EMPLOYMENT TRIBUNALS

Claimant: **Ms. F. Rustvara**

Respondent: **Marriott Hotels Limited**

Heard at: London (Central) Tribunal via Cloud Video Platform

On: 29 - 31 January, 1 and 2 February 2024.

Before: Tribunal Judge Peer acting as an Employment Judge
Mr Daniel Jenkins
Ms Jessica Marshall

Representation

Claimant: Mr Emil Lixandru of Counsel instructed by Calices Solicitors
Respondent: Mr Lee Bronze of Counsel instructed by Lewis Silkin LLP

JUDGMENT

The unanimous decision of the tribunal is that the claimant's representative, Mr Lixandru, is ordered to pay wasted costs to the respondent in the total amount of £3,150 due to the respondent incurring the costs of counsel's attendance on the afternoon of 29 January 2024 and on 31 January and 1 and 2 February 2024 attributable to unreasonable conduct delaying the progression of the hearing.

REASONS

CLAIM AND BACKGROUND

1. The claimant was employed by the respondent as a kitchen porter from 3 May 2022 until dismissal with effect 28 April 2023. By a claim form presented on 9 May 2023 following a period of early conciliation from 28 February 2023 to 11 April 2023 the claimant brought complaints of direct sex discrimination, harassment on the grounds of sex and for unpaid holiday entitlement. All other claims brought by the claimant have been dismissed on withdrawal.

2. Further to a case management hearing before EJ Nicolle on 24 August 2023, a list of issues was agreed. The tribunal allocated five days for the

trial and an indicative timetable was set out in the case management orders of EJ Nicolle sent to the parties.

3. On Friday 26 January 2024, the tribunal wrote to the parties to ask whether there were any objections to the hearing being converted to a remote format. The respondent replied to the tribunal to confirm that they did not object. The claimant did not reply to the tribunal's communication.

4. The hearing commenced on 29 January 2024. There was no objection raised at the outset of the hearing to the hearing proceeding in the remote format by either party.

5. On 31 January 2024, the respondent made an application to strike out the claim under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious and/or under Employment Tribunal Rule 37(1)(c) because it has not been actively pursued. On 1 February 2024, the tribunal gave an oral decision with reasons refusing that application. The written record of that decision was issued on 1 February 2024.

6. On 1 February 2024, the tribunal acting on its own initiative decided to strike out the claimant's claim under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious. The tribunal gave an oral decision with reasons. The written record of that decision was issued on 1 February 2024.

7. On 1 February 2024, the respondent indicated its intention to apply for wasted costs. The tribunal discussed with the parties that the application for wasted costs could be heard on 2 February 2024 given the time available to the tribunal. The respondent filed and served a written application with an accompanying schedule of costs. On 2 February 2024, the parties were notified that the hearing of the wasted costs application would commence at 12noon. The claimant did not attend and the tribunal was told that she was aware of the hearing but did not wish to join. The tribunal emailed the claimant directly at 1320 about the hearing. The tribunal was told by the claimant's solicitors that the claimant was in their waiting room but did not wish to join the hearing and that she was very upset.

8. Neither claimant's counsel, Mr Emil Lixandru, nor the claimant's instructed solicitors objected to the hearing of the wasted costs application proceeding on 2 February 2024 or made submission that they had not had reasonable opportunity to consider the written application or prepare for the hearing at the start of the hearing. If any such submission or point had been raised at the outset, the tribunal would have considered whether or not to proceed in those circumstances. The tribunal heard from Mr Lee Bronze, respondent's counsel on behalf of the respondent. The tribunal then heard from Mr Emil Lixandru of counsel who had been instructed on behalf of the claimant. The tribunal accepts that when the tribunal explicitly asked whether it was

proposed that the claimant's solicitors would address the tribunal, Mr Marius Seaka of Calices Solicitors, indicated at that point that they had not had sufficient time to reflect on what had happened on 1 February 2024. Nonetheless, Mr Marius Seaka was able to present submissions and the tribunal's impression was that Mr Seaka had prepared these submissions in advance, and they were presented clearly in a forthright manner.

9. The legal framework was succinctly and correctly set out by the respondent in the respondent's written application for wasted costs which as set out above was provided in advance to Mr Lixandru and Calices Solicitors.

LAW

10. The Employment Tribunal's Rules of Procedure make provision for the tribunal's discretionary power to award 'wasted costs':

"**When a wasted costs order may be made**
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."

