EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Lightfoot-Webber**

First Respondent: **Lawcommercial Trading Ltd t/a Lawcomm Solicitors**

Second Respondent: **Lawcommercial Services Limited**

Considered by way of written submissions and oral submissions made at the remedies hearing on 5 July 2023 by CVP

Before: **Employment Judge Volkmer**

Representation
Claimant: Mr Goodwin (Counsel)
Respondents: Mr Dhariwal (Director of the First and Second Respondent) in person.

JUDGMENT ON COSTS

The Judgment of the Tribunal is that the Respondents are ordered to pay to the Claimant the sum of £2,000 plus VAT in costs.

REASONS

BACKGROUND

1. By a claim form presented on 10 September 2022 the Claimant claimed constructive unfair dismissal, a bonus payment and a failure to provide a statement of terms of employment. A liabilities hearing took place before me by video on 21 and 22 February 2023. By a reserved judgment dated 22 March 2023, and sent to the parties on 30 March 2023, the Claimant's claims were upheld against the First Respondent. All claims against the Second Respondent were dismissed.

2. In a remedies judgment dated 15 June 2023, I ordered the First Respondent to pay the Claimant a total of £12,878.04 in respect of basic award, compensatory award, failure to give employment particulars and breach of contract.

3. The Claimant's application for costs/wasted costs runs to 9 pages and was accompanied by a Costs Application Bundle of 33 pages. She makes two applications in the alternative: all of her costs, and the costs of the remedies hearing only.

4. The Claimant and Respondents each submitted written submissions in relation to costs. I was also referred to a Remedies Bundle of 116 paginated pages. The Liabilities Bundle of 256 paginated pages was also referenced. Submissions were made in the hearing in relation to the Claimant's costs application, but it was agreed with the parties that this would be dealt with after the remedies judgment had been given. Each party then made submissions in writing about without prejudice discussions relied on by the Claimant as demonstrating unreasonable behaviour.

THE CLAIMANT'S APPLICATION

5. The Claimant seeks all of her costs (£3,700 plus VAT) based on the following allegations of unreasonable conduct and on the basis that the Respondents' response in part or in full had no reasonable prospects of success. She relies on the Respondents' alleged conduct as follows:
   - 5.1. advancing a fundamentally misconceived argument that the Claimant did not have sufficient service for an unfair dismissal claim, and using it to make threats of costs against the Claimant;
   - 5.2. taking an obstructive approach to disclosure;
   - 5.3. use of inappropriate documents;
   - 5.4. providing witness evidence late which exceeded the Tribunal's word limit;
   - 5.5. conduct during the hearing:
     - 5.5.1. asking leading questions in re-examination notwithstanding being warned about such conduct by the Employment Judge;
     - 5.5.2. raising his voice and being argumentative and aggressive towards the Claimant during cross-examination;
     - 5.5.3. seeking to give evidence in cross-examination notwithstanding being warned about such conduct by the Employment Judge;
     - 5.5.4. misrepresenting the Claimant's answers in submissions;

5.5.5. being late for the second day of the hearing;

5.6. failing to comply with case management orders for the Remedies Hearing regarding disclosure, an agreed bundle and index, which was not complied with until the working day before the hearing on 2 June 2023;

5.7. including documents in the remedies bundle which appear to unilaterally waive privilege over five of its clients' legal matters;

5.8. acting unreasonably in relation to without prejudice discussions. The Claimant relies on the fact that on 20 February 2023, the day before the hearing, she made a settlement offer of £9,000, and that this was repeated on 21 February 2023, but that the Respondents did not engage. On 1 May 2023, the Claimant made another offer of £10,392.00 which she says: set out the basis for calculation, took a commercial approach to each head of loss and included a costs warning. She says that the Respondents completely ignored that offer. The Respondents offered £5,010.09 on 12 June 2023, after the remedies hearing but before the Remedies Judgment had been issued, the Claimant argues that this was a tactical offer made after all costs had been incurred.

