conduct of the proceedings.

REASONS

Introduction

1. The claimant brought complaints of protected disclosure detriment and race discrimination. They were heard by a tribunal that constituted EJ Harfield, Mr Pearson, and Mr Barker. An oral judgment with reasons was given on 14 October 2022. The claimant's complaints were found to not be well founded and dismissed in their entirety. There are no written reasons as neither party made such a request.

2. The respondent made an application for costs on 11 November 2022. On 9 December 2022 I directed the respondent to file a schedule of alleged unreasonable actions and an updated schedule of costs. The claimant was to file a response to the schedule of alleged actions and any comments on the schedule of costs within 4 weeks thereafter. On 24 April 2023 the respondent filed a schedule of alleged disruptive/unreasonable conduct, a bundle of documents and a schedule of costs. On 18 May 2023 the claimant was directed to provide his response to the schedules within 7 days and also to provide evidence as to his means to pay. On 24 May 2023 the claimant said he had no comments to add and would rely on the statements and comments he had made to the court through the proceedings. He attached some financial documents. He said if the tribunal sought to make him homeless he would seek a valuation at the expense of the respondent and he would welcome any challenge to the

information he had provided. He said he had raised matters of enormous public importance. He said that proving he had not been genuine at all times and in all things placed before the tribunal would be a waste of public funds. Due to the death of one non legal member and the ill health of the other, the parties consented to me deciding this costs application alone, rather than new non legal members being substituted.

3. The claimant did not attend the costs hearing. He sent an email just before 7am saying events over the weekend (unspecified) made it impossible to attend and he had limited financial resources to prioritise. He said he was due to attend a family funeral in Jamaica on 24 June and needed to provide for himself and his family. He said he had nothing to add or say to the tribunal and that he did not consider his presence or absence would impact on the proceedings and that past experience had shown him that he had not impacted on the tribunal. He said he had concluded pursing the matter further with the tribunal had failed and he had learned much and would apply what he had learned and focus his dwindling resources on the avenues that remain.

4. I therefore decided to proceed in the claimant's absence but on the basis that the costs application remained in dispute and I needed to decide it on its merits.

5. The respondent's original cost application had two broad grounds. First that the claim had no reasonable prospect of success/had been unreasonably brought because of that. Second that the claimant had acted abusively, disruptively or unreasonably in the way in which the proceedings were conducted.

6. The bundle for the costs hearing contains the respondent's schedule of alleged abusive/unreasonable behaviour about the conduct of the proceedings. The bundle for the costs hearing, however, omitted the original costs application. It therefore did not contain the original costs application made about the prospects of success/whether the claimant had unreasonably brought the proceedings.

7. I was concerned, particularly due to the absence of the claimant, whether I could be certain that he was aware that the cost application was still being pursued on that second basis, bearing in mind the document's omission from the cost bundle. Out of fairness to the claimant I wished to be certain that he was aware, when deciding not to attend, that I would be deciding both broad grounds of the cost application and not just the complaints about the manner in which the proceedings were conducted. I wished to ensure he was not deprived of the opportunity to comment on the full grounds on an informed basis. I was not minded to adjourn to another day because the claimant had not attended. Given the content of his email, there was no guarantee he would attend any future hearing; indeed it seemed unlikely. An adjournment would also cause the respondent additional costs and cause further delay for everyone. I therefore heard the respondent's oral submissions but reserved my judgment, to allow the claimant 7 days in which to provide any written comments upon the cost application ground relating to the prospects of success/merit of the claims (the claimant already clearly having had the opportunity to comment on the alternate ground relating to the conduct of the proceedings). Unfortunately, that direction to the claimant was not sent until 28 June and there was then a further delay in re-referring the matter back to me. But as at today's date the claimant had not submitted any further response or comment.

The legal principles

8. An employment tribunal has a discretionary power to make a costs order under rule 76(1)(a) of the Tribunal Rules where it considers that a party 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. Rule 76(1)(a) imposes a two-stage test: first, a tribunal must ask itself whether a party's conduct falls within rule 76(1)(a); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

9. Unreasonable has its ordinary English meaning and is not to be interpreted as if it means something similar to vexatious; Dyer v Secretary of State for Employment EAT 183/83.

