Case No: 1600708/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss A Abhyankar

Respondent: Cardiff & Vale University Local Health Board

Heard at: Cardiff (by CVP) **On:** 10 August 2023

Before: Employment Judge C Sharp
Mr M Lewis
Mrs J Beard

Representation:
Claimant: Mr J Jupp (Counsel)
Respondent: Ms H Barney (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant unreasonably continued the proceedings from 20 January 2022 onwards;

2. The Claimant brought claims with no reasonable prospect of success;

3. The Tribunal will exercise its discretion to order that the Claimant pays costs incurred by the Respondent;

4. The costs to be paid by the Claimant will be assessed by detailed assessment undertaken by an Employment Judge assessing costs as if the proceedings were in the County Court;

5. Once the Respondent's bill of costs (starting from 20 January 2022 up and including the costs of detailed assessment) has been assessed, the Claimant is directed to pay 75% of those costs assessed on a standard basis to the Respondent.

REASONS

The application

1. Following the promulgation of a liability Judgment on 16 January 2023 dismissing the Claimant's claims of detriment due to the making of a public interest disclosure and victimisation, the Respondent applied for a costs order on 10 February 2023.

2. The basis of that application was that the Claimant had acted unreasonably in the bringing/continuing of the proceedings or the way that the proceedings had been conducted. In the alternative, the Respondent argued that the Claimant's claims had no reasonable prospect of success. It sought either 100% or up to 75% of the costs incurred (the full total set out was £202,596.46 inclusive of VAT) should be paid by the Claimant. The Respondent sought detailed assessment or as an alternative summary assesses (with its £20,000 cap on costs).

3. If detailed assessment is directed, there are designated Employment Judges who carry out detailed assessments; the law requires assessment as undertaken by the County Court, not necessarily by that Court.

Unreasonable conduct

4. The Respondent set out 32 findings by the Tribunal as evidence that the Claimant had acted unreasonably in the bringing of the proceedings or the way that the proceedings had been conducted, though it said the list was intended to be a snapshot and was not exhaustive. The list included matters such as:

    a) *"The Claimant in her statement…makes sweeping generalised but serious accusations against others that is not founded by the evidence…[this included statements that the Claimant was found to have known not to be true]*

    b) *"… the overwhelming picture of the evidence before it was that the Claimant asserted everything she raised was a patient safety issue, whether or not this was the case, despite the inaccurate evidence in her witness statement about her belief, but it did not objectively consider this belief to be reasonable given the focus of the letter was about the Claimant's UPSW in 2017 and because her reasoning was based on inaccurate beliefs and ignoring facts known to the Claimant at the time";*

    c) *"the Claimant's concerns had been investigated more than once, but fundamentally the Claimant did not accept the outcomes and criticised the findings of both the external review, the RCS and anyone else with whom she disagreed";*

    d) *"In the Tribunal's view, it was a bad point raised by the Claimant to seek to argue Mr Richards had deliberately failed to address the surgical concerns…"*

e) *"the Claimant was unable to accept other points of view or conclusions that disagree with her";*

f) *"the Claimant in her evidence made many unsubstantiated allegations and speculation and would not withdraw or concede points when under cross-examination it was shown that her account was incorrect.";*

g) *"…given the Claimant was a senior consultant who was repeatedly raising the same or similar issues time and time again, focusing on particular individuals while saying she had no concerns about them (see Mr Darwish and the junior surgeon), but without giving precise details and claiming to be afraid of Professor Jenney. At times, the Claimant was raising concerns about matters which she knew nothing about or based on her supposition or rumour; this is not reasonable conduct.";*

h) *"The Tribunal also bore in mind that the Claimant's recollection of events generally was not wholly reliable; Ms Barney described the Claimant as "skewing" events to suit her own narrative. The Tribunal agreed that when the Claimant's account was placed next to contemporaneous evidence, including her own documents, her account was not to be relied upon";*

i) *"The Tribunal did not accept the Claimant's position in her witness statement (paragraph 568) and under cross-examination that allegations of bullying, even if having a harmful effect on the victim, did not justify suspension; it was a demonstration of the Claimant's unreasonable beliefs";*

j) *"…the Claimant's allegation that the decision to immediately exclude her was due or materially influenced by a number of protected disclosures and acts carried out between 22 March 2019 to 22 November 2020 has no evidential basis. It does not address the issue of the Khakhar complaint; Ms Khakhar was wholly unaware of these actions by the Claimant."*

k) *"The Claimant's account is not supported by any evidence from the BMA or contemporaneous evidence; she has been found to be unreliable in her recollection of events."*

l) *"…the Tribunal considered this to be an example of the Claimant "skewing" facts by making allegations about a personnel file, when really she was asking about the leave system";*

m) *"However, there is no evidence whatsoever that anyone other than Professor Fegan is involved in the sending of this email. The other individuals named had no involvement."*

5. The Tribunal did not consider it necessary or proportionate to individually analyse every example on the list provided by the Respondent. The broad thrust was that the Claimant's evidence was found to be at critical junctures to be vague, generalised, unsubstantiated, unreliable and/or untrue, based on

unreasonable beliefs, in conflict with what the evidence showed she knew at the relevant time, and in a few matters illogical e.g. asserting that individuals other than Professor Fegan sent his email.

6. The Respondent noted that the Claimant had failed to establish any detriment or reasonable belief that it was a detriment in respect of 26 out of 35 allegations. It submitted that the reason she failed was due to her unreasonable "*skewing*" of facts, her unreliability as a witness, her speculative and unsubstantiated approach, untrue/inaccurate evidence, the arguing of trivial/general/bad points, and her inability to accept the professional opinion of others. It also highlighted the late withdrawal of allegations (before and at the hearing), which were "*patently hopeless".*

7. The Respondent argued that the pursuit of so many distorted and/or hopeless complaints, together with the Claimant's unreasonable conduct, caused the Respondent to unnecessarily incur costs. It pointed out that the Claimant earned £136,000 gross per annum, while it was a public authority trying to deliver health services in financially difficult times.