6. The application in relation to the costs of the remedy hearing only (£1,200 plus VAT) relies on the following allegations relating to the alleged unreasonable conduct of the Respondent. The Claimant says that these caused delays and resulted in the need to list a separate remedy hearing. She relies on the Respondent:
   6.1. providing witness statements very late;
   6.2. providing excessively long witness statements, requiring time to be taken from the hearing to cut them down;
   6.3. failing to provide mark-ups of the reduced statements in a timely fashion, slowing cross examination;
   6.4. asking leading questions during re-examination, requiring intervention from the Employment Judge and slowing the progress of the trial as a result;
   6.5. Mr Dhariwal's conduct during cross-examination, requiring intervention from the Employment Judge;
   6.6. exceeding the time estimate for cross-examination by more than 50%;
   6.7. arriving late on the second day / failing to aim to arrive appropriately early on the second day, causing a later than planned start.

THE RESPONDENTS' POSITION

7. The Respondents submitted written submissions for the remedies hearing, pages 8 to 22 of which related to the Claimant's costs application. The Respondents position was as follows:
   7.1. the Respondents point to Claimant being "complicit" in the bundle for the liabilities hearing being longer than the ordered 190 pages (it is unclear how this relates to the points put by the Claimant);
   7.2. attempts to exchange witness statements were made by the Respondents on 14 February 2023 (page 94 Remedies Bundle), 15 February 2023 (page 100 Remedies Bundle) and 17 February 2023 (page 104 Remedies Bundle);
   7.3. the Respondents accept that their witness statements were over the word count, but takes the position that this did not cause delays as preliminary matters had always been intended to be dealt with. They say that amendments were produced in track changes;

7.4. Mr Dhariwal admits to asking some leading questions during re-examination, but states it was not deliberate and was due to inexperience in advocacy;
7.5. Mr Dhariwal also conceded that he had become "animated" but said that he had apologised to the Claimant; he had believed that the Claimant was deliberately evasive and cross examination is an often contentious process. However, he denies being argumentative or aggressive;
7.6. Mr Dhariwal gave the best estimate of time but he admits this was exceeded. The Respondents say that this was in part due to the evasive answers being provided by the Claimant. In any event, the estimate was not fixed but estimated and the Employment Judge permitted additional time;
7.7. the Respondents' position is that it is not the Respondents' fault that a separate remedies hearing was required. The reason for a separate remedies hearing was that there were only two days for all of the evidence, the majority of the first morning was taken up by the Claimant's late application to amend. It is not unusual that a Tribunal directs a separate remedy hearing;
7.8. the Respondents appear to rely on their appeal and/or application to adjourn in relation to the allegation that they failed to comply with the case management orders for the Remedies Hearing; and
7.9. the Respondents deny that their approach to without prejudice discussions was unreasonable.

FINDINGS OF FACT

Respondents' Response

8. The Claimant alleges that the Respondents' response in part or in full had no reasonable prospects of success and refers to the Respondents' argument that the Claimant did not have sufficient length of service to bring an unfair dismissal claim. Whilst this was incorrect in its reflection of the legal position (see below at paragraph 9), the Respondents argued an alternative position that there had been no fundamental breach of contract so as to justify the Claimant's resignation. In my finding, the defence against the unfair dismissal claim cannot be said to have had no reasonable prospect of success. In relation to correspondence with the Claimant regarding length of service, that is dealt with below.

Alleged Misconceived Argument

9. The Respondents' position as set out in the Grounds of Resistance at paragraph 4 was that there had been a transfer of the Claimant's employment on 29 January 2021 pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") from the Second Respondent to the First Respondent. Nevertheless the Respondents sought to argue, at paragraph 9 of the Grounds of Resistance, that the Claimant did not have sufficient length of service to bring an unfair dismissal claim. This could only have been the case if the Respondents did not take into account that the Claimants length of service would have transferred on a TUPE transfer.