10. It may be helpful to look at the nature, gravity and effect of a party's unreasonable conduct but this is not a checklist. It is important not to lose sight of the totality of the circumstances; McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA; Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA. The tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

11. The claimant is a litigant in person and I should not judge him by the standards of a professional representative. I should bear in mind lay people may not have much, if any, previous experience of legal proceedings and may lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser; AQ Ltd v Holden 2012 IRLR 648, EAT. This should be taken into account when assessing both the threshold test and, if that test is met, when exercising my discretion whether to make a costs order. Likewise, however, this does not mean lay people are immune from orders for costs. Each situation depends on its own facts.

14. It is not the case that when deciding whether to make a costs order, that the tribunal has to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. However, likewise it is also not the case that causation is irrelevant when deciding the amount of costs. The tribunal has a broad discretion, should take a broad-brush approach and should avoid adopting an over-analytical approach; Yerrakalva; Sud v Ealing London Borough Council 2013 ICR D39, CA.

12. The employment tribunal also has a discretion to make a costs order where it considers a claim had no reasonable prospect of success — rule 76(1)(b) Tribunal Rules 2013. As with rule 76(1)(a), a two-stage test applies requiring the tribunal to consider first whether this ground is made out, and, if so, secondly to exercise a discretion as to whether or not to actually award costs. Each cause of action has to be considered separately. There are three key questions. First did the claim have no reasonable prospect of success when submitted (based on what information was known or reasonably available at that time), or did it reach a stage where it had no reasonable prospect? Second, at the stage when the claim had no reasonable prospect of success did the claimant know that was the case? Third, if not should the claimant have known (taking into account where relevant whether the claimant is legally represented or not); Radia v Jefferies International Ltd EAT 0007/18; Opalkova v Acquire Care Ltd EAT 0056/21

13. Under Rule 84 in deciding whether to make a costs order, and if so in what amount, the tribunal may have regard to the pay party's ability to pay. A tribunal is not obliged to have regard to ability to pay, it is merely permitted to do so. Either way the tribunal should set out it reasons; Jilley v Birmingham and Solihull Mental Health NHS Trust and ors EAT 0584/06. The fact that a party's ability to pay is limited as at the date of assessment does not preclude a costs order being made against him, provided that there is a realistic prospect that he might at some point in the future be able to afford to pay; Vaughan v London Borough of

Lewisham and ors 2013 IRLR 713 EAT.

14. Costs in the employment tribunal are still the exception rather than the rule; Yerrakalva. The purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party. It is necessary to examine what loss has been caused to the receiving party and costs should be limited to those 'reasonably and necessarily incurred'. Furthermore, the amount of loss will not necessarily be determinative since a tribunal may take into account other factors, such as the means and the conduct of the parties. A tribunal having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party, who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so; Howman v Queen Elizabeth Hospital Kings Lynn EAT 0509/12.

15. Under Rule 78 a cost order may order the paying party to pay a specified amount not exceeding £20,000 or alternatively order the paying party to pay the whole or a specified part of the costs with the amount to paid to be determined by detailed assessment. The respondent's cost schedule totals £69,575.22. The respondent confirmed at the costs hearing they were capping their costs claim at £20,000 and were not seeking a detailed assessment.

Discussion and conclusions

No reasonable prospects of success?

Protected disclosure detriment

16. A case management hearing took place before (then) Employment Judge S Davies on 20 March 2020. The claimant attended. A list of issues for the final hearing was discussed and set out [39-43]. This identified 3 claimed protected disclosures:

    (a) A 21 May 2017 DATIX report about the death of a patient;
    (b) In/around February 2018 an email to the Coroner regarding the patient's death;
    (c) In/around February 2018 that the claimant told his supervisor (PTT) verbally about the email to the coroner regarding the patient's death.

17. Three detriments said to be done on the ground the claimant had made a protected disclosure were identified:

    (a) Extending the period of removal of the claimant from the on-call rota from August 2017;
    (b) Extending the requirement that the claimant work under supervision from August 2017;
    (c) Refer the claimant to the GMC during 2018.