Misconceived (no reasonable prospect of success)

8. The Respondent in addition argued that the Claimant (who was legally represented throughout) knew or ought to have reasonably known that all or part of her claims were misconceived (or using the current term – had no reasonable prospect of success). An extensive fact-finding exercise had previously been carried out by an independent barrister to resolve the Claimant's grievance, which did not find in her favour. The Respondent accepted that the focus of the Tribunal claim did not mirror the grievance, but the report should have made the Claimant reflect on the wisdom of arguing factually inaccurate/unfounded claims in the Tribunal proceedings.

9. Further, the Respondent relied on the list previously provided in relation to unreasonable conduct with the addition of other matters to support the argument that the Claimant's claims were misconceived. It quoted paragraphs in the Judgment showing the lack of evidence underpinning some of the allegations made, such as:

"150. The Tribunal could not see any connection between disclosures made several months earlier (or made in the future) about consent concerns and the sending of this email. The explanation given by Dr Thomas is plausible and consistent with the evidence that shows the issues within the email had arisen recently; the Tribunal considers it likely that the Claimant would have complained about any delay, given the voluminous evidence in the bundles that she complained regularly about any matter with which she was unhappy or felt was a slight on her professional skills or standing.

151. The Tribunal finds that the reason the email was sent was nothing to do with any protected disclosures by the Claimant; it was sent for the reasons given by Dr Thomas. The allegation is dismissed on the grounds that the act was not materially influenced by the making of a protected disclosure."

"171. The Tribunal considers that it is irrelevant when in January 2018 the Claimant sought the amendment to the RCS report. It is a fact that it took

about nine months for the point to be raised by Dr Shortland. Was it a deliberate failure?

172. There is no evidence on which the Tribunal finds the failure was deliberate."

10. The Respondent in its application submitted that "*The Claimant was blindly dogged in her determination to have her day in court at enormous cost and expense to the Respondent. There was a begrudging and piecemeal withdrawal of allegations…".* It added that the sending of a costs warning would have made no difference, nor would an application for a deposit order. Ms Barney confirmed in her submissions that no costs warning letter was sent to the Claimant and no application made for a strike out or deposit order made; this was on the basis that she submitted it would have made no difference at all to the Claimant who was adamant in having her day in court and the Tribunal would not have been sensibly able to deal with a preliminary hearing on merits before the final hearing, given the volume of allegations and evidence.

Oral submissions

11. In her oral submissions and at the start of the hearing, Ms Barney on behalf of the Respondent clarified that the Respondent was seeking 100% of the costs incurred, not 75% as the Judge initially said when outlining the issues. Ms Barney pointed out paragraph 14 of her written application, though she accepted that perhaps she could have used clearer phrasing. In addition, Ms Barney said that the Respondent was seeking indemnity costs, though she accepted that was not within her application. This was because Ms Barney submitted that while the decision would have to be made by this Tribunal, that could be done at a later stage.

12. Ms Barney drew the Tribunal's attention to various judgments, and strongly rebutted the submission in Mr Jupp's written response that persistent or gross dishonesty was required to enable a costs order to be granted (*Arrowsmith* was specifically relied upon – see citation below). Ms Barney said that it was not necessary for the case to be based on a lie, and reminded the Tribunal of its extensive and forensic findings about the case when dealing with liability. Ms Barney also reminded the Tribunal that there was no requirement for any costs awarded to be linked to specific conduct or acts (*McPherson* – see citation below) and it could bear in mind acts before issuing the claim form when considering the broad assessment of the Claimant's conduct where it was echoed in her conduct during proceedings.

13. Ms Barney set out a list of the Claimant's conduct based on the findings within the Tribunal's judgment – a) skewing of facts; b) unreliable evidence by the Claimant; c) that the Claimant had been found to have made speculative, sweeping and generalized accusations; d) that the Claimant had given untrue and inaccurate evidence; e) that the Claimant had advanced bad/unreasonable/trivial points; f) that the Claimant had been repeatedly found to be rigid in her views and unable to accept the views of others; and g) the late withdrawal of allegations, including at the submission stage. Ms Barney argued that the Judgment showed overwhelming unreasonable conduct of proceedings by the Claimant, and highlighted that 26 out of 35

allegations were found not to have happened as alleged and the general lack of evidence supporting the Claimant's position.

14. Ms Barney submitted that the Claimant's conduct easily exceeded the threshold to make a costs order and the Tribunal should exercise its discretion in the Respondent's favour. She noted that the Claimant had not relied on her means as a relevant factor. Ms Barney explained that the Claimant had effectively submerged the Respondent in evidence, and it would have been futile in such circumstances to seek a preliminary hearing on merits or issue a costs warning letter in circumstances where it was plain that the Claimant was determined to have her day in court. Ms Barney said that the Claimant's refusal to concede points in cross-examination except when she had absolutely no escape showed her rigid approach. The judicial mediation email from the Claimant's representatives was not viewed as serious as it attempted to seek parameters, rather than simply offer to mediate. Ms Barney concluded by saying that the Claimant's conduct was so "*out of the norm*" that indemnity costs were justified, but said that the Tribunal might wish to invite further submissions on this point.

The Claimant's response

15. The Claimant on 10 March 2023 sent to the Tribunal her written submissions, drafted with the assistance of her new Counsel Mr Jupp. The Tribunal acknowledges that it is never easy to take over a case at this stage, and was greatly assisted by Mr Jupp's clear and articulate submissions. The Claimant resisted the application and denied that her conduct had been unreasonable, or that all or part of her claims had no reasonable prospect of success.

16. The Claimant pointed out that the Respondent had accepted all of the alleged protected disclosures were protected, with the exception of five (which the Tribunal found were not protected disclosures); also, she noted that some of the alleged detriments were accepted to be detriments by the Respondent. The Claimant considered the withdrawal of particular allegations by her, including at the submission stage, to be reasonable. The Claimant complained that when she indicated an interest in judicial mediation, the Respondent did not respond to queries about its approach if mediation was entered into. She confirmed that no costs warning was sent to her, notifying her that if she persisted with the case as pleaded, the Respondent would seek a costs award.

