EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs R Nwogu	**v**	Royal Berkshire NHS Foundation Trust

Heard at: Reading **On:** 16 April 2024

Before: Employment Judge Anstis
Mr C Juden
Ms J Beard

Appearances
For the Claimant: Mr H Ogbonmwan
For the Respondent: Ms L Gould (counsel)

JUDGMENT

The claimant must pay £4,000 to the respondent in respect of costs.

REASONS

INTRODUCTION

1. These written reasons are produced at the request of the claimant.

2. We are addressing an application by the respondent for costs or wasted costs arising out of the previous seven days of this final hearing and the events immediately leading up to them.

3. Those seven days were taken up with a range of applications from both sides, with the hearing ultimately being abandoned on the seventh day and rescheduled.

4. The respondent had prepared a full written application and the claimant had replied to that in writing. Accordingly, with the agreement of the parties, their oral submissions were limited by us to 30 minutes each, although this was extended at Mr Ogbonmwan's request (made during his oral submissions) to 35 minutes from him.

5. We were surprised when Mr Ogbonmwan said at the end of his 35 minutes that on the basis that he had run out of time he would put the rest of his submissions in writing. That was not our intention in reaching those agreed time limits on oral submissions. We said that we would briefly review those further written submissions and give our view on them in this decision. If they appeared to be

important to our decision we would give the respondent the opportunity to reply to them.

6. In common with almost all of Mr Ogbonmwan's written and oral submissions on this point, these additional written materials concern aspects of the respondent's conduct of the case that the claimant says amounts to misbehaviour, matters in support of the underlying merits of her claim and arguments concerning the fundamental right of access to justice.

7. As we made clear to Mr Ogbonmwan during his oral submissions, in looking at an application for costs or wasted costs our primary focus is going to be on the behaviour of the claimant or his conduct of her claim on his behalf. If (and we express no view on this) the respondent has been at fault, that does not mean that the claimant or Mr Ogbonmwan are not also at fault. Where we are considering whether, for instance, the conduct of the claim has been unreasonable, the behaviour of the respondent may provide some explanation for what might otherwise appear to be unreasonable behaviour on the part of the claimant, but it is of itself no answer to the application to say that the respondent has also behaved unreasonably.

8. If we are to make the costs or wasted costs award sought by the respondent that says nothing about the underlying merits of the claim. It is not the respondent's position in this application that costs should be awarded because the claim has no merit. Their position is set out by reference to the conduct of a claim which may or may not have merit.

9. As for questions of access to justice and underlying human rights, we have repeatedly made it clear to the parties that we wish to proceed to hear the claimant's claim. As far as we are aware there is nothing in us making a costs award that would prevent us going on to hear the claimant's claim. We add that respect for access to justice and human rights also requires employment tribunal proceedings to be conducted in a reasonable manner. There is no underlying conflict between a costs or wasted costs application made on the basis of unreasonable conduct of a claim or response (or other forms of conduct that may give rise to a costs award) and general principles of access to justice and human rights.

THE LAW

10. For the purposes of this hearing Ms Gould invites us to take the unusual step of adopting a statement of the law set out by EJ Wright in Oyebisi v Hyde Housing Association Limited (case nos. 2305977/2020 and 2306525/2020). The claimant in that case was also represented by Mr Ogbonmwan. This is a decision at tribunal level and clearly we are not bound by the statement of the law in that case, but it appears to us to be entirely satisfactory for our purposes and Mr Ogbonmwan had not suggested that there is anything wrong in that, so we will adopt that statement of the law, as follows:

"20. The material provisions of the ET Rules 2013 governing costs applications are excerpted below:

Rule 74. Definitions

(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). […]

Rule 75. Costs orders and preparation time orders

(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. Where a costs order or 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; 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. Procedure

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. The amount of a costs order

(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; […]

(3) For the avoidance of doubt, the amount of a costs order under subparagraphs (b) to (e) of paragraph (1) may exceed £20,000.

Rule 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.

21. When determining an application for costs, the ET should apply a three stage approach:

a. Is the relevant jurisdictional threshold in rule 76 met?

b. If so, should the ET exercise its discretion in favour of making a costs order?

c. If so, what sum of costs should the ET order?

22. It is apparent from the wording of rule 76(1)(a) that a costs order may be made against a party when that party's representative has acted, or conducted proceedings, "unreasonably" etc.