18. In the case management order the claimant was directed to insert any other disclosures relied upon such as other emails to the coroner with dates. He was also directed to insert any other detriment relied upon. The case management order at paragraph 2 directed the claimant to provide that highlighted information. It also said that if the claimant thought the list was wrong or incomplete he must write to the tribunal and the respondent by 24 April 2020. The claimant did not provide any further detail and did not write to the tribunal to say the list of issues was wrong or incomplete. It therefore stood as originally drafted as being the list of issues for the final hearing.

19. The claimant's witness statement in the proceedings did not address the claimed

protected disclosures or how he said there was a causative link between them and the detriments complained about. By the time of the conclusion of the proceedings the claimant had accepted that his first pleaded protected disclosure was unsustainable as he did not submit a Datix report in May 2017. His Datix report was in January 2019 and post dated the detriments that he was complaining about. It was an unsustainable claim.

20. During the course of the hearing itself the claimant produced an email he had sent to the coroner's office dated 16 February 2018. The claimant adduced no evidence at all about his claimed third protected disclosure of having allegedly told his supervisor about his email to the coroner's office. In practical terms we were left with assessing the second claimed protected disclosure (email to coroner's office). For that protected disclosure the only detriment which post dated it (and therefore in play as an alleged protected disclosure detriment) was the referral to the GMC.

21. In respect of that detriment, in our Liability Judgment we found that the respondent could not have possibly known about the claimant's email to the coroner so as to be motivated by it. On the facts as found by us the claimant had not spoken to the coroner's office at this point in time, there was no evidence the coroner's office had contacted the respondent and it seemed highly unlikely they would have done so, so early on. We also noted that Dr Quirke had denied any knowledge of the claimant contacting the coroner's office and had not been challenged on this by the claimant in cross examination. We found as a matter of fact that the respondent had been contemplating referring the claimant to the GMC for some time prior to the claimant's email to the coroner's office because of the claimant's lack of cooperation with NCAS and it was that lack of engagement which led to the referral to the GMC. The referral to the GMC was not a decision the respondent had taken lightly and the claimant had been given multiple opportunities to engage. The protected disclosure detriment claim about referral to the GMC therefore did not succeed (nor did any other protected disclosure detriment claim).

22. The claimant's ET1, as a litigant in person, had been submitted in narrative form. The protected disclosure detriment claim took form once it had been discussed with him by EJ Davies and distilled into the list of issues. I am acutely conscious of the claimant's status as a litigant in person and a litigant in person cannot be expected to set out a claim or prepare evidence as a legal professional would do. However, engaging in legal proceedings is a serious matter. The claimant was making serious allegations. A tribunal and a respondent are entitled to expect a claimant to have thought through and evidence the essential premise of a claim that is being brought. The claimant did not do this. The claimant had the opportunity to check and amend the list of issues when the case management order of EJ Davies was set out to him. He did not do so.

23. In respect of the first claimed protected disclosure, the Datix report, the claimant was making serious allegations. In my judgement, he could and should have known about the date of the Datix report and that it post-dated the actual detriments that he was complaining about, making the whole premise of any claim relating to that unsustainable. In my judgement, once the claimant had had the opportunity to review the case management order of EJ Davies he should have checked and noted the date of the first claimed protected disclosure and that it therefore could not be said the detriments (as a matter of simple chronology) flowed from that first claimed disclosure. That was even more the case once disclosure of the Datix reports was complete and the case was being prepared for the final hearing. In my judgement the claims related to the first claimed protected disclosure had no reasonable prospect of success as at the point the claimant should have reasonably reviewed EJ Davies' case management order. This lack of evaluation of the complaint by the claimant

continued thereafter in the proceedings, including his preparation of witness evidence and preparation for and attendance at the final hearing. If the claimant had responsibly reviewed the basis of the complaint it should also have lead to him withdrawing his claimed detriments about extending his removal from on-call and extending his supervision. This is because as a matter of timing they could only be linked to the first claimed protected disclosure (based on its originally pleaded but wrong date).