17. Mr Jupp made the point that given the Tribunal produced a 111-page judgment where she failed to succeed in any claim, it was to be expected that her evidence was criticised within that Judgment. He added that the Claimant could only deal with the examples provided, and it was not fair for her to be expected to deal with matters not specifically addressed in the application. Accordingly, and helpfully, the Claimant concentrated on the themes underlying the examples given in the written submissions.

18. Mr Jupp submitted that conduct predating the institution of proceedings could not give rise to a costs award (**Davidson -v- John Calder (Publishers) Ltd and another** [1985] IRLR 97). Regarding the contention that the Claimant's allegations were not always supported by evidence, he argued that in respect of detriment 24, she had failed because she did not have a reasonable belief, and in respect of another matter (D24A), she had failed because her

recollection was found to be unreliable – there were established facts underpinning both allegations in his view. The Claimant accepted that in relation to another matter, her belief had been found to be unreasonable, but not that she had been dishonest.

19. The Claimant accepted that on several points, the Tribunal had not accepted her arguments, but submitted that this alone was no basis for a costs award. The same applied regarding the Tribunal's view of her evidence generally; Mr Jupp submitted it was inevitable that the losing party's evidence will have been rejected, but without gross or repeated dishonesty, there was no basis for a costs award.

20. Mr Jupp argued that at times there was no need to amend the claim to reflect the position as supported by the evidence as the general thrust of the complaint was about the escalation of Ms Khakhar's complaint (though he accepted that it was possible that the Tribunal did not agree with this position, given its comments about the need to amend at the liability hearing). The Claimant sought to blame the Respondent for calling Ms Khakhar, despite choosing for her Counsel to cross-examine her.

21. Turning to the argument about "*no reasonable prospect of success*", Mr Jupp made the point that the Claimant's entitlement to legal privilege was not waived and therefore the Respondent could not know what advice the Claimant received after the Hicks grievance report was provided. He agreed with the Respondent that the matters dealt with in that report did not fully mirror these proceedings and the witnesses for the grievance were not cross-examined. Merely not accepting the outcome of a grievance process is not a basis for a costs award. In addition, s48(2) Employment Rights Act 1994 required employers to explain the reason why a detriment had occurred; requiring the Respondent to do that in this case was not a basis for a costs award.

22. On the issue of how the Tribunal should exercise its discretion (though the Claimant's primary argument was that she neither acted unreasonably nor brought claims with no reasonable prospect of success), Mr Jupp submitted that the Tribunal should exercise it in her favour. This was on the basis that no costs warning had been given, no application for strike out or a deposit order had been made, the Respondent had not responded to an email about judicial mediation, and because the application for costs had been made to defeat any chance of reconciliation (the Claimant remains in the employ of the Respondent).

23. In the alternative, if the Tribunal was minded to make a costs award, the Claimant asked that it was limited to £20,000 (subject to summary assessment), rather than referred for detailed assessment with the possibility of a much higher award.

24. The Claimant, despite several opportunities, declined to provide evidence of her means. Accordingly, no witness evidence was heard.

Oral submissions

25. In oral submissions, Mr Jupp accepted that he had over-stated the position in relation to dishonesty, and withdrew his challenges regarding the standing of

some of the lawyers involved in the case on the Respondent's behalf and the charge out rate.

26. Mr Jupp said everything that could be said on the Claimant's behalf, including a reminder that she was entitled to know the case she was facing and it could not be in the public interest to deter whistleblowers in the NHS and a costs order could have a chilling effect.

27. Mr Jupp expanded on his written submissions and reminded the Tribunal not to depart from the findings already made when considering this application. Mr Jupp accepted that the Claimant had not found favour with the Tribunal and had not helped herself during her cross-examination, but that was not the issue before the Tribunal today. It needed to focus on what the Claimant knew at the relevant time (or ought to have known) as highlighted in *Radia* (see citation below); Mr Jupp said that it could not be said that the Claimant knew the allegations had no reasonable prospect of success just because the judgment went against her. The Claimant was not seeking to criticise the liability judgment, and Mr Jupp accepted that there had been allegations made that the Claimant was never going to win. He noted that the Tribunal had appropriately considered all the evidence and made findings – that was the usual process and did not mean that the Claimant had been unreasonable. The Tribunal was entitled to prefer contemporaneous evidence or the evidence of others without finding that a costs order was justified.

28. Mr Jupp pointed out that untrue evidence could be given without a witness being dishonest (for example, an honest mistake). He observed that the Hicks report did not cover the same ground as the Tribunal and witnesses for that grievance report had not been cross-examined. The fact that the report had been produced and did not support the Claimant's position did not mean that the Claimant had been unreasonable in continuing the proceedings.

29. Mr Jupp noted that the Claimant had been held to her pleadings at the liability stage, and so it was only fair that the Respondent should be held to the particulars of its application for costs; he said that it was not clear that the Respondent sought 100% and it was silent on the issue of indemnity costs. Mr Jupp added that the Claimant remained employed by the Respondent so the situation was difficult enough, and the failure to engage in mediation discussion by the Respondent compounded matters. This was a *"case that cried out for judicial mediation*", and Mr Jupp relied on **DSN -v- Blackpool Football Club** [2020] EWHC 670 from the civil jurisdiction and the observations made by Mr Justice Griffiths at paragraph 28 about why mediation is generally always something to engage with, even if the defence is likely to be strong. It is worth noting that the rules regarding the payment of costs are very different in the civil jurisdiction to the Employment Tribunal; for example, the loser does not generally pay the legal costs of the other side here.

30. Mr Jupp highlighted various points why the Tribunal, if it found that the Claimant had crossed the threshold for a costs order, should not subject her to such an order or at the very least direct summary assessment and limit the sum to £20,000. He reiterated that the Claimant's unattractiveness as a witness should not unduly influence the Tribunal in the exercise of its discretion.

Law

31. The Tribunal must deal with costs applications in three stages:

    a) Has the threshold for the making of a costs order been met? This is likely to require findings of fact about the paying party's conduct.

    b) If so, should the Tribunal exercise its discretion to award costs?

    c) If it chooses to make a costs order, how much and in what form?

32. Today's hearing can only address Stages 1 & 2 due to size of the costs award sought. Detailed assessment is carried out by a designated judge sitting alone applying the principles that apply in the County Court. However, it is agreed that this Tribunal is the forum to decide the mode of assessment and the principles to be adopted at that assessment by the costs judge to address Stage 3.

