EMPLOYMENT TRIBUNALS

Claimant: Mr M Hussain

Respondent: The Chief Constable Of Bedfordshire Police

Heard at: Watford Employment Tribunal (In chambers)

On: **19 January 2024**

Before: Employment Judge Quill; Mr C Surrey; Mr A Scott

Appearances: Written submissions only, in absence of parties

COSTS JUDGMENT

(1) The Claimant had paid a total of five deposits of £50 each.
   (i) Three of those (so £150 in total) will be repaid to the Claimant.
   (ii) Two of those (so £100 in total) will be paid to the Respondent.

(2) Subject to paragraph 1, there is no order for costs.

REASONS

Introduction

1. We gave liability judgment, with reasons, orally on 19 September 2023. The written judgment was sent to parties on 25 October 2023. There was no request for written reasons.

2. On 4 October 2023, by email at 15:49 which was copied to the Claimant, the Respondent applied for costs, submitting a five page application (dated 3 October 2023) prepared by trial counsel. No specific amounts, and no breakdown of what time/costs were attributable to particular activities, was included with the application.

3. On 7 October 2023, the Claimant sent three emails to the Tribunal. We assume that all three were copied to the Respondent, as required by the rules, though only the third shows the Respondent in the cc bar.

   3.1 At 18:01, he forwarded an email (marked 'without prejudice', but we have taken it into account) that he sent to the Respondent on 20 September 2023 (so the day after the liability judgment was given to the parties).

   3.2 At 18:02, he forwarded an email sent to the Tribunal on 31 August 2023 enquiring about the return of deposits paid by him

   3.3 At 18:10, he attached his two page document with submissions as to why the costs application should be refused.

4. On 19 December 2023, on the instructions of EJ Quill, the parties were informed that the panel proposed to meet on 19 January 2024, in absence of parties, to make a decision on the papers. The parties were informed that they could ask for a hearing, but neither side did so.

The Law

5. In the Employment Tribunals Rules of Procedure, the section "Costs Orders, Preparation Time Orders And Wasted Costs Orders" is Rules 74 to 84.

6. When an application for costs is made, or when the Tribunal is considering the matter of its own initiative, there are potentially the following stages to the decision.

   6.1 Has one (or more) of the criteria (for costs to potentially be awarded) as set out in the rules been met.

      6.1.1 If not, there can be no order for costs.

      6.1.2 If so, which rule or rules contain the criteria which have been satisfied (and why)?

   6.2 Is the rule one which requires the Tribunal to consider making an award, or is it one which says the Tribunal "may" consider making an award.

   6.3 Either way, if the criteria for a costs order are met, that means that the Tribunal has discretion to make an award, not that it is obliged to. So what are the relevant factors in this case, and, taking into account all of the relevant factors (and ignoring anything which is irrelevant), should an award be made.

   6.4 If an award is to be made, what is the amount of the award? (And what is the time for payment, etc).

7. Rule 84 states:

> **84. Ability to pay**
>
> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

8. As per the rule, "ability to pay" is something that "may" be taken into account at each of the last two stages of the decision-making. That is: should an award be made at all; if so, what is the size of the award (and the timetable for payment). A tribunal is not obliged to take "ability to pay" into account, but should specify whether it has done so or not (and, if not, why not). Generally speaking, where a party wants the Tribunal to decide that they do not have the ability to pay, then the onus is on them to (i) raise the point and (ii) provide evidence to back up the argument. That being said, in accordance with the Tribunal's duty of fairness, and in accordance with Rule 2, it may be appropriate for the Tribunal to seek to ensure that a party (especially a litigant in person) understands that the onus is on them (at least, in cases where the order might be a large one): Oni v NHS Leicester City UKEAT/0133/14.

9. Rule 76, insofar as is relevant, states:

> **76.— When a costs order or a preparation time order may or shall be made**
>
> (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
>
> (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.
>
> (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.

10. Furthermore, Rule 39(5) states:

> **39.— Deposit orders**
>
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
>
> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

11. So one set of criteria for a costs order to be made are those set out in Rule 76(2). The tribunal is not obliged to consider making an award in such circumstances, but it may make an order. These criteria cover breaches of orders or practice direction, and they also cover postponement/adjournment where the application was made more than 7 days before the hearing was due to start.

12. If the criteria set out in Rule 76(1) are met, the Tribunal must actively consider whether or not to make an award (though it is not obliged to decide to make the award). The three subparagraphs are each independent. It is sufficient that any one of (a), or (b) or (c) is met.