24. As set out in our findings of fact, the claimant had known from the time of the events in question that Dr Quirke was contemplating referring him to the GMC. Dr Quirke had told the claimant in correspondence in December 2017 and January 2018 when giving the claimant opportunities to engage with the NCAS process. Furthermore, the claimant knew this via discussions Dr Quirke had arranged for the claimant to have with managers to try to encourage the claimant to engage. That meeting resulted in the claimant saying that he was tired of being threatened with the GMC. This all pre-dated the claimant's first email to the coroner's office. The claimant therefore had an obligation to think sensibly about how he was going to say his email to the coroner's office led, in his belief, to the eventual referral to the GMC. Yet, as already said, he gave no evidence about that himself. He only produced the actual email to the coroner's office at the final hearing. He produced no evidence whatsoever about alleging telling his supervisor about the email to the coroner's office. He did not challenge Dr Quirke's evidence that Dr Quirke did not know about the contact with the coroner's office. Certainly, by the time of the final hearing the complaint had no reasonable prospect of success as there was no evidential basis on which we could find that the link was made out.

25. Further, I consider that the claimant should reasonably have known that this complaint lacked a reasonable prospect of success at an earlier date as at the point he was sent EJ Davies' order for review and amendment. He knew all along that a GMC referral was on the cards, he knew all long that the email was sent to the coroner's office on 16 February 2018, that the GMC referral was made on 19 February 2018 and that by that time the claimant had not had a follow up phone call with the coroner's office or provided much by way of detail about the alleged avoidable death (for example, he did not in his email to the coroner give the patient's name and the date of death given was incorrect). Further, the claimant led no evidence about alleging telling his supervisor about the email to the coroner's office so he must have known this was not in fact the case. All this draws me the conclusion that the claimant reasonably should have known all along that the tribunal would be unlikely to find that the GMC referral had been materially influenced by the claimant's email to the coroner's office. He did not exercise sufficient care in properly reviewing the case as set out in EJ Davies' case management order and then withdrawing complaints which he knew or reasonably should have known were unsustainable.

26. The claimant was unsuccessful in his protected disclosure detriment complaints on the basis of our assessment of the merits. For reasons of procedural economy we therefore did not go on to consider the question of time limits. However, in my judgement the respondent is also right to say the claimant also had not reasonably reflected on the time limit problems he had. At the start of the final hearing (before the adjournment caused by disclosure issues) we had made a finding that the last detriment was dated in February 2018. The claim was not presented until 17 January 2020 yet the claimant never addressed the question of how he said it was not reasonably practicable for him to have presented his claim within time. The protected disclosure detriment complaints were brought with no reasonable prospect of success from 20 March 2020.

27. For the same essential reasoning as set out above the claimant also acted

unreasonably in bringing the protected disclosure detriment proceedings once he had the opportunity to reflect on EJ Davies' case management order. I will return to the question of the exercise of the costs discretion after I have assessed the race discrimination complaints.

Race discrimination

28. The alleged less favourable treatment because of race was identified in the list of issues as part of EJ Davies' case management order as:

    (a) Remove the claimant from the on call rota from August 2017;
    (b) Place the claimant under supervision from August 2017;
    (c) Refer the claimant to Ncas in August 2017;
    (d) Refer the claimant to the GMC in 2018.

29. In our Liability Judgment we found that Dr Quirke placed restrictions on the claimant in August 2017 ((a) and (b)) because he held concerns about the attitude and behaviour of the claimant and put the temporary restrictions in place, as a matter of risk management, pending an investigation. This included a concern about whether the claimant had demonstrated an unwillingness to get actively involved in assisting in patient care for a very sick patient, and whether the claimant had suggested he may withdraw outreach nurse support from wards when on shift.

30. We noted that the claimant had not challenged Dr Quirke's evidence about his decision making process. In fact, despite being told several times by me that he needed to do so, the claimant displayed a notable reluctance to put any real allegations of race discrimination to Dr Quirke. The most the claimant eventually did was to assert that Dr Quirke had failed to protect him from a scenario in which, according to the claimant, there was an overrepresentation of ethnic minority staff in disciplinary activities in the Health Board/ the NHS. It was an assertion that was unsupported by any evidence, statistical or otherwise, and one which Dr Quirke denied. In our judgement, the claimant then unfairly criticised Dr Quirke for not being able to produce in cross examination, off the top of his head, data about the make up of around 15 disciplinary cases Dr Quirke estimated that he may have been involved in from around June 2016 to October 2017 when Dr Quirke had no warning he would be asked for this.