10. On 10 February 2023 (at page 2 of the Costs Bundle) and 13 February 2023 (at page 3 of the Costs Bundle), the same point was made in letters to the Claimant, saying that if she discontinued claims with no prospects of success this would save costs and reserving the right to pursue costs against her if it was found that such claims should have been withdrawn prior to the hearing.

11. The Respondents did not pursue an argument at the hearing that the Claimant did not have sufficient service for an unfair dismissal claim. This was withdrawn at the beginning of the liability hearing.

12. The Respondents' written submissions in relation to the costs application, at paragraph 28, stated that their position regarding the length of service had been based on the fact that they did not consider that a TUPE transfer had taken place. This explanation was hard to sustain in the face of an express position at paragraph 4 of the Grounds of Resistance, that there had been a TUPE transfer. When this was pointed out Mr Dhariwal, he sought to explain it away by saying that this related to a point prior to the proceedings commencing. This did not persuade the Tribunal, since matters prior to the start of proceedings were not in issue.

13. The Respondents' are a law firm holding themselves out as specialists in employment law (page 6 Costs Bundle). Mr Dhariwal himself stating in his Solicitors Regulation Authority profile that he practices in employment law (page 7 Costs Bundle).

14. Against this background, it was unreasonable for the Respondents to write to the Claimant on 10 and 13 February 2022 in the terms that it did, seeking to put pressure on her to concede that she did not have sufficient length of service for an unfair dismissal claim. This position was clearly unsustainable in circumstances, when the Respondents position since the date of the Grounds of Resistance on 11 October 2022 had been that there had been a TUPE transfer of the Claimant's employment.

Alleged Obstructive Approach to Disclosure

15. On 16 November 2022 the Notice of Video Hearing was sent to the parties and contained standard Case Management Orders which required the parties to send one another a list of documents within six weeks of the date of the letter. It states "*They shall send each other a copy of any of these documents if requested to do so*." No date was set for the sending of these documents. The Claimant complains that she requested the documents on 3 January 2023 but the Respondents did not send their documents until 30 January 2023. The Respondents rely on Mr Dhariwal being on sick leave as the reason for the delay but did not provide any dates of his absence.

16. In the absence of any specific deadline the Tribunal does not uphold this allegation as being unreasonable.

Alleged Use of Inappropriate Documents

17. The Claimant complains that certain documents contained irrelevant personal information which were intended to and did cause the Claimant distress and were not referred to by the Respondents. The Respondents position is that

these emails were background documents to demonstrate the Respondent's providing support to the Claimant during the employment relationship.

18. In addition the Claimant points out that the Respondents sought to include an email from a potential witness explaining why she did not wish to give witness evidence. This document was excluded from the Hearing Bundle as a preliminary point, see paragraphs 11 to 13 of the Liability Judgment.

19. Whilst I understand the reasons the Claimant may have found it distressing, I do not consider that there is evidence based upon which I could make a finding that these were intended by the Respondents to cause distress. Numerous documents in the Liabilities Bundle were not referred to, as is normal. Being unsuccessful in a dispute about the appropriateness of a document is also not unusual.

20. I do not make a finding of unreasonableness by the Respondents in relation to the use of documents.

Late Witness Evidence

21. The parties both made attempts to exchange witness statements. Attempts to exchange witness statements were made by the Respondents on 14 February 2023 (page 94 Remedies Bundle), 15 February 2023 (page 100 Remedies Bundle) and 17 February 2023 (page 104 Remedies Bundle). The Claimant wished to complete her page references to the Hearing Bundle before exchanging witness statements. The Claimant had not received the paginated Hearing Bundle at this point, so said that she was not ready. On 17 February 2023 the Respondents sent their witness statements to the Tribunal without copying the Claimant.