33. Rule 76 of the Employment Tribunal Rules of Procedure state:

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

    (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

    (b) any claim or response had no reasonable prospect of success;…"

34. The common meaning of the word "*unreasonable*" apply to this application; the test is not whether the impact of the conduct on the Respondent was unreasonable. However, the Tribunal should take into account the "*nature, gravity and effect"* of a party's unreasonable conduct (**McPherson -v- BNP Paribas** 2004 ICR 1398, CA). If the Tribunal finds unreasonable behaviour during the conduct of the proceedings by the Claimant (or by bringing the proceedings), it does not mean that the Tribunal must make a costs order against her.

35. The case of **Arrowsmith -v- Nottingham Trent University** [2012] ICR 159 addresses the point about whether dishonesty is required, though both parties now accept that dishonesty is not a mandatory requirement on which to base a costs order. This case confirms that while a lie on its own would not necessarily be sufficient to found an award of costs, it is for the tribunal to examine the context and the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct (echoing *McPherson*).

36. An older case cited to the Tribunal was **Davidson -v- John Calder (Publishers) Ltd and another** [1985] IRLR 9 reminded the Tribunal that when considering conduct, it is the conduct in the course of the proceedings alone which has to be considered, not conduct in relation to the dismissal itself.

37. The Tribunal when considering whether to make an order under Rule 76(1)(b) (no reasonable prospect of success) bore in mind the guidance offered in **Radia -v- Jefferies International Ltd** (2020) IRLR 431 - where there is an overlap between unreasonable bringing of or conducting the claim under Rule 76(1)(a) and no reasonable prospect of success under Rule 76 (1)(b), the key issues for consideration by the tribunal are in either case likely to be the same: did the complaints in fact have no reasonable prospect of success, did the complainant in fact know or appreciate that, and finally, ought they, reasonably, to have known or appreciated that? *Radia* notes that tribunals should focus on what the parties knew about their cases at the time, not what the tribunal knows after hearing the evidence.

38. Turning to the issue regarding whether the claims (in whole or in part) had "*no reasonable prospect of success"*, merely losing a claim or a central allegation does not necessarily mean costs should be awarded (**HCA International Ltd -v- May-Bheemul** UKEAT/0477/10/ZT). When considering if a party should have realised that the claim had no reasonable prospect of success, the Tribunal can consider what that party knew or ought to have known if they had "*gone about the matter sensibly*" (**Cartiers Superfoods Ltd -v- Laws** [1978] IRLR 315) (though this authority is based on a older different version of the Tribunal rules, it simply further confirms that the Tribunal should consider what a party knew or ought to have known as set out in *Radia*). However, caution in making such an assessment is wise as what is obvious with hindsight may not be so clear during the "*dust of battle*" (**Marler -v- Robertson** [1974] ICR 72).

39. ***Vaughan -v- London Borough of Lewisham and others*** 2013 IRLR 713 EAT saw the appeal tribunal state that the respondents' failure to seek a deposit order, or otherwise to issue any costs warning asserting that the claims were hopeless, was not cogent evidence that those claims had any reasonable prospect of success. In paragraph 14(4) of that judgment, the EAT said:

"(4) The fact that the claim depended on issues of fact about the motivation of the individual respondents or other council employees did not automatically mean that it was reasonable for the appellant to believe that she had a good chance of success. It depends on the facts and the allegations in the particular case. If, as the tribunal found, there was no evidence to support the interpretation put by the appellant on the acts of which she complained, all of which had in fact more obvious innocent explanations, to assert that the claims were 'fact-sensitive' is nothing to the point. Nor does it make any difference that some questions were only finally resolved as a result of the evidence at the hearing. That will generally be the case; but it does not mean that a reliable assessment of the prospects of success could not have been made at an earlier stage, as the tribunal evidently believed was the case here."

In paragraphs 18 & 19, the judgment went on to say:

"18. We do not believe that as a matter of law an award of costs can only be made where the party in question has been put on notice, by the making of a deposit order or otherwise, that he or she is at risk as to costs. Nor, however, do we believe that the absence of such notice, or warning, is necessarily irrelevant … What, if any weight it should be given in any particular case must

be judged in the circumstances of that case; and it is, as we have already observed, regrettable that the tribunal does not expressly address the question.

19. In our view the fact that the appellant had not been put on notice was not in the present case a sufficient reason for withholding an order for costs which was otherwise justified. In the first place, we do not believe that it would be just to deprive the respondents of an award of costs because they had not sought a deposit order: there may, as discussed above, be good reasons why a party may prefer not to take that course. If there is any criticism, it could only be that they did not write to her at an early stage setting out the weaknesses in her claims and warning that a costs order would be sought if they failed. But what is significant is that the appellant at no stage in her submissions to the tribunal or before us asserts that if she had been given such a warning she would have discontinued her claim; and nor in any event does it seem to us that any such assertion would have been credible. She was, as the tribunal emphasises, convinced, albeit without any rational or evidential basis, that she was the victim of a conspiracy and of a serious injustice, and it seems to us highly unlikely that a letter from the respondents, however well-crafted, would have caused the scales to fall from her eyes."

40. The Tribunal has a discretion and should consider all relevant factors. Costs orders in the Employment Tribunal are the exception, rather than the rule (***Yerrakalva -v- Barnsley Metropolitan Borough Council 2012*** ICR 420, CA). Rule 76 uses the word "*may*" when talking about circumstances which may lead to the making of such an order. It is a relevant factor to consider whether any application for strike out or a deposit order was made by the receiving party (**AQ Ltd -v- Holden** [2012] IRLR 648).

41. The purpose of costs orders is to compensate the receiving party; punishment of the paying party is not a relevant factor (***Lodwick -v- Southwark London Borough Council*** 2004 ICR 884 CA). This means consideration of the loss caused to the receiving party as a result of the identified basis of any costs order is required. The case of *Yerrakalva* demonstrates that costs should be limited to those "*reasonably and necessarily incurred*".