Effect of a wasted costs order
81. A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

Procedure
82. A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on 27 which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

…

Ability to pay
84. 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.

11. Costs awards do not operate by precedent and are to be dealt with as summarily as possible, **FDA and ors v Bhardwaj, 2022 ICR 1541, EAT.** Case law notes the potential tension between proceeding fairly when dealing with such matters summarily. In particular, the tribunal also took account of the decision of, as she then was, Mrs Justice Simler President of the EAT in **KL Law Ltd v Wincanton Group Ltd and anor EAT/0043/18**, that "a wasted costs order is an order that should only be made after careful consideration and any decision to proceed to determine whether costs should be awarded should be dealt with very carefully…serious sanction for a legal professional….Furthermore, even a modest costs order can represent a significant financial obligation for a small firm. Tribunals should proceed with care in this area."

12. In **Ridehalgh v Horsefield & Anor [1994] EWCA Civ 40** the Court of Appeal suggested a three stage approach as follows:

    a. has the legal representative acted improperly, unreasonably, or negligently?
    b. if so, did such conduct cause the applicant to incur unnecessary costs?
    c. if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

13. The Court of Appeal also gave some explanation as to the scope of the concepts 'improper', 'unreasonable' and 'negligent' as follows:

    a. 'improper' covers, but is not limited to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty
    b. 'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case and "the acid test is whether the conduct permits of a reasonable explanation"
    c. '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.

RESPONDENT'S APPLICATION

14. The respondent's written application set out five examples of conduct said to be improper, unreasonable or negligent which were as follows:

> "26.1 The claimant's barrister attended the final hearing without a copy and sight of the bundle despite it being provided to the claimant's solicitors on or around 29 November 2023. This inevitably caused delays on day 1 of the hearing.
> 26.2 The claimant attended Bolt Court Chambers on day 3 of the hearing but despite conversations having occurred between the claimant, counsel and solicitors, the claimant did not have sufficient access to the papers to give evidence.

26.3 Mr Lixandru made numerous references to the claimant being "vulnerable" and requiring an interpreter where there was no instruction to, evidence of and no application that the claimant needed any provision of this nature. These were unsubstantiated submissions made during objections to a strike out application and explain delays.

26.4 Mr Lixandru spoke to the claimant whilst she was under oath during a break on 31st January 2024 following two reminders from the Tribunal that the claimant was under oath. The Tribunal of their own volition in striking out the claimant's case has determined that this conduct has occurred and it was unreasonable conduct.

26.5 Mr Lixandru was found to have changed his position on numerous occasions providing contradictory information to the Tribunal when questioned on the reasoning for his actions."

15. The respondent contends that the respondent incurred costs attributable to the above actions of the claimant's representatives. The respondent's costs schedule included the amounts of: (a) £10,320 Counsel fees where the hearing never sensibly progressed due to the claimant's representatives' actions; (b) £3999.99 for all work conducted from 20th November 2023 by the respondent solicitors for preparation of this case for final hearing; (c) £2,378.42 in witness expenses.

16. At the hearing the respondent submitted that based on its understanding of the decisions delivered on 1 February 2024 in striking out the claimant's claim the tribunal had found 'unreasonable conduct' and noted the similarly worded concept in relation to the wasted costs provisions. Determining a costs application was however different from the approach to strike out given the draconian nature of strike out. There had been persistent conduct despite all accommodating measures put in place by the tribunal and overall, a complete lack of foresight or planning with conflicting accounts and unnecessary submissions made. There had been needless adjournments to put in place basic measures such as access to the hearing bundle and the tribunal had been repeatedly forced to seek clarity including in relation to a video. The respondent's case preparation was hindered in circumstances such as the claimant's witness statement not addressing several of the serious allegations raised and no skeleton had been filed. The wasted costs jurisdiction was not to punish but to compensate the party put to needless expense.

17. The hearing could not continue and adjourned at 1240 as the claimant's solicitors were no longer present and the panel noted that the claimant was not present. Mr Lixandru told us the claimant was aware of the hearing but did not feel emotionally prepared to join. The hearing continued at 1400. The claimant's solicitors told us that the claimant was in their waiting room but did not want to join although would if the tribunal summoned her. Those present were informed that the tribunal had also emailed the claimant directly regarding the hearing.

