EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100139/2019

Consideration in Chambers on 29 January 2023

Employment Judge C McManus
Members: I Ashraf and J McCaig

Miss S Mutter **Claimant**

Turning Point Scotland **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of this Tribunal is that the claimant's application for an Expenses Order is not well founded and no Order is issued under Rules 74 – 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

Introduction

1. The claimant had raised claims of unfair dismissal, breach of contract, redundancy payment and alleged discrimination on the grounds of the protective characteristics of disability and sex. These proceedings have been lengthy. The claim was raised in 2019 and the Final Hearing was on 21 – 25 and 28 – 29 November 2022

2. There was significant case management of this case, including at a number of Preliminary Hearings ('PHs'). A number of Case Management Orders were issued.

3. Following a Preliminary Hearing on disability status, the decision was that, during the relevant period, the claimant was not a disabled person for the purposes of the Equality Act 2010. The claims under the Equality Act 2010 in reliance on the protected characteristic of disability (only) were dismissed.

4. At the Final Hearing ('FH'), this Tribunal considered the complaints of (constructive) unfair dismissal, breach of contract and complaints under the Equality Act 2010 sections 13, 26 and 27, based on the claimant's protective characteristic of sex (gender).

5. The Judgment of this Tribunal following the FH was that the complaints of unfair dismissal and breach of contract were well founded. Awards were made in respect of those complaints. The complaints under the Equality Act were all dismissed, for the reasons set out in Judgment dated 19 December 2022 and amended on reconsideration and with Rule 50 applied on 17 May 2023 (now referred to as 'the Judgment').

6. The claimant has applied for an Expenses Order. No application for costs was made at the conclusion of the FH but the claimant's former representative had indicated that they would apply for a costs order when making an application for strike out of the response, in September 2019. At that time parties were advised that any applications for expenses would be dealt with following the conclusion of the FH. On 30 June 2023 an email was sent by the Tribunal office to the parties seeking specification of the costs application. On 7 September 2023, the claimant wrote to the Tribunal stating that she was 'reiterating' the costs application and making reference to some Rules. The claimant was again asked for specification of her application. The respondent's representative objected to the late application and disputed that any costs award should be made.

7. The Judgment has been appealed by the claimant. That appeal procedure is not concluded as at the date of our consideration of the claimant's costs application. No application has been made to delay our consideration of the costs application until the conclusion of the appeal, and it is not considered appropriate to do so, given the separate considerations.

8. It was agreed that the application for an expenses order would be made on consideration of the parties' written positions.

Relevant Law

9. This case was dealt with throughout seeking to pursue the overriding objective of the Employment Tribunal, as set out at Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Procedure Rules'). Parties had been reminded of the terms of that Rule 2 on a number of occasions.

10. 'Costs' are, in the main, referred to as 'Expenses' in Scottish proceedings (except re. 'wasted costs'). The relevant statutory provisions, relating to Costs / Expenses Orders, are set out in Rules 74 – 84 of Schedule 1 to the Procedure Rules, including:

Rule 74:

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(b) is an advocate or solicitor in Scotland; or

Rule 75:

(1) A costs order is an order that a party ("the paying party") make a payment to –

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

Rule 76:

(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; or

(b) any claim or response had no reasonable prospect of success.

(2) a Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

Rule 77:

"A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

Rule 78:

(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;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of

court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) Order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) Order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) If the paying party and the receiving party agree as to the amount payable, be made in that amount….

Rule 79:

(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—

(a) information provided by the receiving party on time spent falling within rule 75(2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £33 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

Rule 80:

(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that 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.

Costs so incurred are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

Authorities

General Position on Expenses / Costs

11. Following the Judgments of the Court of Appeal in *Gee v Shell UK Ltd [2003] IRLR 82*, *Lodwick v London Borough of Southwark [2004] IRLR 554*, and *McPherson v BNP Paribas [2004] IRLR 558*, costs orders in the Employment Tribunal remain the exception and not the rule. In the majority of Employment Tribunal cases, the unsuccessful party will not be ordered to pay the successful party's costs. Costs are compensatory and not punitive.