13. As was noted in Radia v Jefferies International Ltd [2020] UKEAT 7_18_2102:

> 63. … earlier authorities, about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure, are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.
>
> 64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?

14. So there can be an overlap in the arguments about whether the party acted reasonably in bring the claim (or conducting the pursuit of the claim or response) [Rule 76(1)(a)] and about whether the claim or response had no reasonable prospects of success [Rule 76(1)(b)]. Both sets of arguments can (and should) be considered. See Opalkova v Acquire Care Ltd EA-2020-000345-RN at paragraphs 24 and 25.

15. As Radia makes clear (paragraphs 65 to 69), a tribunal deciding that the claim/response had no reasonable prospect of success for costs purposes is not conducting the same analysis as for a strike out application. The Tribunal is not necessarily obliged to take the paying party's case at its highest, but rather can assess what the paying party knew (or ought reasonably to have known), and when, about the strengths/weaknesses of its case. In terms of what they knew (or should have known), a party is "likely to be assessed more rigorously if legally represented": Opalkova para 26.

16. As Opalkova also make clear, when there are multiple claims/complaints, the issue of bringing, or continuing, with a claim or response which had no reasonable prospect of success must be analysed separately for each complaint.

16.1 The fact that one or more of the complaints succeeded would not – in itself - prevent a respondent from persuading the Tribunal that there were other complaints that had no reasonable prospect of success.

16.2 Correspondingly, the fact that one or more of the complaints failed – that is that the response to that part of the claim succeeded - would not, in itself, prevent a claimant from persuading the Tribunal that part(s) of the response which dealt with the complaint(s) which did succeed had no reasonable prospect of success

17. Rule 39(5) provides a different path, for a party seeking costs, towards establishing that the criteria for a potential costs order have been met. It requires that the Tribunal which made the liability decision compares its reasons that a party "lost" on a particular argument or allegation to those given by the judge who made the deposit order on that particular argument or allegation.

17.1 If the party did not "lose" on that particular argument or allegation then Rule 39(5) has no relevance.

17.2 If the party did "lose" on that particular argument or allegation, but for reasons different to those stated by the judge as the reasons for making the deposit order, then Rule 39(5) has no relevance. [A fine tooth comb approach to the comparison is not appropriate. The Tribunal must analyse whether its reasons were substantially the same as those in the deposit order: Dorney v Chippenham College. [1997] UKEAT 10_97_1205.]

17.3 If the reasons are substantially the same, then the party against whom costs are sought has the opportunity to seek to persuade the Tribunal that, even so, they should not be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76.

17.4 However, even if they fail in that attempt (that is, even if the Tribunal decides that they have not rebutted this presumption of unreasonableness), then it does not follow that costs are automatically ordered.

18. Where Rule 39(5) does not apply (for example, because a party "lost" on a particular argument or allegation but for reasons that were different to those in the deposit order; or, for example, because a party paid the deposit, but then withdrew the relevant complaint(s) before a decision was made at a final hearing) then the existence of the deposit order may still be taken into account, if appropriate, when considering (a) whether the criteria in Rule 76(1)(a) are met and/or (b) whether, in

all the circumstances, the Tribunal should exercise its discretion to make a costs order.

19. Where the argument is that the party has acted "vexatiously, abusively, disruptively or otherwise unreasonably" then the only conduct that is taken into account is that which is (either the bringing of the proceedings or) the way that the litigation has been conducted. This ground can potentially be established even where the paying party has been successful in the litigation. The precise details of the conduct in question will be relevant both the (a) whether the criteria in Rule 76(1)(a) are met and/or (b) whether, in all the circumstances, the Tribunal should exercise its discretion to make a costs order.

20. If the criteria to potentially make a cost order are met, then the factors which are potentially relevant to the decision about whether to make such an order (and, if so, how much the award should be) include, but are not limited to, the following. However, the Tribunal's primary duty is to follow the wording of the rules, and to make specific decisions on the merits of the case in front of it.

20.1 Costs are the exception rather than the rule. A party seeking costs will fail if they do not demonstrate that the criteria for *potentially* making such an order (in the Tribunal rules) have been met. However, the mere fact alone that the criteria have been met does not establish that the general rule is to make a costs order in such circumstances.