31. We noted that despite again being invited to do so in EJ Davies' case management order the claimant had not identified any actual comparators relied upon. We found that Dr Quirke would have placed similar restrictions on an individual who was not black and/or not born in Jamaica but was otherwise in not materially different circumstances to the claimant. We found that the claimant's race did not materially influence Dr Quirke's decision making whether consciously or subconsciously.

32. Notwithstanding the claimant's failure to identify a comparator at the case management stage we conscientiously went on to consider the comparator issue at the final hearing because the claimant, at least by the time of closing submissions, appeared to be referring to various individuals. His main complaint seemed to be he had been treated differently to the junior doctor who had care of the patient. We found she was not in a comparable situation to the claimant and therefore her situation did not offer us any analytical assistance in our decision making. The claimant then also appeared to identify a series of other people who he said were not treated the same as him. For the most we did not have information about their ethnic origins. But in any event we found the two supervisors for the junior doctor were in very different circumstances to the claimant to offer any comparative analysis. We were given no real evidence about the surgical SHO on duty that night and the surgical registrar that the

claimant made a passing reference to in closing submissions was also not a comparator of any assistance.

33. We found that Dr Quirke decided to refer the claimant to NCAS as a supportive measure to obtain an assessment on the claimant, and if appropriate, obtain an action plan and any retraining that was required to reintegrate the claimant back into the workplace to ultimately work unsupervised. We were satisfied that Dr Quirke would have treated an individual who was not black and/or born in Jamaica but otherwise in not materially different circumstances in the same way. We did not find the decision to be materially influenced by race in any way. We made the same observations about comparators and indeed the junior doctor could not be referred to NCAS as she was subject to separate trainee processes. We rejected the claimant's contention that Dr Quirke had decided to refer him to NCAS to avoid a formal investigation and to avoid disclosing documents which we understood the claimant saw as being part of an attempt to cover up the involvement of others and lay blame on the claimant.

34. We found that Dr Quirke decided to refer the claimant to the GMC because of the claimant's continue lack of engagement with NCAS. The claimant through his own conduct had tied the respondent's hands in that regard. We observed that this situation, through the claimant's own conduct, was very far removed from those he sought to rely on as comparators. We found that Dr Quirke and Dr Asaad were not influenced at all in their decision making by the claimant's race or that he was born in Jamaica and they would have treated anyone in the same situation in the same way.

35. The above is a summary of our ultimate findings having heard all the evidence. But did the claimant's claims lack a reasonable prospect of success? I have to take into account here that it is well recognised that direct evidence of discrimination because of a protected characteristic is often difficult to prove. A claimant will often rely on being able to show, through cross-examination of witnesses, that the employer's stated reasons for the treatment complained of were not in fact the true reasons. This difficulty is also why the shifting burden of proof provisions are there in the Equality Act. It was said in Saka v Fitzroy Robinson Ltd EAT 0241/00 it may be difficult for a claimant to know whether or not he or she has any prospect of success until the explanation of the employer's conduct is heard, seen and tested. But it is also not the case that cost orders can never be made against a claimant in a discrimination case (for example Vaughan v London Borough of Lewisham and ors 2013 IRLR 713, EAT.)

36. In Keskar v Governors of All Saints Church of England School and Another [1991] ICR 493 a costs order was upheld on the basis that the claimant ought to have known that the claims he was making had no substance as there was virtually nothing to support the allegations claimant had made, from which the tribunal had drawn the conclusion he had acted unreasonably in bringing the complaint. It was said:

"That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations. When one adds the specific finding of motivation of resentment and spite it becomes, in our view, perfectly clear that there was ample material upon which the industrial tribunal could reach the conclusion that this was a proper case in which to make an order for costs against the applicant."

37. The heart of this case ultimately was that the claimant felt he was being singled out and scapegoated for the death of the patient, and that others were being

protected, in particular the junior doctor. We found those beliefs were misplaced. The serious incident review was never something that had the claimant as its core or only focus, nor did the initial emails being passed between those involved immediately following the serious incident being raised and the subsequent death of the patient. The root cause analysis report identified, amongst other things, the first root cause as being the lack of an out of hours upper GI bleeding service. The first care and service delivery problem was recorded as the junior medical registrar not adequately escalating the matter or using critical thinking and she was referred for reflective practice. The claimant only became a person of interest during Dr Neville's team's investigation and even more so after the claimant had given his interview, largely because of what the claimant said and how he conducted himself during that interview.