22. The co-founding partner of the Respondents, Mr Amar Sandhu, passed away on 17 February 2023.

23. The Claimant received the paginated Hearing Bundle at 11.07 on 17 February 2023 and confirmed by email to the Respondent's at 17.17 that she was ready to exchange witness statements. This email was sent to a typist at the Respondents, whose email footer stated that any replies should be copied to Mr Dhariwal's assistant. The Claimant, however, did not copy her email to Mr Dhariwal's assistant (page 58 of the Remedies Bundle). The Respondents say that the typist had gone home at this point. However, the typist did send a further email, the following day 18 February 2023 (a Saturday) (page 22 of the Costs Bundle), so had accessed their email account at that time. The Claimant emailed Mr Dhariwal directly on Sunday 19 February 2023 at 15.03 asking that they exchange on Monday morning and pointing out that since the Respondents witness statements had already been filed with the Tribunal there could be justification in preventing exchange.

24. After several email exchanges the Respondents did not send their witness statements to the Claimant until 16.39 on 20 February 2023, the day before the hearing. The Respondents say this is because Mr Dhariwal was out of the office following the bereavement and his assistant was not confident to exchange witness statements.

25. It was unreasonable to send the Respondents witness statements to the Tribunal on Friday 17 February 2023 without copying the Claimant, and then delay until 16.39 on Monday 20 February 2023 to send them to her, when all that was required was to forward an existing email, which should have been copied to the Claimant in any event. This left the Claimant and her representatives with very little time to prepare for the hearing which started on 21 February 2023. I take into account the mitigating circumstances in relation to the bereavement, but the Claimant should have been copied on the email sending the statements to the Tribunal. On Monday morning this could have easily been forwarded to the Claimant by the assistant helping on the case. It would have been clear to the Respondents, in particular Mr Dhariwal, Head of Litigation, that witness statements were central to the case, as is almost invariably the case in any litigation.

26. Further the Respondents had significantly exceeded the word limit for witness statements set out in the Case Management Orders, of 5,000 words. The statements ran to 7,085 words. In the absence of any application to the Tribunal, made in good time, and in the context of the late provision of the witness statements this was unreasonable.

Allegations regarding Conduct During the Hearing

27. It is agreed by the parties that Mr Dhariwal asked some leading questions in re-examination. I had warned Mr Dhariwal about such conduct. He denies that it was a deliberate tactic as alleged by the Claimant, and there is no evidence before the Tribunal of this.

28. At one point during cross-examination Mr Dhariwal raised his voice saying "*just answer the question"*. I told Mr Dhariwal that it was not appropriate to raise his voice and he apologised. This was acknowledged in the Respondents submissions.

29. Claimant alleges and the Respondents deny that Mr Dhariwal was argumentative and aggressive. I do not consider that Mr Dhariwal was argumentative and aggressive in the way he conducted cross-examination except as set out in paragraph 28 above.

30. I was required to remind Mr Dhariwal that he should not seek to give evidence in cross-examination. In submissions Mr Dhariwal incorrectly stated that the Claimant had agreed in cross-examination that the failure to pay the bonus was not a breach of contract and was corrected by me on this point.

31. The Claimant says that the Respondents exceeded the time estimate for cross-examination by more than 50%. The Respondents admit that the time estimate was exceeded by Mr Dhariwal, but submits that it was an estimate and not fixed, and submits that was in part due to "*evasive answers*" being provided by the Claimant.

32. The parties agreed an earlier start time for the second day of the hearing, at 9:30 AM. However Mr Dhariwal arrived later, so the hearing could not commence until 10 AM, and he stated that this had been because of traffic. The Claimant's position is that Mr Dhariwal's explanation that a journey which would normally take 25 minutes had taken an hour meant that he must have only left

himself five minutes of leeway which is unacceptable. The Respondents position is that this was a general explanation and not a forensic response.

33. Overall the Tribunal does not consider that the conduct of Mr Dhariwal can be described as unreasonable during the hearing. These types of issues are common in liabilities hearings and not sufficiently serious to be described as unreasonable whether in isolation or when taken together.

