EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms T Stoodley-Dowty	**v**	The Chief Constable of Surrey Police

Heard at: Reading (by video) **On:** 6 October 2023

Before: Employment Judge Hawksworth
Mrs A E Brown
Ms H Edwards

Appearances:
For the Claimant: Mr R Bhatt (counsel)
For the Respondent: Mr R Oulton (counsel)

RESERVED JUDGMENT ON COSTS

The unanimous decision of the tribunal is that:

1. The claimant's application for costs is refused.

2. The respondent's application for costs is refused.

REASONS

Claim and hearings

1. The claimant was employed by the respondent from 30 March 2009 until her dismissal on 22 June 2018. Prior to her dismissal, she worked as an Intelligence Support Officer (a member of police staff).

2. In a claim form presented on 2 November 2018 after a period of Acas early conciliation from 23 August 2018 to 7 October 2018, the claimant made complaints of unfair dismissal, failure to make reasonable adjustments, direct discrimination, indirect discrimination, harassment and victimisation. The respondent presented its response on 18 February 2019 and defended the claimant's claim.

3. The liability hearing took place in person at Reading tribunals on 24, 26, 27, 28 August 2020 and 1 September 2020. There was a deliberation day for the panel only on 2 September 2020.

4. The tribunal unanimously decided that the following complaints succeeded:

   4.1. the complaint of failure to make reasonable adjustments in respect of the requirement for the OCGM co-ordinator role to be undertaken at Woking;

   4.2. the complaint of discrimination arising from disability in respect of the decision not to award the claimant a full recognition bonus; and

   4.3. the complaint of unfair dismissal.

5. The remedy hearing took place in person at Reading tribunals on 3 and 4 July 2023. The claimant was awarded the sum of £58,750.74.

6. Three earlier remedy hearings had to be postponed:

   6.1. the hearing on 5 and 6 July 2021 was postponed on the first day because the basis of the claimant's claim for pension loss changed and the respondent did not have time to consider and prepare its case on the pension loss claim as put by the claimant;

   6.2. the hearing on 1 and 2 February 2022 was postponed on 31 January 2022 at the claimant's request, for health reasons;

   6.3. the hearing on 25 and 26 October 2022 was postponed the day before the hearing, because the respondent had not had sufficient time to respond to the claimant's evidence and calculations in respect of pension loss.

7. There were preliminary hearings about preparations for the remedy hearings on 5 July 2021, 1 February 2022 and 25 October 2022 (the days originally scheduled to be the start of the remedy hearing). An agreed list of issues for the remedy hearing was discussed and included in the case management summary of the preliminary hearing on 25 October 2022.

8. Both parties made applications for costs against the other. There was insufficient time to consider these at the remedy hearing, so a further date was set. The costs hearing took place by video on 6 October 2023.

9. Both representatives provided helpful written skeleton arguments and made oral submissions.

10. A costs bundle with 267 pages was provided. It included a witness statement and supporting documents from the claimant about her ability to pay any costs award made against her. By agreement, pages 344 to 388 of the remedy bundle were added to the costs bundle as pages 268 to 313. These

were documents about the respondent's ill health retirement process. Page references in these reasons are to the costs bundle.

11. There was also an authorities bundle with 326 pages.

12. The tribunal reserved judgment and took the afternoon for deliberation. The judge apologises for the delay in promulgating this reserved judgment on costs. The parties have been told the reason for the delay.

The claimant's costs application

13. After the judgment on liability, the claimant made a costs application on 18 June 2021 (pages 137 to 141). She said that respondent had acted 'vexatiously, abusively, disruptively or otherwise unreasonably' in:

    13.1. failing to engage with pre-action correspondence and acting in a wholly dismissive manner when sending a brief response to the claimant's detailed pre-action letter of 11 July 2018; and
    13.2. making four costs warnings which were unwarranted and which included disparaging statements about the claimant's case.