42. The ability to pay of the paying party can be a relevant factor in deciding how to exercise the Tribunal's discretion (and also when considering how much should be paid). However, this is a factor to be balanced against the need to compensate the receiving party if they have been unreasonably put to expense (***Howman -v- Queen Elizabeth Hospital Kings Lynn*** EAT 0509/12). The Tribunal is not required to consider ability to pay, but it may choose to do so. Any assessment of the Claimant's ability to pay must be based on evidence before the Tribunal; the Claimant has chosen not to adduce such evidence and has not asked the Tribunal to consider her means as a relevant factor.

43. Another potentially relevant factor can be whether the paying party was legally advised (*AQ Ltd*).

44. Finally, the Tribunal considered that the duty to have a fair hearing included a party knowing exactly the case/application they had to meet. It considered it more likely than not that the Respondent had cited what it considered to be the best examples that supported its arguments, and it would be more

appropriate to focus on those (rather than matters not touched on in the submissions of either party). However, given the examples provided were illustrative, it would be permissible for the Tribunal to focus on the core of the application, rather than analysing every example in minute detail. This would be in accordance with both over-riding objective and fair. Costs applications are often dealt with in a global or holistic manner, rather than in the same forensic manner as a liability decision.

Findings

Stage 1 - Did the Claimant act unreasonably in the bringing or continuing of proceedings? Did the Claimant bring claims with no reasonable prospect of success?

45. As *Radia* confirms, the key issues for consideration by this Tribunal when dealing with Stage 1 overlap between the two limbs relied on by the Respondent. Whether the Claimant was unreasonable in bringing or continuing the claims is closely connected to the issue as to whether the claims had no reasonable prospect of success and whether the Claimant knew or ought to have known that. The limbs in this case cannot be sensibly separated in the Tribunal's view, and so were considered together.

46. The Claimant can only be taken to have known what she knew, or ought to have known, and cannot be expected to have predicted the findings of the Tribunal. The Tribunal must also consider the nature, gravity and effect of conduct when deciding if it was unreasonable.

47. No further evidence was before the Tribunal for the costs application about what the Claimant did or did not know. The Claimant was legally advised throughout by solicitors and Counsel who represented themselves as specialists in employment law. The Claimant is a senior consultant surgeon; she is highly educated and intelligent. The Claimant is able to understand and assess complex information. While legal privilege has not been waived, it is reasonable for the Tribunal to conclude that it is more likely than not that the Claimant was given advice throughout about both the claims and what would need to be evidenced at the final hearing to succeed.

48. As Ms Barney pointed out in her submissions, the hearing judge attended a preliminary hearing on 23 September 2023 with the parties' representatives (at which the Claimant also attended) where it was evident that control over the evidence appeared to have been lost; the parties were directed to work together to ensure that only relevant evidence was before the Tribunal and the Claimant's verbose witness statement was reduced to a more useable (and focused) form. The Judge recorded in her Order that "*I found it difficult to understand how a legally represented Claimant had produced such a lengthy statement, particularly given the risk of drowning good points amongst irrelevant or unnecessary evidence*." The Claimant's witness statement relied upon at the final hearing was notable for the amount of irrelevant evidence, assertions, and failure at points to adduce any relevant evidence regarding particular allegations (the liability judgment sets out the detail). The hearing bundles contained much to which the Tribunal was never referred. As Mr Jupp observed at the costs hearing, the Claimant did not help herself in the cross-examination; the same could reasonably be said for her witness statement.

49. The observations in the paragraph above are made in order to demonstrate the tone of the conduct of proceedings by the Claimant. The intellectual rigour required for such a complaint with a large number of allegations was absent; one example was the number of times that the Tribunal had to point out that the annex of allegations contained several errors regarding dates and other matters in order to trigger amendment applications by the Claimant (to which the Respondent sensibly conceded). The Claimant's allegations did not appear to have been assessed against the actual evidence in relation to the basic points, such as when a particular event happened. The Claimant adduced wholly irrelevant evidence, such as the statement of Professor Gregory, who witnessed nothing and was not present as an expert witness. The Claimant did not argue that her legal advisers were negligent; the Tribunal does not make any such findings - it presumed that the Claimant's representatives acted as she instructed and in a competent manner.

50. It was these matters that led to the Tribunal making the findings cited by the Respondent about the quality of her evidence; there was no doubt that the proceedings took so much time as the Claimant adduced irrelevant, speculative and generalised evidence and made allegations for which she herself either had no evidence on which to rely or made no sense (for example, the allegations that Dr Walker had carried out detriments against her before he even started work at the Respondent, or allegations that others were involved in matters in which there was no evidence at all that they were involved – the liability judgment sets out several examples of this).

51. Her performance during her cross-examination saw the Claimant persistently refuse to accept points that were plainly correct based on the evidence put to her by Ms Barney; it was uncommon for the Claimant to concede any point. The description of the Claimant's thinking as "*blinkered*" by Ms Barney was fair in the Tribunal's view; in the liability judgment, the Tribunal noted that the Claimant was in essence arguing that she was the victim of a conspiracy conducted by those at the highest levels of the Respondent. All that this showed was that the Claimant may not have been able to accept the reality of the situation regarding her allegations or any advice given. This means that the Tribunal has to consider when the Claimant should have known that a number of her allegations were without merit. The findings of the Tribunal demonstrate that at least 26 (the Tribunal considered that it was closer to 29) allegations were without any reasonable prospect of success; the arguable allegations were in its view D1, D2, D5, D7, D34 and D37.

52. The Claimant issued the proceedings on 13 May 2021 (though later claims were added by way of amendment bringing more recent allegations into the final complaint). The agreed chronology provided for the liability hearing showed that the Hicks grievance investigation was undertaken in 2022, and the outcome report [2604] provided to the Claimant on 1 August 2022. It is accepted by all that the report did not address all the same points as this Tribunal and was not conducted in the same way as these proceedings, but the report did address many of the issues before this Tribunal, such as UPSW, the appointment of clinical experts, Professor Fegan, and the exclusion of the Claimant from work. In addition, the Claimant accepted that she was aware of the outcome of the nurse-led review by January 2020 (before the proceedings were issued), which was a careful and detailed

investigation into the Claimant's concerns about particular patients, supported where appropriate by a medical adviser respected by the Claimant.