20.2 Costs, if awarded, must be compensatory, not punitive. If the argument that there has been unreasonable conduct is made then the whole picture of what happened in the case is potentially relevant. However, it is necessary to identify the specific conduct, and decide what, specifically, was unreasonable about it and analyse what effects it had. Some causal link between the conduct and the costs sought by the other party is required. Yerrakalva v Barnsley [2011] EWCA Civ 1255.

20.3 Was the party warned that an application for costs might be made, and, if so, when, and in what terms.

20.3.1 The lack of such advance warning does not prevent an application being made (or the Tribunal granting it). Rule 77 gives a party up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. Furthermore, while the rule give the other party the right to a reasonable opportunity to make representations in response to the application, it does not impose a requirement that they were warned before the application was made.

20.3.2 However, the issue of whether a party (especially a litigant in person) was aware of the possibility of having to pay costs is likely to be relevant. This

can be demonstrated by something other than a costs warning from the opposing party: for example, comments made at a preliminary hearing; the fact that they had been involved an earlier case in which there was a costs application; the fact that they themselves had expressed an intention to seek costs from the other side.

20.3.3 If a warning has been made, its precise terms will be relevant. A simple boiler plate threat to apply for costs, which appears to a knee jerk response that the party (or its representative) always sends out is likely to be far less persuasive than a considered attempt to address the arguments raised by the other party, and explain why they have no prospect of success, or to explain why the particular conduct has been unreasonable, and what the rules or case management orders (specifically) require instead.

20.3.4 The timing of the warning will be relevant, as will the issue of whether the warning was updated and repeated at relevant stages.

20.3.5 The fact that a costs warning was made, even one which is clear and detailed and well-timed, and which identifies the precise basis on which the application was later made, does not guarantee that an order will be made.

20.4 What advice did the party have? Who from? When? It can be a double-edged sword that a party has taken legal advice. On the one hand, they might seek to argue that since a lawyer advised them that the claim had merit, it was not unreasonable to pursue it. On the other hand, the opposing party might seek to argue that (even if the paying party was a litigant in person at the Final Hearing) the fact that they had legal advice available shows that they ought to understood the claim was hopeless, and/or that their conduct was inappropriate, and/or that a settlement offer that had been made was a good one. To rely on the former argument, the paying party might have to waive privilege over the advice in question. However, there is no obligation to do so to defend itself against the latter inference; where privilege is not waived, the Tribunal will not make assumptions that the party specifically received advice that they were acting unreasonably, but the fact that advice was available to them is likely to undermine an argument that, as a litigant in person, they could not reasonably have been expected to anticipate the arguments being raised by the costs application.

21. The fact that a party applying for costs used in-house legal representatives rather than external does not prevent an order being made, and nor does it mean that it should be a preparation time order instead of a costs order. Ladak v DRC Locums UKEAT/0488/13/LA (which was a decision based on the 2004 rules, but which commented briefly on the 2013 rules at paragraph 20).

Analysis and conclusions

22. References to [Bundle XXX] are to page XXX in the liability bundle.

23. There had been prior preliminary hearings and case management, before there was a hearing on 6 September 2022 which was to consider the Respondent's applications for deposit orders.

24. [Bundle 90 to 91] lists the five deposit orders made, numbered 1 to 5.

25. [Bundle 91 to 99] contain the reasons for those deposit orders, and for refusing the other applications made. That included, at paragraph 2 [Bundle 91 to 92], the Claimant's allegations, identified (a) to (k). This was not the first time that these allegations had been set out this way, they having been previously clarified and agreed between the parties for the purpose of preparing the agreed list of issues, and both parties had referred to them (using the lettering (a) to (k)) in their submissions for that hearing.

26. The Claimant was legally represented at that hearing, as he had been previously. At the deposit order hearing, his representative was a trainee solicitor. After the Claimant had paid the deposits, that same individual wrote to the Tribunal and the Respondent [Bundle 102] on 15 February 2023 as follows:

> Please note our client has withdrawn allegations a, b, c, d in the attached Order. I confirm these are withdrawn and the remainder will continue to be pursued. We notified the Respondent's solicitor that these are withdrawn on 8 February 2023 and have copied them into this correspondence in accordance with Rule 92.