34. The Tribunal considers that a separate Remedy Hearing had to be listed due to the volume of matters to be considered including preliminary matters, such as the Claimant's amendment application, the number of witnesses and the complexity of the claim. This had not been anticipated by the parties or in the listing, which reflected the time taken for a normal unfair dismissal claim. However, the Tribunal does not consider that any of the parties were at fault in relation to the need for a Remedy Hearing.

Failure to comply with Case Management Orders for Remedies Hearing

35. The Respondents appear to rely on their appeal/application to adjourn as an excuse for a failure to comply with the Tribunal's orders. The relevant documents were sent to the Claimant the day before the hearing. Once again I have to take into account that the Respondents are a law firm specialising in both Employment and Civil litigation, and should therefore be that the making of such an application does not operate as a stay on proceedings.

36. In the circumstances, I consider this is unreasonable behaviour and echoes earlier failures to comply with the Tribunal's orders. These create difficulties for the Claimant's preparations for the hearing.

Use of privileged client documents in Remedies Bundle

37. The Tribunal considers that there is not enough evidence to make findings as to whether the relevant clients have consented to the use of these documents. The points made by the Claimants (cherry picking, documents dated long after the Claimant has left) are relevant to the relative weight that should be placed on them. The Tribunal does not make a finding that the inclusion of these in the bundle is unreasonable conduct.

Allegations regarding Without Prejudice Offers

38. The without prejudice offers relied on by the Claimant were made at a very late stage in the proceedings, the working day before, and the first day, of the hearing, and in my finding, at this stage of the proceedings, when the Respondents had made all of their preparations for the hearing, it was not unreasonable for the Respondents to reject those offers even though they were ultimately beaten by the Claimant. On 1 May 2023, the Respondents had a reconsideration application and appeal outstanding, and again I do not find it was unreasonable to wish to proceed with the litigation in those circumstances.

THE LAW

39. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Tribunal Rules") provides:

1) A Tribunal may make a costs order or a preparation time order, and shall consider
whether to do so, where it considers that –
a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted; or
b) Any claim or response has no reasonable prospect of success or
c) ……
2) A Tribunal may also make such an order where a party has been in breach of any order or any practice direction or where a hearing has been postponed or adjourned on the application of a party."

40. *Rule 78 provides:*
"1) A costs order may –
a) Order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party."

41. Although the Tribunal Rules provide me with the power to make costs awards, such awards in Employment Tribunal proceedings are the exception rather than the rule (*Gee v Shell UK Ltd [2003] IRLR 82*).

42. *Milan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN* sets out a structured approach to be taken in relation to an application for costs where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise at paragraphs 52:

"*There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court*."

43. The EAT decided in *Dyer v Secretary of State for Employment EAT 183/83* that "unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious". It will often be the case, however, that a Tribunal will find a party's conduct to be both vexatious and unreasonable. Whether conduct is unreasonable is a matter of fact for the Tribunal to decide.

44. In *AQ Ltd v Holden UKEAT/0021/12/CEA* His Honour Judge Richardson stated that a Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. Tribunals must bear this in mind when assessing the threshold tests. Even if the threshold tests for an order for costs are met, the Tribunal must exercise its discretion having regard to all the circumstances and it is not irrelevant that a lay person may have brought proceedings with

little or no access to specialist help or advice. However, Judge Richardson said in paragraph 33:
"*This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity*."

45. Similarly, in *Vaughan v London Borough of Lewisham & Ors (No. 2) [2013] IRLR 713*, the EAT declined to interfere with a substantial costs order against an unrepresented party. Underhill J observed that "*the basis on which the costs threshold was crossed was not any conduct which could readily be attributed to the appellant's lack of experience as a litigant*".