18. The tribunal thought it would be helpful to explicitly remind the parties of the decisions and reasons given orally on 1 February 2024 for the purpose of the wasted costs application before it. The respondent's application for

strike out was refused. The tribunal had found a range of matters of very serious concern including that actions related to the bundle were unreasonable but the overall conclusion having regard to the test as explained in the case law as requiring persistent and deliberate disregard was that the threshold was not quite met. The tribunal also considered that a fair trial was then possible in the trial window and that having regard to proportionality it was not in the interests of justice to strike out the claim. The further circumstances that then arose in relation to discussion about evidence and the contradictory statements provided about this given the previous circumstances were unreasonable conduct, a fair trial was then no longer regarded as possible within the trial window and strike out was considered appropriate.

MR LIXANDRU'S SUBMISSIONS

19. Mr Lixandru submitted that he was disappointed with the way the hearing had unfolded and did not agree with the wasted costs application. Mr Lixandru submitted he had been cooperative from the very beginning, communicating with respondent's counsel via texts and emails and was prompt to assist the claimant with all the technological issues she incurred. Mr Lixandru submitted that it was common for these cases to deal with housekeeping on day one. On day two he was able to cross-examine a respondent's witness. On day three the claimant attended his chambers with an electronic hearing bundle as per all other participants and he and his colleagues in chambers assisted with provision of a paper copy of the bundle. Mr Lixandru submitted that the claimant had approached him showing him a video on her phone over the lunchbreak on day three and he saw that it was playing on her phone but he did not watch the video nor discuss evidence with the claimant. Mr Lixandru contended that the respondent's application for strike out had interrupted the hearing and without that application, the hearing could have concluded in a timely manner.

20. Mr Lixandru told the tribunal that the claimant would be applying for permission to appeal the decision to strike out her claim and would rely on the authority in Hughes Jarvis Ltd & Anor v Searle [2019] EWCA Civ 1. We interjected at this point as we anticipated that this was potentially being raised to contest the hearing of the wasted costs application going ahead which is a point which ought preferably to have been raised directly and clearly at the outset. Mr Lixandru however clarified that it was simply the claimant's full intention to appeal the strike-out decision. Mr Lixandru submitted that the Court of Appeal case was authority for the proposition that where a witness discusses evidence with their lawyer this does not justify striking out of a claim.

21. Mr Lixandru stated that a reference he had made to an updated version of the respondent's skeleton was due to a misunderstanding as he had been emailed the skeleton in a different format. He had only received written instructions to attend the hearing on Saturday morning and had his phone off due to the Shabbat holiday. Mr Lixandru submitted that the claimant had been difficult to deal with due to her emotional state and his clerks were witness to the polite and respectful way he had attempted to deal with her. The claimant had been in a separate room from him at all times separated

by a glass window. Mr Lixandru submitted that he was not under direct instruction but had been instructed via solicitors and had been assured the claimant could attend and had access to the bundle. Mr Lixandru submitted that setting aside the issue with the bundle, the respondent was supposed to be ready for the five-day hearing. The application was disproportionate, unreasonable, unfair and ought to be dismissed.

22. We raised two issues with Mr Lixandru: (i) whether he had any submissions in relation to rule 84 which set out that the tribunal may have regard to a person's ability to pay, and as to the allocation of any costs ordered; and (ii) whether the tribunal would hear anything with regard to the allegations in so far as they related to the solicitors' conduct or hear from the solicitors.

23. Mr Lixandru then submitted that he disagreed there had been delays caused on day one save perhaps one hour. He had spoken with the claimant on Monday morning and Tuesday evening and reached the conclusion that the claimant needed an interpreter and the submission she was vulnerable was based on his impression and what was stated in the claimant's witness statement as to how she had been impacted. We interjected as these submissions did not appear to directly address the issues we had raised. Mr Lixandru then told us he was a self-employed barrister whose bills did not always get paid promptly. Mr Lixandru also stated that he did not want to make any submissions about the claimant's solicitors but in addition he was not sure what they could have done to make the hearing more efficient given the claimant's choice to stay at home to give evidence. The respondent's application for strike out had unreasonably wasted two and a half days.

CALICES SOLICITORS' SUBMISSIONS

24. Mr Seaka submitted they had not had sufficient time to reflect on what happened on 1 February 2024 and the claimant was very upset. A costs order would be disproportionate and far from measured and there was no basis for a costs order against them. To the extent strike out was based on compromise to the integrity of witness evidence, this did not relate to the solicitors' conduct.