27. A written judgment dismissing on withdrawal was signed on 29 June 2023 and sent to parties on 14 August 2023 [Bundle 320]. It said:

> The following complaints (as identified more fully in list of issues) are dismissed following a withdrawal of the claim by the claimant.
>
> a. In 2017, Claimant was made to work an unfair workload compared with his comparators
>
> b. Respondent failed fail to implement reasonable adjustments as a result of the Claimant's burnout.
>
> c. Claimant was required by Respondent to take the workload of his comparators while they were preparing for exams while Claimant was also studying for exams.
>
> d. In 2019 Respondent failed to make reasonable adjustments recommended by Occupational Health by continuing to expose him to a high volume of intensive and complex crime matters.
>
> The remaining complaints, and the case management orders dealing with those, are not affected by this judgment.

28. There was no application to reconsider that judgment.

29. We will deal first with the Claimant's suggestion, raised in his objection to the Respondent's costs application, that there was an error when the list of issues was discussed on Day 1 of the hearing (and reflected in the liability judgment) to the effect that the Tribunal treated allegations (a) to (d) (only) as having been previously withdrawn, when it actually should have been allegations (a) to (i).

30. This is an argument more suited to an application for reconsideration of the judgment than as an objection to a costs order. If treated as an application for reconsideration, then the proper procedure (as per Rule 72(1)) would be for the employment judge to decide whether it had "no reasonable prospects of success" (and, in which case, whether to dismiss it on that basis) or whether it should be progressed as set out in Rule 72(2). However, all three of us on this panel, including the judge, are unanimous that the (implied) application for reconsideration has no reasonable prospects of success.

    30.1 The Claimant has not pointed to particular correspondence which (allegedly) withdrew claims based on allegations (e) to (i). The withdrawal on [Bundle 102] is clear and unambiguous that it did NOT withdraw claims based on allegations (e) to (i).

    30.2 The Claimant's chasing repayment of deposit is consistent with claims based on allegations (a) to (d) (only) as having been withdrawn, and does not, in itself, imply that other allegations were also withdrawn.

    30.3 During the course of the final hearing the Claimant informed the Tribunal and the Respondent that he was now a litigant in person, and that his former lawyers were no longer acting for him. However, he had every opportunity to either:

        30.3.1 State that, contrary to the Respondent's and the Tribunal's understanding, allegations (e) to (i) had also been withdrawn already (and to explain when, and/or provide copies of correspondence withdrawing them); AND/OR

        30.3.2 State that he had believed that he had instructed his solicitors to withdraw allegations (e) to (i), and that, if not previously communicated to the Tribunal and the Respondent, he now wished to withdraw them.

    30.4 Not only did the Claimant take neither such course of action, during the hearing, he cross-examined on the basis that claims based on allegations (e) to (i) were live claims before the Tribunal, and he made closing submissions on that basis also.

31. The deposit orders and reasons speak for themselves, and we do not intend cite extensively from them or to seek to paraphrase.

32. Our decision is that the first three of the deposit orders dealt with allegations or arguments that were relevant to complaints based on allegations (a) to (d), and only to those complaints. Since those complaints were withdrawn by the Claimant before the final hearing, the Tribunal has NOT "*at any stage following the making of a deposit order [decided] the specific allegation or argument against the paying party for substantially the reasons given in the deposit order*". Thus the consequences in Rule 39(5)(a) and (b) do not apply to those first three deposits, and, instead, the applicable part of Rule 39(5) is that "*otherwise the deposit shall be refunded*".

33. For the other two deposits,

    33.1 Our decision is that Deposit Order 4 was relevant to complaints based on allegations (e) and (f), and only to those complaints.

    33.2 Our decision is that Deposit Order 5 was relevant to complaints based on allegations (g) and (i), and only to those complaints.

    33.3 In each case, it is important to note that the specific argument which had little reasonable prospects of success was the argument that complaints based on these allegations were in time (as opposed to the substantive merits of the complaints).

34. For complaints based on allegations (e) and (f), our liability judgment expressly decided the time point against the Claimant, for the reasons given orally. We gave reasons at the time for why we were satisfied that there was no continuing act (that was in time) and for why the passage of time (coupled with the Respondent's decisions about which witnesses to call) meant that we had decided that we were unable to make decisions about the relevant motivations of the individual who was the subject of those allegations. We expressly decided that we would not extend time for those complaints. The Claimant was unsuccessful on those complaints for substantially the same reasons given in the deposit order. We take into account paragraphs 34, 36 and 37 of the deposit order reasons in particular: [Bundle 98].

35. Allegation (g) related to DI Rivers decision circa September 2019. We gave our reasons for deciding that that complaints based on this allegation would have failed on their merits, even if had they been in time.