53. Following various case management directions which saw the grounds of resistance amended, there was a case management preliminary hearing before Employment Judge S Jenkins on 20 January 2022. At this hearing, which was a little after three weeks had passed since the amended Response was filed and served, the parties talked to the Judge about the evidence and witnesses to be called. In order to do so, the parties must have (or ought to have) assessed carefully the statements of case, the instructions of their client, and any evidence available to them at that time. As Ms Barney submitted, the Respondent's grounds of resistance set out the calibrated position of the Respondent; it conceded much of the protected acts and set out why it could not concede other matters, and explained why it could not accept the account of the Claimant. With the benefit of hindsight, the amended Response is similar to the Judgement that resulted. However, the Claimant could not have foreseen that or be taken to have been able to foresee that.

54. The Tribunal appreciated that, given the Claimant's rigid belief in the rightness of her cause, why she considered it reasonable to bring the claims, even though the grievance process was ongoing at the time she presented her complaint. Time limits are often a concern and it is not until a response is received, or even evidence is disclosed, that a party can sensibility weigh up whether the proceedings should continue. Evidence that supports a party's case can come from the other side.

55. The difficulty for the Claimant was that, as Mr Jupp on her behalf accepted, there were allegations made she was never going to win. An analysis of her witness statement alongside the liability judgment showed that there were large swathes of allegations for which the Claimant had nothing of relevance to say or evidence to rely upon, or gave evidence contradicted by the contemporaneous evidence in the bundle which she could have and should have reviewed; they had no reasonable prospect of success. See for example (and refer to the liability judgment for more detail):

    a. PID5 (the Claimant alleged she had said things in her disclosure that the evidence showed she had not, she knew that it was about her 2017 UPSW and gave inaccurate evidence in her statement about Mr Darwish);
    b. GMCPID2b (the Claimant accepted it was untrue to assert suboptimal management of the patient and she knew Mr Lander had not made such a finding);
    c. GMCPID2e (the Claimant knew about the mentor situation at the relevant time);
    d. D14 (the Claimant alleging Dr Walker failed to investigate before he even arrived at the Respondent, alleging no or inadequate investigation when she knew of the substantial investigations carried out; the alleged detriment could not have been one in the view of a reasonable employee and the Claimant ought to have known this – see paragraph 198 liability judgment);
    e. D15 (no evidence relied on by the Claimant of detriment, blaming Dr Walker for acts before his arrival, saying Mr Richards should have

dealt with surgical concerns when he was not a surgeon, the Claimant knew of investigation at the relevant time);

f. D16 (asserting an account not supported by the transcript and not supported by Claimant's own statement);
g. D17 (asserting no or inadequate investigation when untrue – see paragraph 255-256 liability judgment);
h. D18 (the Claimant's evidence was speculation and did not set out in detail what she said happened, and was not supported by her union representative's letter [1998]);
i. D20A (incorrect assertions as to who received the email, allegation not to put to witnesses, did not make allegation against the person who was obviously responsible);
j. D22 (persistently asserting that the complaint brought by Ms Khakhar was not made by her despite overwhelming evidence, asserting others were involved without any evidence at all; arguing that bullying allegations did not require a full investigation);
k. D22A (asserting a letter was a grievance letter when it was not, asserting others made a decision that the evidence did not support);
l. D22B (allegation against those not involved at all as shown by the evidence);
m. D24 (allegation against those not involved at all as shown by the evidence, incorrect assertion known by the Claimant that she had never been told she had acted inappropriately, claiming that allegations of bullying did not justify suspension, no evidence Ms Khakhar knew of Claimant's disclosures);
n. D24A (the evidence showed Dr Boyle did not make the instruction alleged and it also showed the process to be followed, the claim was against those clearly not involved in conflict to Mr Jupp's submission that there was evidence supporting the allegation),
o. D25 (allegation about a referral that the evidence showed did not happen),
p. D26, D28 & D29 (allegations against those not involved at all as shown by the evidence and should have been obvious to the Claimant),
q. D30 (allegation against those not involved at all as shown by the evidence, allegation claiming that the Claimant was prevented from training not supported by the evidence and the Claimant knew she was assisting a local medical school with training in 2021 which was not within her statement);
r. D32 (the Claimant saying that she was not permitted to engage with academic work when she knew that she was able to do so);
s. D35 (the Claimant claiming that a person had access to her personnel file when she knew the complaint was about access to her leave record only, the Claimant did not deal with how this was a detriment);
t. D39 (allegation against those not involved at all as shown by the evidence, Claimant alleging no initial assessment when she knew Professor Fegan had reviewed the concerns);
u. D40 (the Claimant claiming that she did not know why previous clinical experts removed when she knew it was because she objected to two of them);
v. D41 (allegation against those not involved at all as shown by the evidence).

56. Ms Barney highlighted the "*piecemeal and begrudging*" withdrawals by the Claimant during the proceedings. It is correct that the Claimant did withdraw

some allegations very late in the proceedings, but *McPherson* reminds tribunals that late withdrawals are not in themselves unreasonable conduct. Tribunals encourage parties throughout proceedings to take a realistic view, and the over-riding objective does the same thing. The Tribunal considered that the Claimant ought to have realised that the complaints she did withdraw (and some that she did not; for example PID5 when the Claimant did concede it was about the UPSW in 2017 and her witness statement claimed points were made within the alleged disclosure that upon reading the document were not there – paragraphs 75 & 76 liability judgment) were unsustainable in light of the evidence received before the proceedings began (such as D21 – there was evidence to show that the complaint had a foundation in the bundle and statements). However, in the absence of any evidence from the Claimant about what she did know and when, the Tribunal found it difficult to pinpoint the exact moment when the Claimant should have realised.