38. In my judgement the claimant's case was predicated on an inadequate premise from the start. The claimant saw the root cause analysis report when Dr Quirke sent it to him in following their meeting on 19 September 2017. The claimant knew or should have known he was not the sole or even the main focus of the report into the patient death. He knew from that report and Dr Quirke's letter of 22 August 2017 that there were concerns about the claimant's team working, providing clinical support in the interests of patients, and concerns about what the claimant had said in interview (particularly about outreach support), as well as the other historic matters Dr Quirke set out. The claimant's downfall was that he was unable to engage in any reflective practice about this, or see that he was one part of a wider picture of organisational learning. Instead, his reaction was to see himself as being the scapegoat. As the litigation progressed and particularly during the course of the final hearing the claimant then started to try to draw ever increasing parallels between his treatment and that of others including the junior doctor and others in work that night, or supervisors. He did that without ever properly reflecting on the fact that they were not in materially the same circumstances as him, in part because they had not conducted themselves in the same way the claimant had. The claimant's own inability to reflect and engage then ultimately led to the GMC referral.

39. I take fully on board that the claimant has been a litigant in person throughout and that he will not have had the same degree of objectivity or legal knowhow as a litigant with the benefit of legal representation. However, on balance I do consider that it was unreasonable on his part to have consistently failed to take a step back and look at the root cause analysis report, look at his own interview and what was said about it by Dr Quirke, and see that he was not being single-handedly blamed for the death of the patient. He should have been able to undertake some analysis about comparative situations. His failure at the case management stage to identify comparators, and the general incremental creep of trying to draw multiple comparators by the time of closing submissions shows he had never before properly stepped back and evaluated the basis of his claim as he should have done. His witness statement did not set out the essential basis of his race discrimination claim. The claimant in cross examination showed a marked reluctance to put specific allegations of race discrimination to the very people he was complaining about, particularly Dr Quirke. Again I consider that was telling in demonstrating that he ultimately himself could not identify the substance in what he was trying to put forward. He thought the death of the patient raised important issues. He thought he had been wronged. But he never stopped and thought about how and why he was saying that was discriminatory.

40. I ultimately do therefore consider and find that this is a case where the claimant ought to have known that there was no real substance to his complaints, which were serious complaints of discrimination. It is not a case, in my judgement where he was justified in saying it was reasonable to test the witnesses at a tribunal hearing. In truth, the claimant largely did no such testing.

41. The claimant's race discrimination complaints had no reasonable prospect of success from the date of original presentation and for the same essential reasoning the claimant also acted unreasonably in bringing the race discrimination complaints.

Costs discretion

42. I have decided to exercise my discretion to order costs against the claimant. I take into account his status as a litigant in person. The claimant's pursuit of complaints that had no reasonable prospect of success/ were unreasonably brought caused the respondent to broadly incur costs in defending the proceedings as claimed by the respondent in their schedule at £69,575.22 (of which £20,564.00 is counsel's fees) and in having to answer through evidence at the hearing serious allegations.

43. The claimant asks me to take into account what he says are his limited means. I, however, find that difficult as the claimant did not attend the costs hearing. This meant he did not confirm his evidence as to means under oath and importantly deprived the respondent and me of the opportunity to ask the him questions.

44. He has prepared a statement of assets and other financial circumstances as used in the county court. He says his take home income is £1340.00 a month. He says he has rent or mortgage of £1243.00 a month, with other outgoings such as council tax at £179, travel £25, utility bills £150, telephone £59, television £42, food £250 and travel (again) of £110.00. He also refers to county court orders of £1168 but it is not clear what they are or whether that is in fact monthly. He refers to loan repayments of £23,700.00 which I doubt can be a repeating monthly amount. He says he has savings of minus £3250, has one dependent child and a mortgage of £107,500.00 on a properly valued at £140,000.00. I do not appear to have a full set of bank records but I have a letter from the RBS (I believe relating to the claimant's mortgage) saying the claimant has missed a payment, owes £11,464.35 but suggests he had available funds in another account. I have a M&S credit card statement saying the claimant has an overdue amount of £587.85 and a balance of £3703.10. I have a MBNA credit card statement saying the claimant had missed a payment, needed to pay £1096.75 and owed £7420.75. I do not know (and was unable to ask about) the age of the claimant's child and his general child dependency arrangements.