12. In the Court of Appeal's judgment in *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ.1255, [2012] IRLR 78, Lord Justice Mummery, at paragraph 39 of his judgment, stated:

"I begin with some words of caution, first about citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion."

13. In *Ayoola v St Christopher's Fellowship* [2014] ICR D37, guidance was given by HHJ Eady, as follows:

"17. As for the principles that apply to an award of costs in the Employment Tribunal under the 2004 Rules, the first principle, which is always worth restating, is that costs in the Employment Tribunal are still the exception rather than the rule, see Gee v Shell UK Ltd [2002] IRLR 82 at page 85, Lodwick v London Borough of Southwark [2004] ICR 884 at page 890, Yerrekalva v Barnsley MBC [2012] ICR 420 at paragraph 7. Second, it is not simply enough for an Employment Tribunal to find unreasonable conduct or that a claim was misconceived. The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order, see Robinson and Another v Hall Gregory Recruitment Ltd UKEAT/0425/13 at paragraph 15.

18. On this point, albeit addressing the previous costs jurisdiction under the 2001 Employment Tribunal Rules, the EAT (HHJ Peter Clark) in Criddle v Epcot Leisure Ltd [2005] EAT/0275/05 identified that an award of costs involves a two-stage process: (1) a finding of unreasonable conduct; and, separately, (2) the exercise of discretion in making an order for costs……

19. The extension of the Tribunal's costs jurisdiction to cases where the bringing of the claim was misconceived has been seen as a lowering

of the threshold for making costs awards, see Gee v Shell UK Ltd per Scott Baker LJ. In such cases the question is not simply whether the paying party themselves realised that the claim was misconceived but whether they might reasonably have been expected to have realised that it was and, if so, at what point they should have so realised - see Scott v Inland Revenue Commissioners [2004] ICR 1410 CA per Sedley LJ at paragraphs 46 and 49. Equally, in the making of a costs order on the basis of unreasonable conduct, the Tribunal has to identify the conduct, stating what was unreasonable about it and what effect it had, see Barnsley MBC v Yerrekalva per Mummery LJ at paragraph 41.

20. That said, an appeal against a costs order will be doomed to failure unless it is established that the order is vitiated by an error of legal principle or was not based on the relevant circumstances; the original decision taker being better placed than the appellate body to make a balanced assessment as to the interaction of the range of factors affecting the court's discretion. Again, see Yerrekalva per Mummery LJ at paragraph 9, and note also the observation at paragraph 49 that `...as orders for costs are based on and reflect broad brush first instance assessments, it is not the function of an appeal court to tinker with them. Legal microscopes and forensic toothpicks are not always the right tools for appellate judging`."

14. LJ Mummery gave guidance at paragraph 41 of Yerrakalva, as follows:

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

Three Stage Test

15. Following *Oni v Unison* [2015] ICR D17, the Tribunal is required to go through a three-stage process. Firstly, it must decide that the conduct in question is

unreasonable. Secondly, it must then decide whether to exercise its discretion whether to make an award of expenses. Thereafter, it will assess the amount of an award having had regard to the paying party's submissions and his means and assets. This approach is in line with the position in the civil courts (***Ridehalgh v Horsefield and other cases 1994 3 All ER 848, CA***, and ***Medcalf v Mardell and ors 2002 3 All ER 721, HL***), as confirmed by the EAT in ***Mitchells Solicitors v Funkwerk Information Technologies York Ltd EAT 0541/07***.

Grounds for Costs

16. In ***Ridehalgh***, the Court of Appeal examined the meaning of *'improper', 'unreasonable' and 'negligent'* — subsequently approved by the House of Lords in *Medcalf v Mardell and ors* 2002 3 All ER 721, HL — as follows:

"'improper' covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty

'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case

'negligent' should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession."