57. Stepping back, the Tribunal concluded that for many allegations, the Claimant ought to have known that she had no evidence to support her case very early on, if not from the outset. The Claimant sought to rely on speculation, untrue evidence in her witness statement that she ought to have known was untrue, and brought allegations against people who plainly were never involved in the matter complained of. However, the Tribunal did not conclude that the bringing of proceedings was unreasonable; in a matter as complex as this, it considered that bringing the complaints (not least to potentially address any time limit concerns) to order to see the Respondent's Response and potentially then the evidence was reasonable, bearing in mind that the grievance process was ongoing. That said, by the point the Claimant issued proceedings, she was aware of the outcome of the nurse-led review and other investigations. The Claimant was given the benefit of the doubt by the Tribunal in relation to the bringing of the proceedings, even though at that point she knew many of the matters she relied upon were not accurate or true. This was because she was struggling to accept what she had been repeatedly told, rather than being motivated by a desire to be unreasonable.

58. However, upon receipt of the first Amended grounds of resistance, the Claimant and her legal representatives should have carefully considered it. It was not a response that denied everything. The Claimant and her representatives were by the time of the preliminary hearing before Judge Jenkins on 20 January 2022 able to talk about the case, witnesses and evidence. By this point, they were aware of some of the evidence available (or ought to have been) and the Claimant ought to have been aware that for many of the allegations she was relying on her own speculative beliefs, many of which were illogical (such as why would Dr Shortland recommend to Mr Darwish that he raised a formal complaint when it was clear Mr Darwish wanted it dealt with formally from the outset? D3. Or why would Ms Khakhar's complaint have been brought by anyone else? D21-D22).

59. Without any evidence as to when the various pieces of evidence were received, the Tribunal considers that by the preliminary hearing, the Claimant ought to have known that it would be unreasonable to continue with many of the allegations, which she ought to have known had no reasonable prospect of success when viewed objectively. By the time that she produced her witness statement, which showed how much her case relied on what she believed to be the position, rather than what actually was the position, it ought to have been obvious that the majority of the allegations were without any

merit. The drafting of the allegations were as highlighted in the liability judgment drafted to make allegations against people who at the relevant time could not have been involved (e.g. Dr Walker before he joined the Respondent), used incorrect dates despite the Claimant having the emails in her possession, and made incorrect assertions (see personnel file v leave record issue in D36).

60. The nature, gravity and effect of the Claimant unreasonably continuing allegations that had no reasonable prospect of success was that substantial resources were committed by both the Respondent and the Tribunal that should not have been expended. The Claimant's conduct was such that she persisted with such allegations when a reasonable person would have withdrawn most of the allegations either by January 2022 when the initial review of the position should have been undertaken, shortly after receiving the Hicks report in August 2022 which addressed many of the matters before this Tribunal, when contemporaneous evidence showing that the Claimant's position could not be correct was received, or ultimately when preparing her witness statement and realising that what she was saying could not be correct or was pure speculation.

61. At each stage set out above, the Claimant chose to push on and consequently gave untrue, unreliable and illogical evidence in legal proceedings. Ms Barney's submission that the Claimant's conduct throughout the proceedings (and beforehand as shown in the liability judgment) was that her version of events must be right and she would continue to assert that position in the teeth of any explanation, no matter who it was from and regardless of the evidence. Such conduct was unreasonable and occurred during the proceedings.

62. The Tribunal on the basis of the evidence before it considered that the earliest firm date from when the Claimant ought to have known many of her allegations did not "*stack up*" was 20 January 2022. She was legally represented and ought to have been aware of the burden of proof and what she would need to show in order to succeed. The Claimant made an amendment application on 14 January 2022 (which was approved at the preliminary hearing on 20 January 2022) bringing the later alleged detriments. This demonstrates a further opportunity to analyse her case was not utilised.

<u>Stage 2 - How should the Tribunal exercise its discretion?</u>

63. The Tribunal was asked to consider a number of factors when exercising its discretion. The Claimant's means was not a factor on which the Claimant sought to rely.

64. The Respondent pointed out that it was a public authority and a substantial amount of resources had been expended dealing with the Claimant's claims, rather than used elsewhere within the NHS. Resources include not just financial, but also management time and the time spent in dealing with the Tribunal proceedings by medical professionals. The Tribunal accepted that this was a valid point for it to consider.

65. Ms Barney highlighted that the Claimant increased the resources committed to the case through her unreasonable conduct, which included her approach to cross-examination, and was part of the reason why the Respondent did not

pursue the Claimant's representative's email about the "*parameters*" of its approach to judicial mediation. Ms Barney submitted that the Claimant intended to have her day in court.

66. The Tribunal did not consider the email from the Claimant's solicitors to be a serious offer to attend judicial mediation. This was because they required to know the parameters for mediation in advance before agreeing to undertake it. Judicial mediation is conducted by both parties indicating a willingness, which is then explored (in this region) through a short preliminary hearing with a mediator judge who ensures that the parties have the appropriate flexibility before listing a judicial mediation. Position statements are exchanged after this hearing, but before the mediation. Trying to short-circuit the process and requiring to know what the parameters are before agreeing to judicial mediation is unhelpful and does not inspire the trust and good faith mediation requires.

67. The email sent by the Claimant's solicitors is unlikely to have inspired much confidence that the Claimant was truly flexible; this is supported by the lack of any evidence that her solicitors followed up this email, called the Respondent's solicitors, or told the Tribunal that the Claimant was potentially interested. On the face of it, it appears to be a tactical email designed to be relied upon if the Claimant found herself subject to this type of application. Given the voluminous correspondence between the parties and the Tribunal, if the Claimant seriously was willing to mediate, her solicitors would have followed the matter up. The Tribunal does not consider the single email to be sufficient evidence that the Claimant attempted to enter into mediation and the Respondent unreasonably refused.

68. Ms Barney's submissions that seeking a costs warning or preliminary hearing about merits would have been pointless in the circumstances and given the legal principles (such as an application to strike out or obtain a deposit order cannot become a mini-trial) were considered. The Tribunal noted that no costs warning was sent, and no application was made to strike out or obtain a deposit order. However, it is difficult to succeed in striking out a claim for discrimination; such applications are not encouraged. Regarding the deposit order, the Tribunal concluded that it would have been difficult for a tribunal at a preliminary hearing to assess prospects of success in the absence of much of the evidence before this Tribunal. This case, due to the number and complexity of allegations made by the Claimant, was not one ripe for either a strike out application or a deposit order.