14. On 2 October 2023, the claimant provided additional reasons in support of her costs application (pages 247 to 249). In this letter, the claimant relied on two additional grounds for costs:

    14.1. continued unwarranted conduct by the respondent in the making of an application for costs; and
    14.2. that the respondent's defence to two claims made by the claimant had no reasonable prospects of success (a) the claim that the respondent failed to make reasonable adjustments in respect of the requirement for the OCGM co-ordinator role to be undertaken at Woking and b) the complaint of unfair dismissal).

The respondent's costs application

15. The respondent made a costs application against the claimant on 16 June 2023 (page 178 to 181).

16. The respondent's application relates to the costs incurred in preparing for and attending the remedy hearing which was due to take place on 5 and 6 July 2021 but which had to be adjourned on the morning of the first day because, without warning, the claimant substantively altered the basis of her claim for pension loss.

17. The application is for a costs order against the claimant. It is put in the alternative as an application for wasted costs, that is for an order against the claimant's representatives.

The law

Costs orders

18. The power to award costs is set out in the Employment Tribunal Rules of Procedure 2013. Under rule 76(1), a tribunal may make a costs 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 proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or response had no reasonable prospect of success or*
>
> *(c) a hearing has been postponed or adjourned on the application of a party, made less than 7 days before the date on which the relevant hearing begins."*

19. Rule 77 says that an application for costs may be made up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. Where remedy is considered at a hearing after liability, the 28 day period runs from the date on which the remedy judgment is sent to the parties (*Soll (Vale) v Jaggers* UKEAT/0218/16/DA).

20. Rules 74 to 78 provide for a two-stage test to be applied by a tribunal considering costs applications under Rule 76. The first stage is for the tribunal to consider whether the ground or grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and if so, for how much.

21. In determining whether unreasonable conduct under rule 76(1)(a) is made out, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (*McPherson v BNP Paribas (London Branch)* 2004 ICR 1398, CA). However, it is not necessary to analyse each of these aspects separately, and the tribunal should not lose sight of the totality of the circumstances (*Yerrakalva v Barnsley Metropolitan Borough Council* 2012 ICR 420, CA). At paragraph 41 of *Yerrakalva*, considering an application for costs against a claimant, Mummery LJ emphasised that:

> *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it has."*

22. The tribunal should also bear in mind that in litigation there may be more than one reasonable approach: the range of reasonable responses test is relevant here (*Soloman v University of Hertfordshire* EAT 0258/18).

23. In determining whether a claim or response had no reasonable prospect of success for the purpose of rule 76(1)(b), the meaning of 'claim' is 'any proceedings before an Employment Tribunal making a complaint', and 'complaint' means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the tribunal (rule 1).

24. In *Opalkova v Acquire Care Limited* (EA-2020-000345-RN) HHJ James Tayler, considering an application for costs against a respondent, held that for the purposes of rule 76(1)(b), the correct analysis is that each separate statutory cause of action is a claim, and that a claim form may therefore include a number of claims. The tribunal must consider whether a response to an individual statutory cause of action had no reasonable prospect of success, not whether the response to the claim form as a whole had no reasonable prospect of success.

25. When assessing whether the 'no reasonable prospect of success' ground in rule 76(1)(b) is made out, the test is not whether a party had a genuine belief in the prospect of success. The tribunal is required to assess objectively whether at the time it was brought, the claim (or response) had no reasonable prospect of success (*Radia v Jefferies International Ltd* EAT 0007/18).

26. This is judged on the basis of the information known or reasonably available to the party, and what view the party could reasonably have taken of the prospects of the claim (or response) in light of those facts. The assessment consists of three stages:

    26.1. Did the claim or response in fact have no reasonable prospects of success?
    26.2. If so, did the party in fact know or appreciate that?
    26.3. If not, ought they reasonably to have known or appreciated that?