17. Following ***Ridehalgh***, a legal representative should not be held to have acted improperly, unreasonably or negligently simply because he or she acts on behalf of a party whose claim or defence is doomed to fail. In Medcalf, the House of Lords commented that it is the duty of advocates to present their client's case even though they may think that it is hopeless and even though they may have advised their client that it is. Even if a legal representative can be shown to have acted improperly, unreasonably or negligently in presenting a hopeless case, it remains vital to establish that the representative thereby assisted proceedings amounting to an abuse of the courts process (thus

breaching his or her duty to the court) and that his or her conduct actually caused costs to be wasted.

18. In *Attorney-General v Barker [2000] 1 ILR 759*, following *Marler Ltd v Robertson [1974] ICR 72, NIRC*, guidance was given on the meaning of 'vexatious':

"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process"

Claimant's costs order application

19. The claimant set out that she relies on:

- Rule 76(1) (a) and (b)
- Rule 76(2)
- Rule 78(1)(d) and 76
- Rules 79-80

And as follows:

"The respondent acted wrongfully towards me throughout the case. They also partook in ignoring orders, ignoring notes, broke GDPR and AMRA laws, purpose delays, withholding evidence, editing evidence, colluding witness statements, lied under oath, sent unrelated private detail to all witnesses, said I just had a typical body hang up, accused me of lying and creating a meeting that happened yet later admitted it happened, continually interrupted me, speaking over me when I was answering under oath so that I could not get

my answers heard, saying my operation wasn't for medical reasons despite having NHS proof. This is amongst other vexatious acts.

Additionally, I was always due redundancy and my contract was breached and they wasted my time completely on this when they knew.

The application should be considered, with reference to the time limit in Rule 77 and / or Rule 88, as appropriate because it was already applied for on more than one occasion." [sic]

20. Following her receipt of the respondent's representative's written submissions on the costs application, the claimant's position was:

"…this is a prime example of why we had previously claimed for time, preparation and costs. As mentioned before, the respondent's rep is legally trained, works for a law firm, and respondent themselves are a huge company.

As before, I wish to reiterate the amount of times this has occurred, including orders not being adhered to, this dates back to 2018, and at that time it led to a strikeout request. The respondent went unpunished each time throughout including breaching AMRA law which further delayed proceedings. Like all times before, there have been no valid reasons provided. I believe this to be on purpose, to my detriment.

I was lead to believe that lay persons would be given balance during proceedings, yet through the whole proceeding it has consistently been the respondent not adhering to Tribunal regulations and law, and this is another example. As such, like the many times before from which the respondent went unchallenged by the Tribunal despite my concerns and protests, I wish to once again object to the respondent treating me with disdain.

Their latest late response should not be considered."

Respondent's position

21. The respondent's position was set out in written submissions provided by the respondent's representative, who has represented the respondent throughout

the proceedings in this case. The respondent relied on the following authorities:

- *Yerrekalva v Barnsley MBC [2012] ICR 420;*
- *Lodwick v London Borough of Southwark [2004] EWCA Civ 306;* and
- *Monaghan v Close Thornton EAT/0003/01.*

22. The references in the respondent's representative's submissions to attempts to seek to resolve this matter by settlement are not relevant to this application and have not been regarded in our consideration of the issues.

23. The respondent's representative did not address in detail any specific conduct indicated to be relied upon.

Decision

Time limits

24. On application of Rule 2 of the Procedure Rules, we considered the claimant's application for costs, and the respondent's response to this application, although neither were submitted within the relevant time periods (particularly with regard to Rule 77). In doing so, we took into account that the claimant's former representative had stated on a number of occasions throughout these proceedings that costs would be sought, that the claimant was not legally represented throughout the case and that the claimant is no longer represented at all. We considered that it was in furtherance of the overriding objective of the Tribunal to consider the costs application and the response. Much of what was set out in the respondent's representative's response was to state the relevant law and authorities relied upon.

Scope of Application

25. Despite correspondence sent from the Tribunal requesting that the claimant set out a 'fully specified application' and that the claimant would need to provide particular information, there was very little detail from the claimant on

the particular conduct relied upon in her application for costs. It is for this reason that the terms of the claimant's application are set out above.

26. It was unclear whether the claimant was seeking costs against the respondent or the respondent's representative. Given the Rules stated as being relied upon, the claimant appeared to be seeing both an application for expenses and an application for wasted costs. No detail was given of any costs incurred. That is a necessary factor in a successful application for wasted costs.