45. The respondent makes the point that the claimant is in receipt of a pension (which may be the income figure given of £1340) but that the claimant when he retired (which was not an ill health retirement) also took a lump sum which the claimant has given no information about. I do not have a full set of bank account records for the claimant (for example, the RBS letter refers to another account). I have not been able to ask him questions about these things. I am also not satisfied that the claimant has no earning capacity. I am told by the respondent that the claimant's pension does not prevent the claimant working elsewhere. I am told by the respondent the claimant currently remains under restrictions that may pragmatically prevent the claimant at the current time from practicing as a doctor. However, it does not mean that the claimant is not in the future able to meet any NCAS/GMC requirements and return to practice. It also does not mean that the claimant is unable to work in some other form of occupation. He is 57 years old. He still has some years of potential economic activity left. Moreover, the claimant on his own figures is living way beyond his means. He must have a plan for the future, but by his non-attendance I and the respondent have been unable to ask him about that. He also has some equity in his property.

46. I have also taken into account the fact that costs are the exception in employment tribunal litigation. I have also taken into account that there is no suggestion a costs warning was sent by the respondent to the claimant (which is

a potential factor but not of itself to determinative).

47. I further take into account that part of the costs incurred in this cause was caused by the adjournment of the hearing because it came to light that Dr Neville had sent to the respondent's legal team some interview recordings which had been overlooked in the various emails that had been sent through. These needed to be transcribed and sent to the claimant along with other material and witness statements to explain what had happened. The claimant ultimately accepted it was down to human error. The respondent seeks to blame the claimant for this by saying it was caused by the claimant's own bombarding of them with emails. I do not think that is a correct analysis. It was an email from the respondent's own witness to the respondent's legal team and I do not consider that the claimant should be responsible for the costs that the respondent incurred through their own mistake in that regard and the resulting postponement and relisting of the final hearing.

48. I therefore take a step back and look at this all in the round. The respondent's (unassessed) schedule comes in at £69,575.22. The respondent has however capped their claim for costs at £20,000. I consider that it is reasonable, appropriate and proportionate to order the claimant to pay that £20,000. It reflects the nature, gravity and effect of the claimant's pursuit of litigation that had no reasonable prospect of success. Even if I take into account the costs sustained by the respondent's disclosure failings that would not bring the figure below £20,000. Furthermore, bearing in mind my comments on the claimant's ability to pay I am satisfied that this is a figure that there is a realistic prospect he might at some point in the future to be able to afford to pay. Enforcement itself is ultimately a matter for the respondent/ the county court.

Abusive/ Disruptive/ Unreasonable Conduct?

49. Given the above analysis which awards the respondent their capped costs of £20,000 I will deal with their additional arguments about abusive/ disruptive/ unreasonable conduct of the litigation in shorter form, as it would not and could not lead me to make any greater costs award. I will concentrate on the key themes.

50. The application of 11 November 2022 alleged that the claimant had acted disruptively and otherwise unreasonably in bringing the proceedings and the way they were conducted. It alleged the claimant had not engaged with the court timetable, harassed the respondent with copious ill-mannered emails regarding disclosure, the timing of such emails and requests for documents unrelated to maters in issue. It was said that emails were disrespectful and rude. It was said that the respondent attempted to answer relevant queries as much as possible but it was made difficult by the claimant ignoring requests made of him as his opinion was that the responsibility for bringing the claim rested on the respondent. It was said the large number of emails from the claimant (often copied to the tribunal) made it difficult for the respondent to manage and keep up with requests and resulted in them, as set out above, missing the email from Dr Neville with certain recordings. It is said the claimant often asked for information rather than documents (including when in December 2021 it was directed the claimant was to provide the respondent with a list of all the documents he wanted). It was said the claimant's conduct meant they incurred additional legal costs including preparation and searches for evidence that did not exist or was not relevant and had to engage in multiple unnecessary correspondence. They say they attend preliminary hearings where the claimant did not attend.

51. The respondent's schedule of alleged disruptive/unreasonable/abusive conduct alleged that the claimant's conduct of the litigation had increased costs over 60-70% above what might reasonably have been expected.