27. Any information or evidence the tribunal has gained by virtue of hearing the case may and should be taken into account if it properly casts light on the question of how things may have looked at the time the claim began (or the response was made) (*Radia v Jefferies International Ltd* EAT 0007/18).

28. Where a party is legally represented, in the absence of evidence to the contrary, the tribunal can assume that the represented party had been properly and carefully advised as to the risks and weaknesses of its case and the potential for an adverse costs order (*Brooks v Nottingham University NHS FT* EAT 0246/18).

<u>Wasted costs</u>

29. The tribunal also has the power to order wasted costs in favour of a party who has incurred costs as a result of the conduct of a representative. A wasted costs order may be made where a party has incurred costs –

'(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.'

30. In *Ridehalgh v Horsefield* [1994] Ch 205 the Court of Appeal set out a three stage test for determining an application for wasted costs:

30.1. Did the representative act improperly, unreasonably or negligently?
30.2. If so, did that conduct result in the party incurring unnecessary costs?
30.3. If so, is it just to order the representative to compensate the party for the whole or part of its costs?

31. The wasted costs jurisdiction should be exercised with great caution and as a last resort. The tribunal should be satisfied that the conduct of the impugned representative can properly be characterised as improper, unreasonable or negligent. This is a more rigorous test than whether a party has acted unreasonably (*Ratcliffe Duce and Gammer v Binns and McDonald* UKEAT/0100/08/CEA).

32. The tribunal must take into account that, unless the representative's client waives privilege, the confidence between client and representative is likely to prevent the representative from explaining why they have pursued their client's case as they have (*Mitchells Solicitors v Funkwerk* UKEAT/0541/07/MAA).

Conclusions

33. We have applied these legal principles to the circumstances in this case, to decide the applications for costs. We have dealt with the claimant's application first.

<u>The claimant's application for costs</u>

34. We first consider whether there are grounds for a costs order against the respondent.

35. In relation to the grounds relied on in the application of 18 June 2021, for the reasons set out below, we have not concluded that the respondent acted 'vexatiously, abusively, disruptively or otherwise unreasonably' in the manner in which it dealt with either the claimant's detailed pre-action letter of 11 July 2018 or the costs warnings the respondent made.

36. As to the pre-action correspondence, in our judgment on liability, we rejected the suggestion that the respondent's response to the pre-action letter was high-handed or dismissive. We concluded that it was a matter for the respondent as to whether it chose to reply in detail to the pre-action letter or not (page 76).

37. For the same reasons, we do not consider the respondent's conduct in relation to the pre-action letter to have been vexatious, abusive, disruptive or otherwise unreasonable. There was no requirement on the respondent to respond in detail to the claimant's pre-action letter, and it was not unreasonable to reject the settlement proposal contained in the letter without providing a detailed explanation as to why. Some parties might have chosen to engage with the detail contained within the letter, but it was within the range of reasonable response for the respondent to chose not to do so.

38. The respondent's costs warnings were also relied on by the claimant earlier in the litigation, in the context of an application for aggravated damages. In paragraphs 152 to 155 of our judgment on remedy sent to the parties on 5 October 2023, we concluded that the respondent's conduct was not high-handed and did not justify an award of aggravated damages. We said that the respondent was entitled to defend the claim and did not overstep the mark in the way it had done so.

39. For similar reasons, the respondent's costs warnings were not vexatious, abusive, disruptive or otherwise unreasonable. The costs warnings were based on evidence which the respondent had obtained and shared with or explained to the claimant. The warnings were expressed in professional language. The respondent used language which was fairly robust but not vexatious, abuse, disruptive or unreasonable, when describing the dispute between the parties as 'an issue of semantics'.

40. The claimant relied on two further grounds for costs in its letter of 2 October 2023, shortly before the costs hearing before us. That application was made in time as provided for by rule 77, because the remedy judgment was sent to the parties on 5 October 2023.