27. In her email of 7 September the claimant stated: -

"I estimate the costs incurred to be £1600 - £160 per day x 10 days.

I estimate the preparation time to be in excess of 100 hours."

28. There was no detail given of how that sum was calculated, with regard to the Procedure Rules or in particular the rate in Rule 79. The claimant was represented by her partner. No explanation was given for the basis of the costs being incurred. There was no breakdown of any element alleged to be 'wasted costs', as distinct from costs incurred in the pursuit of the complaints.

29. It was noted that the respondent's representative's submissions did not specifically address concerns raised by the claimant in respect of that representative's conduct. In all the circumstances, it was considered appropriate to also consider the respondent's representative's conduct, noting that the applicable test is higher than that re costs against a respondent.

Conduct relied upon

30. We sought to identify the conduct relied upon, so to consider whether the conduct of the respondent and / or the respondent's representative in these proceedings was unreasonable.

31. Given the broad statements in the claimant's application, in particular with regards to allegations of failure to comply with Case Management Orders and 'delays', we considered it appropriate to consider the procedural steps in this case.

32. Following earlier Case Management Preliminary Hearings ('CMPHs'), this case was scheduled for a Preliminary Hearing ('PH') to determine whether, at the relevant time, the claimant had the protective characteristic of disability. That PH was scheduled for 26 September 2019. Prior to that PH, the claimant made an application for strike out of the response. That application was dealt with at the outset of the hearing on 26 September 2019. The claimant insisted that the PH on disability status could not proceed. The claimant's application for strike out of the response was refused, for reasons set out in the decision issued on 22 October 2019, within the Note following upon that PH. That decision is now referred to as 'the strike out decision'.

33. It is understood that the root of the claimant's expenses application is in respect of the matters which were the basis of the claimant's application for the response to be struck out. These concerns are set out in some detail in the strike out decision, as is the respondent's response to the claimant's concerns. We therefore considered that strike out decision in respect of this strike out application. The claimant relied on non-compliance with a number of CMOs. She alleged breach of the Access to Medical Reports Act ('AMRA') and the General Data Protection Regulations ('GDPR'). As set out in the strike out decision, the claimant had significant concerns about the respondent representative having sent her a *'blank mandate'* in relation to the release of medical records from the claimant's GP. The conduct relied upon by the claimant as referred to in the strike out decision (re. the mandate and re delay in exchange of documentary evidence and failure to comply with case management orders (at that time) is understood to be part of the conduct relied upon by the claimant in this costs application. At that time, the claimant's position (as referred to at lines 12 – 13 on page 12 of the strike out decision) was that the respondent *"…have been actively unreasonable and brought vexation to me about this case.".* The respondent's representative's position on their actions is also set out in the strike out decision, particularly at paras 59 – 60 re the mandate.

34. The next hearing before the Employment Tribunal in these proceedings was a CMPH on 4 June 2021. The Note issued after that CMPH on 4 June 2021 sets out proceedings from October 2019 to June 2021, as follows:

> *"3. The claimant sought to appeal that decision to the Employment Appeal Tribunal ('EAT'). These Employment Tribunal ('ET') proceedings were sisted pending that appeal process (UK EATPAS/0109/19/SS). The appeal was refused as having been presented out of time, for reasons set out 8 February 2021. On 17 February 2021 the ET wrote to parties noting that the case was sisted until 29 March 2021 and directing that parties update the ET by that date on steps taken to instruct the medical experts.*
>
> *4. On 22 March the EAT informed the ET that the claimant had sought to appeal the decision of the Registrar of 8 February 2021, that that appeal had been dismissed by Lord Fairley and that the claimant had 42 days to seek leave to appeal to the Court of Session.*
>
> *5. The claimant set out her position in email to the Tribunal of 11 and 12 April 2021 with regard to the instruction of independent experts and who should meet the cost of obtaining medical reports.*
>
> *6. On 4 May 2021 the ET was informed by the EAT that the case was closed. On 13 May 2021 parties were asked to update the ET on any progress re the Orders issued on 22 October 2019. There was no reply from either party. A further chasing email was sent on 1 June 2021 and no reply was received to that."*

35. Case Management Orders were issued with the Note following that CMPH in June 2021. Those Orders varied the Orders issued with the CMPH Note on 22 October 2019, so far as they conflicted.