36. Allegation (i) related to what happened in May 2020, namely that the Claimant received a Regulation 21 notice which included the February 2019 matter as well, despite the Claimant having been told in March 2020 that it was only the later matter (the separate allegations from September 2019) which would go to a disciplinary hearing. In our liability reasons, we said that we were surprised by

this, and said why, but also gave our reasons for deciding that that complaints based on this allegation would have failed on their merits, even if had they been in time.

37. We also said, in relation to allegations (g) and (i), "*while we have discussed them and dealt with them on their merits, because of their overall significance and because of the evidence which we have heard, they are effectively also out of time*".

38. Our decision is that complaints based on allegations (g) and (i) failed for substantially the same reasons given in the deposit order. We take into account paragraphs 35, 36 and 37 of the deposit order reasons in particular: [Bundle 98]. The allegations would have failed anyway, even had they been in time, but that does not change the fact that we also decided that they were out of time.

39. Thus, Rule 39(5)(b) applies to Deposit Orders 4 and 5, and they shall be paid to the Respondent (not the Claimant).

40. Having considered, Rule 39(5)(a), we are satisfied that "the contrary" has not been shown. Thus, the effect is that we treat the Claimant as having acted unreasonably (for the purpose of rule 76) in pursuing the specific allegation or argument that complaints based on allegations (e), (f), (g) and (i) were in time.

41. Before we address whether we will made a costs order on that basis, we will comment on the Respondent's other points.

42. The Respondent argues:

> The Claimant further acted unreasonably at the hearing producing material that could have been submitted to the ET and the Respondent before the hearing which took up considerable judicial time in determining its relevance but which in the event was not of any assistance to the panel. One example of this was the late production of alternative comparators from a different force and for events that postdated the matters giving rise to the Claimant's claim.

43. The Claimant produced some documents from the disciplinary hearing (notably his own barrister's submissions), which had already been in the Respondent's possession, which, as we said when allowing them to be introduced, were of dubious relevance to the issues which we had to decide. He did not refer to those documents in any detail either in his own evidence, or in cross-examination, or in submissions. While we accept that their admission into evidence caused the Respondent's counsel for the Employment Tribunal hearing to have to read them, we consider that these were documents which the Respondent's legal representatives (for the ET proceedings) would have had to consider in any event when preparing for the final (and/or preliminary) hearing(s). Further, we were told that the Respondent's legal team and the Claimant's former lawyers had discussed

the document and decided it did not need to be in the hearing bundle. If true, that does tend to show that the Claimant (having become a litigant in person) caused inconvenience with his late request for the material to be put before the employment tribunal panel. However, it also shows it did not add anything to the Respondent's legal costs.

44. As alluded to in the Respondent's application, the Claimant also produced a printout from the BBC website of a short news article which reported on the outcome of a disciplinary hearing for officers of a different force. At its very highest, the relevance might have been that the Professional Standards Department ("PSD") which carried out an investigation on behalf of the Respondent contained officers from various forces, including the one mentioned in the BBC news report. We did not make a finding that the officers mentioned should be found to be actual comparators for the Claimant, and his argument that we should had little reasonable prospects of success. The suggestion that the information in the article should help us decide how a hypothetical comparator would have been treated was also weak. However, the Respondent's counsel had no difficulty in making those points at the hearing, and she did so. The Claimant's attempt to rely on the document and arguments about why it helped his case did not put the Respondent to any extra legal expense. Furthermore, taking into account that the Claimant was a litigant in person, it was not unreasonable conduct of the litigation to seek to rely on the document (albeit, he ought to have found it, and sent it to the Respondent, much sooner, if he did intend to try to make use of it).

45. In relation to complaints based on allegations (h), (j) and (k), our decision is that they were not claims which had no reasonable prospect of success. The Claimant failed to persuade us that the burden of proof should shift. He focused to a large extent on seeking to argue that particular decisions were "wrong" rather than on why we should decide that "race" or "religion" played a part. However, by reference to documents, and by cross-examination questions, he did show were issues about religious beliefs (and, in particular, issues about whether the Claimant had been influenced by his own religious beliefs) formed part of the investigation.

46. Furthermore, while the Claimant "lost" on those complaints, and did so for the reasons we gave in September, it does not follow from the fact that a claimant "lost" that it had been unreasonable to pursue the claim. The Equality Act 2010 would be toothless if persons who believed that it had been contravened were unable to seek decisions from courts or tribunals to that effect. It is true that the Claimant had a decision go against him from a panel, and did have a review of that decision by an independent Queens Counsel (as she then was). It is also true that alleged discriminatory motivations were only raised after that. However, it is not a precondition of bringing a claim to the employment tribunal that the allegations were previously made to the Respondent (though that might a factor relevant to compensation if claims succeed).