25. Mr Seaka told the tribunal that they were aware the tribunal had been told that the respondent's solicitors had sent the bundle on 29 November 2023 but this was an email with no attachments. They were aware of an email from the tribunal on 26 January 2024 complaining about the filing of the bundle and on that day the respondent sent the bundle. Mr Seaka told the tribunal that on 26 January 2024, they forwarded this to chambers, and they did not agree with Mr Lixandru's submissions. Mr Seaka submitted that further to taking on the case from the previous representatives on 9 November 2023 they had not acted unreasonably in any way. They were not aware the claimant had any problems with technology until the hearing and this could not have been anticipated. They could not have accommodated her but had discussions with Mr Lixandru and understood she could go to his chambers. Mr Seaka submitted that they could meet the costs order if liable to pay but their position remained that they were not liable.

26. We clarified the information about 26 January 2024 given Mr Lixandru had told the tribunal on the afternoon of day one that his instructing solicitors had told him that they did not have a copy of the hearing bundle. Mr Seaka said that they had provided the bundle to chambers on 26 January 2024 and that they did not agree with the information that counsel had provided and it was not consistent with their position.

ANALYSIS AND CONCLUSIONS

Has the legal representative acted improperly, unreasonably, or negligently?

27. We agree with the respondent that in relation to the strike out decisions, we had found certain conduct unreasonable. We found it unreasonable that Mr Lixandru did not have a copy of the hearing bundle by the afternoon of day one. This caused delay on the afternoon of day one.

28. We consider that issues such as whether a person requires an interpreter and whether a person is to be treated as a vulnerable witness are matters that ought to be addressed at the earliest opportunity and preferably at case management stage and/or in advance or potentially at the outset of a hearing. We accept that circumstances can arise during the course of the hearing which may result in a conclusion that there is a need for an interpreter or to treat a person as a vulnerable witness including where this is identified by the tribunal. The tribunal's primary objective is to ensure a fair hearing. The overriding objective as set out in the Employment Tribunal's Rules of Procedure is to deal with cases fairly and justly and the parties are required to assist the tribunal in securing that.

29. We also accept that the nature of counsel's role in acting in the best interests of his client before a court or tribunal may require counsel to raise matters that have not been previously identified and canvass these with the court such as whether his client requires an interpreter for a fair hearing and in the interests of justice. We note that the tribunal is well used to making accommodation or adjustment as necessary to support and ensure participation by parties and others during hearings.

30. We have been told by Mr Lixandru that he spoke with the claimant on Monday morning. On day two the claimant was able to join with an audio and video connection but unfortunately there was a national incident that disconnected all participants from the platform. Thereafter, all participants save for the claimant were able to effectively re-join. It was at this point in the hearing that Mr Lixandru raised the issue of an interpreter. Mr Lixandru indicated that this was based on his own impressions and he did not know what the relevant language would be. Mr Lixandru indicated that he had taken no instructions regarding this. When instructions were taken, the tribunal was told that the claimant considered her English sufficient and did not want an interpreter. As the tribunal had heard very little from the claimant at this point, the tribunal was not in a position to form any impressions of its own. Mr Lixandru also confirmed to the tribunal that he was content for the claimant to participate by way of telephone only whilst a respondent's witness was cross-examined.

31. Mr Lixandru raised the issue of the claimant being a vulnerable witness only during submissions in reply to the respondent's application for strike out on the afternoon of day three. Mr Lixandru could not point to any evidential basis for treating the claimant as a vulnerable witness beyond him describing her as emotional and then that her witness statement described the impact of events in the workplace on her.

32. With the above in mind, we observe that needing an interpreter or being a vulnerable witness are matters that might be described as shields to ensure a fair hearing; they are not weapons to be deployed responsively during a hearing.

33. We have concluded that these are examples having regard to their timing and the context of unreasonable conduct. They interrupted rather than sensibly advanced the hearing.

34. We have considered the circumstances relating to the claimant being in a position to give evidence to the tribunal at the hearing of her claim. Given what had transpired on day one and day two as regards the claimant's ability to fully join the hearing, we had taken the exceptional step of ordering her to attend counsel's chambers to give evidence on day three. The location was chosen after discussion as to what was preferable in all the circumstances and with Mr Lixandru given time to confer with instructing solicitors. We refer above to Mr Lixandru having indicated that he had spoken with the claimant and formed his impression of the claimant including the suggestion on day two that she required an interpreter. We accept that Mr Lixandru was not directly instructed on this occasion but the attendance at chambers was further to time taken to explore options to support the claimant.