36. The PH on disability status took place on 10 and 11 January 2022. The decision dated 19 January 2022 was issued on 21 January 2022. The claimant was found to have had the protected characteristic of disability in respect of the physical condition she relied on.

37. A 5 day FH was scheduled to begin on 5 September 2022. That FH was postponed on 2 September, on the claimant's application. The respondent had previously made an application for postponement, which had been refused. The respondent did not object to the claimant's postponement application. The first day of the scheduled FH was converted to a CMPH.

38. In the Note issued after the Case Management Preliminary Hearing ('CMPH') held on 5 September 2022, under the heading 'Failures to Comply with Case Management Orders issued in April 2022' is stated:

"I expressed concern at what appeared to be both representatives' stage of preparation for the FH in this case. Both representatives relied on their own personal circumstances as part of their explanations. Reliance was also placed on lack of clarity re necessary witnesses and witness' availability.

I reminded representatives that Tribunal resources and public money had been used in respect of arrangements for the FH in this case, and the late postponement of this."

39. The Case Management Orders issued in April 2022 were in respect of exchange of documentary evidence, preparation of the List of Issues, preparation of the Joint Bundle, witness statements, notification of timetabling arrangements, participation in a CVP test and provision of an updated Schedule of Loss. These Orders were complied with by the FH.

Was that conduct unreasonable?

40. In respect of the matters relied upon at the time of the strike out application, and now relied on as the basis for a Costs Award, we considered the strike out decision. We considered the claimant's position at that time on what actions by the respondent / the respondent's representative were founded upon as being unreasonable. with reference in particular to what is set out in the strike out decision under the heading 'Background', particularly at paragraphs 2 – 17 and the summary of the claimant's submissions in para 54. We noted the particular Order non-compliance relied on at that time (set out at paras 24 – 30). We considered the submissions made on behalf of the

respondent in respect of the reasons for those actions, at paragraphs 55 – 61. We concluded that the conduct of the respondent and / or the respondent's representative relied on at that time was not unreasonable within the meaning of the applicable Rules and the guidance from the authorities set out above. With regard to the relevant tests, it was not designed to harass the claimant. Given that the respondent's explanations were accepted as being the reason for the action, the action was not an abuse of the court process. That does not mean that he claimant was not upset by the actions. Without making any inference on the likely prospects of such action, it is noted that that actions of the respondent's instructed solicitor may be subject to a complaint to their firm and / or to their professional body, but that is not a matter for this Tribunal.

41. In this application, for a Costs / Expenses Order, the claimant refers to postponement and failure to comply with case management orders. She refers to *'purpose delays'.* No particular postponement is relied upon. No detail was given by the claimant of any particular Order relied upon as not having been complied with by the respondent. As far as the Tribunal can ascertain, although there were delays in some Case Management Orders being complied with, we have not been able to identify any which were not complied with at all. There were also delays in the claimant's compliance with some Case Management Orders.

42. Where there was delay in both parties' compliance with Case Management Orders, and where all Case Management Orders were complied with by the FH, we decided that that the conduct of the respondent and / or the respondent's representative in delaying to comply with Case Management Orders was not unreasonable within the meaning of the applicable Rules and the guidance from the authorities set out above. It was not an abuse of the court process. On the basis of the position of parties at the various PHs, the delays in compliance with the Case Management Orders were not designed to harass and were not an abuse of process. It was taken into account that Expenses Orders in the Tribunal are not punitive and are exceptional.

43. No detail was given by the claimant in respect of her allegation of the respondent / respondent's representative '*ignoring notes'*. The position as set

out in the strike out decision was considered. As set out above, although there was delay by both parties, there was no complete failure to comply with Case Management Orders before the FH.