47. The lateness of the withdrawal of a particular complaint can, in some cases, demonstrate that the litigation has been conducted unreasonably (or even, in appropriate circumstances, that the complaint had no reasonable prospects of success). We take into account that the complaints based on allegations (a) to (d) were not withdrawn prior to 6 September 2022, and were not even withdrawn at the time that payment of the deposits fell due. They were, however, withdrawn around 6 months prior to the date on which the Respondent's witness statements for the final hearing were signed. There is a legitimate argument that it would have been reasonable to withdraw those complaints sooner. It does not follow that the withdrawal in February 2023 (rather than September/October/November 2022, or earlier) was unreasonable. The withdrawal was around 3 months after the deposits were paid, but around 7 months prior to final hearing.

48. In summary, other than the consequences of Rule 39(5) as mentioned above, we do not consider that there is any additional reason that the criteria in Rule 76 are met.

49. Dealing with allegations (g) and (i) first, we are confident that, even had there not been specific complaints based on these allegations, there would have been documents, witness evidence, cross-examination and submissions about these events. It is true that there were two sets of allegations made against the Claimant: those around February 2019 by VEO Hobins; those around September 2019 by a member of the public we referred to as "N". It is true that the Claimant's employment tribunal complaints which were (directly) connected to the first set of allegations were out of time. However, it is also true that the formal investigation, when it started, was in relation to both allegations, and that, as late as May 2020, the Claimant was told that he would face disciplinary hearing for both sets of allegations. It was only the second set of allegations that actually went to disciplinary hearing, and only the second set of allegations that led to his dismissal. However, the (disputed) importance of those first set of allegations to the decisions made to investigate, and to arrange a formal conduct hearing was important background information. Although it is true that the disciplinary panel did not receive evidence about the first set of allegations, the evidence to the employment tribunal hearing would have been misleading and incomplete had it not included the evidence about how that first set of allegations had been part of the investigation.

50. In terms of allegations (e) and (f), there was no extra evidence produced, other than that which went into the bundle because of allegations (g) and (i).

51. The redactions to the documents submitted to the Conduct hearing were done because of the change(s) of mind by the Respondent about whether the February 2019 allegations would be presented to that hearing. (The redactions were not done, in other words, for any reason connected to the employment tribunal litigation). It did not cause, in our view, any (significant) extra cost for the

Respondent to be required to search for the original unredacted versions (as sent to the Claimant) so that we (the employment tribunal panel) could have those too. Furthermore, our desire to see those was not only because of allegations (e), (f), (g) and (i), but because we considered the unredacted report to be a relevant item that we wanted to see.

52. Although the complaints based on allegations (e), (f), (g) and (i) were out of time as complaints in their own right, we are not persuaded that the Respondent's lawyers actually had to spend time considering documents, or preparing witness evidence, or submissions (other than to the time point itself) on those first set of allegations, that they would not have had to spend anyway. Notably, for example, none of Hobins, Rivers, Dillon or Beeby were called as witnesses.

53. We have taken into account what the Claimant says about his means in his 2023 correspondence, as well as what is contained in paragraph 25 of the reasons for the deposit order. The Claimant would be able, in our view, to make some payment of costs, either outright and/or in accordance with a payment schedule.

54. However, costs in the employment tribunal are the exception rather than the rule. The Respondent has not supplied a specific breakdown of its lawyers' time/costs.

    54.1 Even had it done so, our assessment, as mentioned above, is that no (significant) extra legal costs were incurred by the fact that allegations (e), (f), (g) and (i) were pursued as complaints rather than just background information.

    54.2 Had it done so, we might have been in a better position to assess what (if any) costs specifically attributable to allegations (a) to (d) were incurred, and when. However, our assessment, as mentioned above, is that the fact that these complaints were (i) presented and (ii) not dropped (before or) by the time the date for payment of the deposit came round and (iii) not dropped until February 2023 was not unreasonable conduct of the litigation.

55. For these reasons, we decline to exercise our discretion to award costs to the Respondent. (Furthermore, and in any event, we would not make an award in excess of the £100 for which it will be compensated by receipt of the deposit).

Employment Judge Quill

Date: 21 January 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

14/02/2024

FOR EMPLOYMENT TRIBUNALS