35. Mr Lixandru told the tribunal the claimant attended his chambers on day three well in advance of the start time of 10am. That time could sensibly have been used to ensure the claimant was in a position to give evidence particularly in light of the difficulties that had transpired on day one and two and that the hearing was not progressing. In that context, we consider it was unreasonable that it was for the tribunal to firstly identify that the claimant was clearly having difficulty navigating the electronic bundle, could read but preferably with larger font, that a hard copy or paper bundle would be of assistance, and finally that the loose pile of papers provided were not conducive to the claimant moving effectively through the bundle during the provision of evidence. The tribunal had discussions with Mr Lixandru during which we were presented with obstacles rather than prompt and proactive steps such as the size and capacity of the printer in his chambers and when a loose pile of papers had been provided that his chambers had no available folder or other means of fixing the papers together.

36. We fully accept and appreciate that we cannot know the detail and extent of advice given to the claimant with regard to joining the hearing on day two. We were told by Mr Lixandru that the claimant had been encouraged to

attend chambers on day two but the claimant wished to join from home. We accept that decision was for the claimant with all the risk that entailed given day one. We have concluded that it was not unreasonable conduct on Mr Lixandru's part that the claimant did not make herself available to give evidence on day two when the expectation was that the tribunal would hear from the claimant. We accept that the tribunal did hear from a respondent's witness on day two and we had already been told that witness was only available on day two so at the outset it was anticipated that witness would give evidence likely on the afternoon of day two.

37. We concluded that in relation to day three when the claimant had attended chambers and been available well in advance of the hearing that not taking sufficient proactive steps to ensure she was in a position to give evidence amounts to unreasonable conduct. We accept Mr Lixandru was confronted with an atypical situation where he was not directly instructed but had the client in his chambers without her instructing solicitors. However, we are not persuaded that he took sensible steps to ensure the tribunal was in a position to hear the claimant's evidence particularly in a context where on his own account he had thought she might need an interpreter and/or was forming the impression at some point that she was vulnerable. The statement that she had a bundle accessible electronically like everyone else simply does not engage with the reality of the circumstances.

38. Mr Lixandru submitted that it was the respondent's application made at the end of the morning of day three that interrupted matters and meant the trial could not be completed. That is not accurate. That application was refused and at the point it was refused the tribunal took the view that whilst we had strayed far from the indicative timetable, the evidence and submissions could still be heard. That approach of course impacted on other tribunal users as the tribunal would need to find additional time to deliberate, reach and record and deliver its decision and, if the claimant were successful, a remedy hearing would need to be held. The respondent's application was not inapposite given the tribunal had only narrowly concluded the threshold to trigger strike out had not been met.

39. On day four, the tribunal struck out the claim acting on its own initiative. The tribunal gave oral decision and reasons. As set out above at paragraph 18, the unreasonable conduct found to have occurred related to the circumstances of discussion of evidence and contradictory statements made to the tribunal given the previous circumstances.

40. We have considered whether the circumstances set out at 26.4 and 26.5 of the respondent's application are to be considered unreasonable conduct in the context of deciding the application for wasted costs. We fully accept that counsel's conduct is as to his own actions and as to whether they might be regarded as going against advancing resolution of the case rather than conduct of the claimant in this context. Mr Lixandru clearly cannot control any actions of the claimant waving a device at him or approaching him. Mr Lixandru is however expected to explain matters to the court in a direct and sufficiently clear and unambiguous way. Seeking clarification did not serve

to secure clarity but rather the receipt of contradictory statements from Mr Lixandru.

41. We consider that where a representative does not provide consistent and clear statements and information to the tribunal or sets out submissions or alludes to applications without instruction this is inevitably a cause for concern. We considered that this conduct on day four was unreasonable.

42. We considered whether these actions individually or cumulatively could be said to fall under the rubric of unreasonable conduct explained as vexatious, designed to harass the other side rather than advance resolution of the case or did not permit of reasonable explanation. We concluded that progress towards resolution of the case did not advance in a sensible manner. We concluded there were no reasonable explanations advanced. We therefore concluded not without serious consideration that there had been unreasonable conduct before the tribunal by the claimant's barrister.

43. We were of the view that the claimant's solicitors gave clear and forthright submissions at the hearing of the wasted costs application. The email of 29 November 2023 is understood not to have had an attachment as it contained a link to download the bundle and the solicitors had done this. The solicitors furthermore indicated that the bundle had been sent to counsel in advance of the hearing and that the difficulties with technology could not have been anticipated. We accepted that as a reasonable explanation particularly in the context where the hearing was initially listed as an in-person hearing. We further noted that the claimant's solicitors set out that they could not have accommodated the claimant to join the remote hearing but when the tribunal was taking time to seek to support and accommodate the claimant and discussing how best to do this on day two it had not come across that the only realistic option was chambers.