44. No detail was given by the claimant in respect of what she relied on in her allegation of *'purpose delays'* by the respondent/respondent's representative. As noted in the Note issued after the CMPH on 5 September 2022, the respondent had made an application for postponement of the FH arranged to be in September 2022. That application was refused. The claimant then made an application to postpone the FH scheduled for those September dates (for childcare reasons). That application was granted. A CMPH arranged for 19 April 2022 was postponed on the claimant's representative's request. No significant delay had been caused by the postponement of that CMPH. In circumstances where there has been no postponement of hearings on the basis of an application by the respondent's representative, we decided that the conduct of the respondent and/or the respondent's representative in respect of postponement applications, or on the basis of the allegation of '*purpose delays'* was not unreasonable within the meaning of the applicable Rules and the guidance from the authorities set out above.

45. In our consideration, we noted the position at paragraph 11 of the decision issued following the Preliminary Hearing on disability status in January 2022 (now referred to as 'the disability decision'). The respondent's representative had accepted that the Joint Bunde for that PH ought to have been lodged earlier. Proceedings were adjourned on that day for a short time to enable the Joint Bundle to be shared on the Document Upload Centre.

46. The claimant also relied on conduct during the course of the FH. During that FH, concern was raised by the claimant's witnesses that one of the witnesses' medical records had been included in the Joint Bundle, and the full Joint Bundle had been circulated to all witnesses. This is mentioned at paragraph 109 of the Judgment. It was understood that that witness's medical records had been disclosed without their consent. We considered that conduct as being relied upon by the claimant in this costs application.

47. There were no details given in respect of the allegation of *'sent unrelated private detail to all witnesses'.* We considered that in reference to the concerns raised during the FH as set out at paragraph 109 of the Judgment. It appeared that that witness' medical records had been disclosed without their consent. Given the concern expressed during the FH in relation to the disclosure of a witness' medical records, we considered that conduct as being relied upon by the claimant in this costs application.

48. During the FH, the respondent's representative's explanation for having included that witness's medical records was, in summary, that his medical situation was relevant to the respondent's position that the claimant was not discriminated against on the grounds of her disability. Reference is made to the respondent's position on this, in particular at paragraphs 150 – 151 of the Judgment.

49. Although care ought to have been taken by the respondent's representative in respect of authority for disclosure of medical evidence, in these circumstances we did not find that this conduct met the high test of being unreasonable or vexatious, in consideration of the case law authorities set out above. That conduct was not an abuse of process or done vexatiously, in the context of the guidance from the authorities above. As above, again without making any inference on the likely prospects of such action, it is noted that that actions of a solicitor may be a matter of complaint. However, we did not find that that conduct to have been done in abuse of the court process or with the intention to harass. It was then not unreasonable or vexatious in the context of an application for expenses or wasted costs, which is not punitive and is exceptional.

50. No detail was given in respect of the allegation of *'withholding evidence'.* As set out above, all Case Management Orders were complied with by the FH. That includes Orders for production or exchange of documents. As set out above, in these circumstances, where all CMOs were complied with by the FH, we decided that that the conduct of the respondent and / or the respondent's representative in respect of disclosure of evidence was not

unreasonable or vexatious within the meaning of the applicable Rules and the guidance from the authorities set out above.

51. No detail was given in respect of the allegations now made of *'editing evidence, colluding witness statements, lied under oath'.* As set out in the Judgment, carefully consideration was given to the evidence before us. There was no detail provided of what the claimant relied on in respect of the allegations of the respondent having *'accused me of lying and creating a meeting that happened yet later admitted it happened'.* We considered our position set out in the 'Comments on Evidence' section of the Judgment. In consideration of what is set out there, in particular at paragraph 111 re the claimant, we noted that the claimant's evidence was found to be credible and reliable. It is not uncommon for a claimant or witness' position to be challenged in cross examination. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 2560 (Comm)* it was concluded that the value of oral evidence *"….lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events."*

52. In relation to the allegation of the respondent having *'said I just had a typical body hang up',* no detail was given in the costs application. We considered this position in the context of the disability decision. We noted in particular the reference to that phrase at paragraph 70 of that disability decision, and at lines 5 – 7, where it is stated:-

"I considered that to be inappropriate language and did not accept the premise, in circumstances where the claimant's clinical legitimate need for the surgery was not disputed.'