52. I do consider that the claimant engaged in unreasonable conduct of the litigation in respect of the extent of his overzealous and misguided pursuit for information and documents that did not relate to the core issues in the list of issues that the tribunal was going to decide in the case. I do not consider he was being intentionally disruptive. I consider it was borne of the lack of focus by the claimant throughout on what his pleaded case was actually about, his genuinely held belief in the seriousness of the underlying issues regarding the death of the patient, and his general (misguided in our findings) sense he was being made a scapegoat. He lost sight of the claim he had actually brought. He lost sight of the limited time frame to which his claim related. When he did not get the response he thought he was entitled to the claimant would then sometimes make accusations of incompetence, deliberate obfuscation or even at times criminal corruption. I do factor in that the claimant was a litigant in person, he would not have readily understood the tribunal processes. He thought he was pursuing issues of fundamental importance. The respondent also worked hard to engage with the claimant which is entirely commendable but probably also contributed to the claimant not stepping back and engaging in some critical analysis. (To be clear I am not criticising the respondent). I also factor in that the claimant was right in relation to insisting there should be recordings of interviews with other individuals undertaken by Dr Neville and no doubt that made him suspicious there were other things too that he did not have. But on balance I do consider the claimant's conduct as a whole in relation to the pursuit of documents and information was unreasonable for reasoning linked to my findings above about the merits of the claims he was pursuing. If he had a responsibility to stop and think and evaluate the basis and strength of his claims then he had an allied responsibility to stop and think about the relevance of the documents and information he was seeking, rather than making demand after demand and allegation after allegation.

53. I therefore do also consider that the claimant acted unreasonably in the level of repeated correspondence he engaged in repeatedly seeking the same documents or information, and criticising the respondent for not providing it or meeting his demands. It was over and above the ordinary conduct of a litigant in person even taking into account the lack of knowledge of the conduct of legal proceedings or the claimant's belief in the importance of what he was raising. I consider the claimant did have a mindset that it was the respondent's job to do everything and meet his every demand for information that he sometimes metered out with a remarkable lack of specificity on his on part as to exactly what he was seeking and why. This was a case he had brought against the respondent, not vice versa. He had obligations to be clear in what claim he was bringing, why and how that related to what allegations he was making or information he was seeking. All litigants in person have a duty to cooperate with the tribunal and respondent in that regard so that a case can be fairly and proportionately got ready for final hearing. In short, he expected the respondent to do all the running when doing very little himself other than making lots of demands or requests, which sometimes ill-tempered.

54. In terms of the way in which the claimant expressed himself, I do consider that at times did display a lack of patience, a lack of understanding of his own responsibilities, unnecessary criticism of the respondent, and some emails were ill tempered and unnecessary accusatory, (sometimes of criminal wrongdoing.) This was in the face of a respondent legal team that were seeking to engage with him to get the case ready. That said I do appreciate it can be difficult for litigants in person to separate out a legal team from the respondent, and to have a level of trust in their professionalism. The situation with the recordings will not have helped in that regard albeit the claimant did himself in due course acknowledge he understood it was a mistake and sent a kind email to the individual involved. I should also be clear that I am not saying all the claimant's correspondence is

being criticised. Much of it was also linked to the claimant's fundamentally held belief in the public importance of matters he was raising. On balance looking at it all in the round, I would not find that the way the claimant conducted himself in this regard in general tipped over the edge into of itself becoming unreasonable or abusive conduct of the proceedings (as opposed to some individual emails which may well have been – but I do not think should generally result in a finding of unreasonable or abusive conduct of the litigation), taking into account his status as a litigant in person and the perspective the claimant was coming from. Albeit that is not to condone the claimant's conduct or to not appreciate the impact that behaviour has. In any event it is also not something, if I was looking at it solely by itself, that I would exercise a costs discretion about. The wider context of where the claimant was coming from is relevant. Moreover, it did not of itself disrupt the proceedings or prejudice the fairness of a hearing. The disruption and cost was more caused by the excessive, repeated demands themselves and the linked lack of focus on what the case was actually about.

Employment Judge R Harfield
Date - 21 July 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 24 July 2023

FOR THE TRIBUNAL OFFICE Mr N Roche