41. The first additional ground relied on by the claimant is the making of a costs application by the respondent on 16 June 2023. That application was in relation to the postponement on 5 July 2021 of the remedy hearing due to take place on 5 and 6 July 2021. The reason for the postponement was that the basis of the claimant's claim for future loss of pension had changed, and the respondent did not have time to consider and prepare its case on the new claim. For reasons explained in more detail below in the context of our decision on the respondent's application for costs, we have found that the conduct which led to the postponement was unreasonable. In the circumstances it was reasonable for the respondent to apply for its costs of the postponement. It was not vexatious, abusive, disruptive or otherwise unreasonable conduct for the respondent to apply for its costs of that hearing.

42. We have concluded therefore that there is no ground under rule 76(1)(a) to make an award of costs against the respondent.

43. The second additional ground relied on by the claimant in the letter of 2 October 2023 is that the respondent's defence to two claims made by the

claimant had no reasonable prospects of success: a) the claim that the respondent failed to make reasonable adjustments in respect of the requirement for the OCGM co-ordinator role to be undertaken at Woking and b) the complaint of unfair dismissal.

44. We have considered the prospects of success of the response to the individual complaints of a) failure to make reasonable adjustments in respect of the requirement for the OCGM role to be undertaken at Woking and b) the complaint of unfair dismissal, not the overall prospects of success of the response to the claimant's whole claim and all elements of it.

45. We have considered the prospects of success of these two individual complaints by applying the three stage test set out in *Radia*. This requires us to assess:

    45.1. At the time the response was presented, did the response to the two individual complaints in fact have no reasonable prospect of success?
    45.2. If so, did the party in fact know or appreciate that?
    45.3. If not, ought they reasonably to have known or appreciated that?

46. In relation to the complaint about failure to make reasonable adjustments, although in hindsight after the liability judgment it may seem obvious that the difference between the respondent's approach at the second and third consultation meetings was the central issue in the claimant's reasonable adjustments complaint about location, that only came clearly into focus during the hearing.

47. The prospects of success in a complaint of failure to make reasonable adjustments are fact sensitive and can be difficult to assess in advance, as they turn on the tribunal's assessment of reasonableness. In this case there was an important but quite fine distinction between the approaches at the two meetings. The respondent thought it had taken sufficient steps to address the claimant's disadvantage; we concluded that it had not gone far enough.

48. Even if we had found that the response to the complaint of failure to make reasonable adjustments had in fact no reasonable prospect of success, at the time it presented its response to this complaint, the respondent did not know or appreciate this and we do not consider that the respondent ought reasonably to have known or appreciated it. The importance of the evidence on this point only became clear during the hearing. In our reasons for reaching our factual findings about Mr Norbury's approach to location which formed the basis for our conclusions that this complaint succeeded, we relied very significantly on Mr Norbury's evidence to us on this central issue (pages 56 to 58, paragraphs 92, 96 and 106). That was not information which the respondent knew or appreciated, or could reasonably have known or appreciated, as it was not the clear focus at the time the response was presented.

49. In relation to the complaint of unfair dismissal, we found that there was a fair reason for dismissal and that the procedure adopted was broadly fair. Our conclusion that this individual complaint succeeded was based on our finding that the respondent had failed to make adjustments to a suitable alternative role. For the same reasons as above, we do not consider that the response to this complaint had no reasonable prospects of success at the time it was made.

50. We have concluded that, at the time the responses to these two individual complaints were presented, they did not in fact have no reasonable prospect of success. This means that there is no basis to make a costs order under rule 76(1)(b) against the respondent.

51. We are supported in our conclusion by the fact that this ground was only identified by the claimant as grounds to apply for costs the week before the costs hearing. It was not included in her initial application. The prospects of success of the response to these two complaints were not as clear cut as the claimant now suggests.

52. We have found that there are no grounds for making a costs order against the respondent. The second stage, the exercise of discretion, does not arise for consideration. The claimant's application for costs is refused.