53. There were no additional costs incurred as a result of this comment being made. The respondent did not dispute the claimant's need for the surgery. Costs / expenses awards in the Tribunal are not punitive. Although that language may the subject of a professional complaint, we decided that that

that conduct was not unreasonable or vexatious within the meaning of the applicable Rules and the guidance from the authorities set out above. We did not conclude that the comment was 'designed to harass'. The overall conduct of the respondent and their representative in defending this case did not support a position that they intended to harass the claimant. Although in this application the claimant relied on the respondent *'saying my operation wasn't for medical reasons despite having NHS proof,'* that does not accurately reflect the respondent's position at the time of the PH on disability status. As set out in the disability decision, in particular at paragraphs 58 and 70, it was not disputed by the respondent that the condition relied on by her had effects on the claimant.

54. We considered the allegations of *'continually interrupted me, speaking over me when I was answering under oath so that I could not get my answers heard'.* We noted that that position was not in line with the claimant and her representative's position at the conclusion of the FH. We recalled that, at that time, thanks had been expressed to the Tribunal, particularly in respect of 'listening to' the claimant. It was not alleged that the claimant had been unable to present her case. We were satisfied that the claimant had the opportunity to present her case and have her evidence heard.

55. In respect of the claimant's position that *'I was always due redundancy and my contract was breached and they wasted my time completely on this when they knew',* we took into account our consideration of the claimant's entitlement to redundancy pay, as set out in the Judgment, particularly at paragraphs 171 – 173. The reason for the termination of the claimant's employment with the respondent was not redundancy. It was the claimant's position that she ought to have been paid redundancy pay, and she relied on the respondent's failure to do so as being a breach of contract entitling her to resign and claim constructive dismissal. That constructive dismissal claim was successful. The claimant's position on the service closure in her witness statement, as set out at paragraph 112 of the Judgment was *"I see the service closure as unrelated."*

56. In consideration of the relevant authorities, in particular, ***Ridehalgh*** referenced above, the defence of the breach of contract complaint was not an abuse of process. The defence of that complaint was not conduct which was unreasonable or vexatious within the meaning of the applicable Rules and the guidance from the authorities set out above.

57. In consideration of all the above, we decided that that the conduct of the respondent and / or the respondent's representative at the FH (and throughout) was not unreasonable or vexatious within the meaning of the applicable Rules and the guidance from the authorities set out above. There was no abuse of process. It was not designed to harass. There was clearly animosity between the parties in these proceedings, and in particular between the claimant / the claimant's representative and the respondent's representative. Although, as referenced above, some of the respondent's representative's conduct may be the subject of a complaint, such a complaint is not progressed by way of an application for an Order for expenses or wasted costs. Costs / Expenses Orders are not punitive. We required to consider the conduct in respect of the guidance in the relevant authorities. We considered whether the conduct was unreasonable or vexatious within the meaning of the applicable Rules and the guidance from the authorities set out above. We do not find that the conduct of the respondent or of the respondent's representative in these proceedings was unreasonable or vexatious within the meaning of the applicable Rules and the guidance from the authorities set out above.

Did the response have no reasonable prospects of success

58. We separately considered whether an expenses order or wasted costs should be issued on the grounds of the response having had to reasonable prospects of success. That could only relate to the claimant's complaints which were successful at the FH i.e. breach of contract and (constructive) unfair dismissal. We had regard to ***Ridehalgh***, and our consideration of the issues in this case, particularly as set out at paragraphs 161 – 164 of the Judgement. On the evidence before us, the complaints of breach of contract and (constructive) unfair dismissal were successful. They were not 'doomed to fail', and even

if they were, following the relevant authorities set out above, the defence of those complaints was not unreasonable in the context of being an abuse of the process of the Tribunal.

59. For these reasons, no award for expenses or wasted costs is issued against either the respondent or the respondent's representative.

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Employment Judge

8 February 2024
Date
12 February 2024

Date sent to parties