69. On the other hand, the Tribunal considered the lack of a costs warning to be striking. It was evident in its view by 20 January 2022 that the Claimant would struggle in relation to many allegations. The sheer size of this case (and the Tribunal recalled that it was conducted at pace, though fairly, because the representatives had misjudged the amount of time required at the final hearing) and the potential financial implications for both parties, indicated that a costs warning should have been seriously considered, if not issued, by the Respondent. The Claimant admittedly was making some allegations that were unlikely to succeed (such as Dr Shortland encouraged Mr Darwish to complain), but others required much more careful consideration to resolve (e.g. the complaint that Dr Shortland asked the Claimant to step aside as Clinical Director).

70. However, the failure to issue a costs warning is not determinative. The case of *Vaughan* as Ms Barney submitted makes the point that the Tribunal must consider the likelihood of the Claimant considering the costs warning and stepping back from the brink. In this case, the Claimant was asserting in the Tribunal's view (see the liability judgment) that there was a conspiracy against her. The Claimant was found by the Tribunal (and the RCS made similar observations about the Claimant in its report about her department) to be unable to accept that her view of a matter may not be correct; she could not take the view of anyone else on board.

71. Mr Jupp rightly pointed out that the Claimant's conduct before proceedings were issued cannot form the basis of a costs order; the Tribunal accepts that. However, how a person has acted in the past and has acted before the Tribunal is a good guide as to how they would act in hypothetical circumstances. The Claimant was so firmly of the view that she was in the right, the Tribunal found that a costs warning would have made no difference to the Claimant's unreasonable conduct of proceedings or her decision to continue bringing allegations with no reasonable prospect of success.

72. The other main factor put before the Tribunal was that the making of a costs order could have a chilling effect on the likelihood of other NHS whistleblowers coming to an employment tribunal (or indeed blowing the whistle at all). The Tribunal considered this argument carefully; it cannot be in the public interest to deter whistleblowers, especially in the health service. However, the Claimant has found herself at risk of a costs order not because she has made protected disclosures/protected acts, but because she acted unreasonably in continuing allegations that were unsupported by any evidence (and had no reasonable prospect of success), and attempted to rely on untrue and incorrect evidence or pure speculation in doing so. The liability judgment speaks for itself; an individual who has or may wish to blow the whistle has nothing to fear in respect of costs if they conduct proceedings reasonably and bring claims with a reasonable prospect of success. The Tribunal did not consider making a costs order here would have a chilling effect.

73. Mr Jupp observed that the unattractiveness of the Claimant as a party or witness should not influence the Tribunal. The Tribunal agreed, but it considered that it had to look at the Claimant's conduct which crossed the threshold to allow a costs order to be made. The Tribunal could not ignore the nature, gravity and effect of the conduct when deciding how to exercise its discretion.

74. The Tribunal concluded that it would make a costs order against the Claimant. The Claimant's unreasonable conduct in continuing claims that she ought to have known had no reasonable prospect of success resulted in significant cost to the Respondent when resources are limited; the Claimant was entirely unwilling to consider the evidence available or the explanations with which she had been provided. Instead, the Claimant persisted in allegations against those plainly not involved in the matters of which she complained, made untrue assertions, ignored the contemporaneous evidence that did not support her case, and provided a statement that failed to address key elements of her case or contained an unreliable, speculative and generalised account. It is appropriate for the Claimant to pay the Respondent's costs.

The nature of the assessment to be undertaken and on what basis

75. The Tribunal concluded that the costs to be awarded in favour of the Respondent had to be assessed in a global way, rather than trying to match the unreasonable conduct or allegations with no reasonable prospect of success, to particular items of cost incurred by the Respondent. It considered that the Claimant had brought a handful of allegations that were arguable, and did not find that the bringing of proceedings had been unreasonable. Accordingly, the Tribunal did not consider that the whole of the Respondent's costs should be paid by the Claimant (though it accepted that paragraph 14 of the Respondent's application did seek 100% of its costs.

76. The Tribunal concluded that an appropriate calculation of the Respondent's costs to be paid by the Claimant was 75% from 20 January 2022 onwards (including the costs of assessment). This percentage is based on the Tribunal's assessment of the percentage split between the allegations brought by the Claimant that were arguable and the allegations continued by her that had no reasonable prosect of success. Any doubt was resolved in the favour of the Claimant, though the Tribunal accepts that it is an approximate calculation. The date chosen was the date from when the Claimant ought reasonably have been aware that the majority of her allegations should not be continued for the reasons outlined above. VAT is not recoverable from the Claimant (***Raggett -v- John Lewis Plc*** [2012] IRLR 906) as the Respondent can reclaim that in the usual manner.

77. The method of assessment will be detailed assessment. The Tribunal considered that to limit recovery to summary assessment would not be just. It is evident that the Respondent's costs far exceed £20,000, and this would have been reasonably foreseeable to the Claimant (or her legal representatives) from the outset. There is no suggestion that the Claimant would be unable to pay such costs. The Respondent is entitled to be properly compensated for the costs incurred as a result of the Claimant's unreasonable conduct of proceedings/bringing claims with no reasonable prospect of success; summary assessment would not achieve that goal.

78. The detailed assessment will be conducted on the basis of standard assessment of costs. The Tribunal bore in mind that the Respondent's application never indicated that the detailed assessment sought would be on any other way basis than the standard approach (and the time to make such contention was within the application so the Claimant fully understood the case she had to meet). In addition, costs orders are the exception in this jurisdiction, detailed assessment even rarer and indemnity costs are uncommon even in the civil jurisdiction. While unreasonable conduct in the civil jurisdiction can attract indemnity costs, that cannot be in the case in this Tribunal as such conduct is dealt with by the making of a costs order.

79. Following promulgation of this Judgment, the proceedings will be assigned to an Employment Judge sitting alone who will make further directions to enable a detailed assessment to be undertaken in line with the judgment of this Tribunal. The parties are encouraged to co-operate and consider whether they are able to agree the amount to be paid by the Claimant to the Respondent, given the findings herein.

Case No: 1600708/2021

Employment Judge C Sharp
Dated: 14 August 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

17 August 2023

S Griffiths
FOR EMPLOYMENT TRIBUNALS