46. *Calderbank v Calerbank [1975] 3 All ER 333* is a case regarding without prejudice save as to costs offers, this applies in family proceedings and not to Employment Tribunal proceedings. However in *Kopel v Safeway 2003 IRLR 753* the EAT upheld the Tribunal's finding that the Claimant's failure to accept the employer's substantial offer of settlement was unreasonable conduct of the proceedings. The Tribunal is entitled (but not required) to make a finding on the facts that the rejection of a without prejudice offer is unreasonable, and may take it into account in exercising its discretion in relation to costs. Costs warnings may also be taken into account.

47. In *McPherson v BNP Paribas (London Branch) [2004] EWCA Civ* 569 Mummery LJ stated:

[40] … "*The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred.*"

48. In *Yerrakalva v Barnsley Metropolitan Borough Council and another [2012] ICR 420*, CA Lord Justice Mummery held:
"*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 was unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had." That case also decided that although there was no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that did not mean that causation is irrelevant*."

49. In *Lodwick v Southwark London Borough Council [2004] ICR 884*, CA, the Court of Appeal determined that at both stages of the Tribunal's discretion to make a costs award, the fundamental principle that costs awards are compensatory not punitive, must be observed.

CONCLUSIONS

50. I have decided it is appropriate to deal with this application by considering costs rather than wasted costs because the Respondents are representing themselves.

51. There are three stages to be applied:
    51.1. finding whether the Respondents have behaved unreasonably in the way the proceedings have been conducted;
    51.2. considering whether it is appropriate to make a costs order; and
    51.3. considering whether I should exercise my discretion in making such an order.

52. With regard to the way in which the proceedings were conducted by the Respondents, I made a finding above that the following conduct of the Respondents was unreasonable:
    52.1. writing to the Claimant on 10 and 13 February 2022 in the terms that it did, seeking to put pressure on her to concede that she did not have sufficient length of service for an unfair dismissal claim;
    52.2. sending the Respondents witness statements to the Tribunal on Friday 17 February 2023 without copying the Claimant, and then delaying until 16.39 on Monday 20 February 2023, the day before the hearing, to send them to the Claimant;
    52.3. significantly exceeding the word limit for witness statements; and
    52.4. failing to comply with case management orders for the Remedies Hearing.

53. Having found that some of the conduct on behalf of the Respondents was unreasonable, there is no requirement for this Tribunal to award costs. There are a number of factors to consider, including the nature, gravity and effect of the unreasonable conduct, although there is no principle that costs should only be awarded where they can be shown to have been incurred by specific instances of unreasonableness.

54. In this case, I find that it is appropriate to award costs against the Respondents in respect of the conduct outlined above, in particular in relation to the witness evidence which caused significant difficulty and disruption to the Claimant's preparation for the hearing. If the Claimant's counsel had not been as diligent as he was in preparing cross examination after close of normal business hours on the day before the liability hearing, despite having a young child at home, the hearing would likely have had to be adjourned. Witness statements within the correct word count were not received by the Claimant until the afternoon of the first day of the hearing. This put significant pressure on the Claimant's representation in the circumstances.

55. In deciding whether costs should be awarded, I am permitted to take into account the Respondents' ability to pay. However, there were no submissions or evidence in respect of their ability to pay and, therefore, this does not affect my decision in finding that it is appropriate to award costs.

56. Having found that there was unreasonable conduct and that it is appropriate to award costs, I am still required to address my mind to whether I should exercise my discretion in awarding costs in this matter. In other words, I must decide whether it is just to exercise the power to award costs. The basic principle is that the purpose of an award of costs is to compensate the party in whose favour the order is made, not to punish the party ordered to pay the costs. Looking at all the evidence in the round, I find that is just to award costs in this matter to take into account the conduct outlined above. Given the nature of the

findings of unreasonableness when considered in the context of the case overall, I make an award of costs in the sum of £2,000 plus VAT.

Employment Judge Volkmer

Date 10 July 2023

Sent to the Parties on 27 July 2023

For the Tribunals Office