44. We did not hear any points specifically directed at why the claimant's witness statement did not address many of the allegations she raises by way of these proceedings such that the respondent did not have any real details of her case on those matters in the course of preparing for the hearing. The claimant alleges that she was prevented from access to PPE, that she was prevented from going to the toilet, that she was owed holiday pay, that she was required to clean an oven and her witness statement does not address these matters at all. That was the position at the start of the hearing. We do not know what discussions were had between the claimant and her solicitors regarding the preparation of her witness evidence and what their advice to her was and nor can we unless she waives privilege. To the extent that a person advances no evidence regarding an allegation, that will clearly have a bearing on the resolution of that issue at the hearing.

45. We concluded that in all the circumstances there had not been unreasonable conduct by the claimant's solicitors so as to form a basis for any award of wasted costs against them.

<u>If so, did such conduct cause the applicant to incur unnecessary costs?</u>

46. We next considered whether the conduct we concluded was unreasonable by Mr Lixandru directly attributed to the incurring of costs by the respondent and, if so, what amount we ought to award.

47. We observe that Mr Lixandru referred to at most an hour being wasted on the afternoon of day one due to the issue with the bundle but otherwise no points were raised or submissions directed as to the costs claimed and their attribution. There was no real engagement with the second and third stages of the approach to deciding a wasted costs application and thus very little for us to take into consideration on Mr Lixandru's part.

48. We are not persuaded that preparation in advance of the hearing is to be considered as costs incurred attributable to the matters we have identified as unreasonable. We note the respondent's submission that the hearing did not sensibly progress at all but we are not persuaded that the claimant was not looking to advance her claims irrespective of how her case might have been or might be perceived to have been prepared and the impression which might arguably be formed that she did not want to get on with it due to the difficulties in her joining the hearing. The hearing did not progress as might have been expected for a range of reasons including the degree of readiness of counsel.

49. We are however persuaded that costs were incurred by the respondent due to the unreasonable conduct identified. We have concluded that costs incurred on the afternoon of day one, on day three and on day four are attributable to the unreasonable conduct identified which went against advancing the resolution of the case and did not support the sensible progression of the hearing. In addition, the respondent has incurred the costs of the application for wasted costs and the need for respondent's counsel to attend on day five.

50. We have concluded that the costs of the witness who attended on day two are not attributable to the unreasonable conduct identified. We did not have any detailed particulars of how the costs of other witnesses who remain employed by the company and would have joined the remote hearing were incurred. We accept that certain respondent's witnesses made themselves available remotely leaving their workplace as the hearing progressed and the tribunal tried to work with the parties to use time sensibly and effectively when the claimant was not in a position to give evidence. We have however concluded those costs cannot be directly attributable to the unreasonable conduct identified.

<u>If so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?</u>

51. We next considered whether in all the circumstances it would be just to make an award of costs. We were mindful of the tension in addressing the application summarily as required and given the serious consequences. We refer to our assessment above as to such explanations provided to us as to

the alleged unreasonable conduct and our findings. We invited Mr Lixandru to provide information as to ability to pay such that we might have regard to that in reaching our decision in accordance with rule 84 but we received no real detail to consider. Mr Lixandru submitted an award would be disproportionate, unreasonable and unfair but did not advance any clear basis before us as to why it would be unjust to make any award. As above, there was no engagement with the detail of the amounts claimed and the second and third limb of the approach to a wasted costs application. In all the circumstances, the hearing did not sensibly progress and we have identified the extent to which this is attributable to unreasonable conduct we have found.

52. Accordingly, we have concluded that the costs incurred by the attendance of respondent's counsel for 3.5 days in total as set out at paragraph 49 are attributable to the unreasonable conduct and that it is just in all the circumstances to make an award of wasted costs. We have calculated the award on the basis of 3.5 x £900 given the daily rate for respondent's counsel as set out in the respondent's schedule thus we award a total of £3,150 in wasted costs.

Tribunal Judge Peer acting as an Employment Judge

Date 20 February 2024

JUDGMENT SENT TO THE PARTIES ON

1 March 2024

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FOR EMPLOYMENT TRIBUNALS

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/