<u>The respondent's application for costs</u>

53. We first need to consider whether there are grounds under rule 76(1)(a) for a costs order against the claimant because of her conduct in changing the basis of her claim for future pension loss on the first morning of the remedy hearing.

54. On 4 November 2020 the claimant was ordered to provide a schedule of loss setting out how much loss of pension was being claimed, and on what factual and arithmetical basis (page 80). Her schedule of loss dated 17 February 2021 made a claim for future pension loss based on the difference in employer contributions between the respondent and the claimant's new employer, up to planned retirement date (page 106).

55. On 5 July 2021, the first day of the remedy hearing, the claimant's counsel produced a skeleton argument which said that the claimant no longer claimed future loss relating to pension 'in the manner calculated in the schedule of loss'. Instead the claimant claimed the loss of redundancy early retirement pension and ill health early retirement pension (page 190). The respondent had not had any opportunity to respond to a claim for pension loss on this basis. The hearing was postponed and case management orders made to allow it to do so.

56. The claimant's counsel said that the reason for the change was the discovery very shortly before the remedy hearing by the claimant of a document explaining ill health retirement benefits under the LGPS, the claimant's pension scheme. He said that the respondent ought to have

disclosed documents about this, and, essentially, that the late change in the way in which the pension claim was put was the respondent's fault.

57. We do not accept this. It was up to the claimant to identify the basis for her pension loss claim and to do so clearly and sufficiently in advance of the remedy hearing so that the respondent could respond to it. That was the purpose of the case management orders of 4 November 2020. The claimant had not told the respondent that she was making any claim based on loss of ill health pension, so the respondent would not have known to disclose any documents about that. The LGPS is a public sector scheme with details about the scheme benefits and rules available online which the claimant and her representatives could have accessed.

58. The claimant's late change in the way she put her pension claim led to the postponement of the remedy hearing. It was unreasonable not to give the respondent more notice of the change in the way the pension loss claim was put. The respondent incurred additional costs as a result. That amounts to unreasonable conduct within rule 76(1)(a) and gives grounds to make a costs order against the claimant.

59. Having found that there are grounds for making a costs order, we next consider whether we ought to exercise our discretion to make an award.

60. We first remind ourselves that orders for costs in the employment tribunal remain the exception rather than the rule.

61. We next consider ability to pay. We were provided with information about the claimant's ability to pay any costs award. The claimant has been in new employment since shortly after leaving the respondent, so she does have an income. However, this has been very long running litigation. The claimant's success in relation to part of her claim is what she describes as a hollow victory. This is because the award we ordered in our remedy judgment is considerably less than the total sum of her legal costs. The claimant has exhausted her savings and has debts in unpaid legal and professional fees of £57,092.86. The amount we have awarded will be reduced by 33% in line with a damages based agreement. Overall, the award to the claimant will not clear her outstanding debts for legal and professional fees.

62. It does not follow that a successful claimant in the employment tribunal must always recover more than they have spent on legal fees. As we say, costs in the employment tribunal are the exception not the rule. It was a matter for the claimant whether she chose to instruct lawyers to pursue her claim. Part of her assessment when making that decision would or should have been whether she was likely to recover more than she incurred in legal fees. That said, in light of the detailed explanation we have been given of the difficult financial circumstances in which this litigation has left the claimant, and bearing in mind the claimant's long-standing ill-health and likely need to retire early because of that, we have decided that we should not exercise our discretion to award costs against her.

63. The respondent's application was put in the alternative as an application for wasted costs against the claimant's representatives. We should make such an order only as a last resort, and the threshold is higher than the test for unreasonable conduct by a party. We are not satisfied that the conduct of the claimant's representatives here in relation to the late change of the pension loss claim can be characterised as improper, unreasonable or negligent.

64. For these reasons, the respondent's application for costs or wasted costs is refused.

Employment Judge Hawksworth

Date: 17 January 2024

Sent to the parties on:
24 January 2024.....

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For the Tribunals Office

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