23. In Scott v Russell [2013] EWCA Civ 1432, the Court of Appeal cited with approval the following definition of "vexatious" conduct at §30:

"[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings 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. "*

24. *For the purposes of rule 76(1)(a) the word "unreasonable" is to be given its ordinary English meaning and is not to be interpreted as meaning something similar to vexatious (Dyer v Secretary of State for Employment UKEAT/0183/83).*

25. *The ET should consider the nature, gravity and effect of the unreasonable etc conduct, but it is appropriate to avoid a formulaic approach and have regard to the totality of the relevant conduct. As Mummery LJ explained in Yerrakalva v Barnsley MBC [2012] ICR 420, CA at §41:*

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

26. *It should, however, be noted that the ET is not confined to making an award limited to those costs caused by the unreasonable conduct. As Mummery LJ confirmed in McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA:*

> *"39. Miss McCafferty submitted that her client's liability for the costs was limited, as a matter of the construction of rule 14, by a requirement that the costs in issue were "attributable to" specific instances of unreasonable conduct by him. She argued that the tribunal had misconstrued the rule and wrongly ordered payment of all the costs, irrespective of whether they were "attributable to" the unreasonable conduct in question or not. The costs awarded should be caused by, or at least be proportionate to, the particular conduct which has been identified as unreasonable.*
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> *40. In my judgment, rule 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred. As Mr*

> *Tatton-Brown pointed out, there is a significant contrast between the language of rule 14(1), which deals with costs generally, and the language of rule 14(4), which deals with an order in respect of the costs incurred "as a result of the postponement or adjournment". Further, the passages in the cases relied on by Miss McCafferty (Kovacs v Queen Mary and Westfield College [2002] ICR 919, para 35, Lodwick v Southwark London Borough Council [2004] ICR 884, paras 23-27, and Health Development Agency v Parish [2004] IRLR 550, paras 26-27) are not authority for the proposition that rule 14(1) limits the tribunal's discretion to those costs that are caused by or attributable to the unreasonable conduct of the applicant.*
>
> *41. In a related submission Miss McCafferty argued that the discretion could not be properly exercised to punish the applicant for unreasonable conduct. That is undoubtedly correct, if it means that the indemnity principle must apply to the award of costs. It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a precondition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order."*

27. *Mummery LJ did not resile from these observations in his later judgment in Yerrakalva, though His Lordship did emphasise in Yerrakalva that whilst the ET is not limited to awarding those costs incurred by the receiving party as a result of the paying party's unreasonable conduct, the "effect" of the unreasonable conduct will often be a relevant factor in the ET's exercise of its discretion.*

28. *A finding of unreasonable etc conduct is not necessary for a costs application to succeed under rule 76(2) ET Rules. It is sufficient, under rule 76(2), that the paying party is responsible for breaching the ET's orders. Clearly, however, the explanation for breaching the ET's orders may be a relevant factor at the discretionary stage in applications made under rule 76(2).*

29. *In circumstances where the ET finds that the jurisdictional threshold in rule 76 is met, the ET retains a broad discretion as to whether to make a costs order and the amount of any costs awarded. Whilst there is no closed list of factors relevant to the exercise of the ET's discretion, the following factors are often relevant:*

a. Costs orders are intended to be compensatory, not punitive (Lodwick v Southwark LBC [2004] ICR 884, CA). Therefore, the extent of any causal link between the unreasonable etc conduct and the costs incurred will normally be a relevant discretionary factor (Yerrakalva), albeit there is no requirement to establish a causal link between the unreasonable conduct and the costs incurred before an order can be made (McPherson).

b. The paying party's ability to pay is a factor which the ET is entitled, but not obligated, to consider (see rule 84 ET Rules). Where regard is had to the paying party's ability to pay, that factor should be balanced against the need to compensate the receiving party who has unreasonably been put to expense (Howman v Queen Elizabeth Hospital Kings Lynn UKEAT/0509/12).

c. Any assessment or consideration of means need not be limited to the paying party's means as at the date the order is made. It is sufficient that there is a "realistic prospect that [they] might at some point in the future be able to afford to pay" (Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT).

d. Where the ET does decide to take the paying party's means into account, it must do so on the basis of sufficient evidence (for example by the paying party completing a county court form EX140) (Oni v NHS Leicester City UKEAT/0144/12).

e. There is no requirement to limit costs to the amount the paying party can afford (Arrowsmith v Nottingham Trent University [2012] ICR 159, EAT).

f. The ET may have regard to the means of a party's spouse or other immediate family members (Abaya v Leeds Teaching Hospitals NHS Trust UKEAT/0258/16).

g. Whether a party is legally represented may be a relevant factor. An unrepresented litigant may be afforded more latitude than a party who has the benefit of professional legal advice and representation (AQ Ltd v Holden [2012] IRLR 648, EAT).

30. Rule 78 specifies two bases upon which the ET may deal with assessment of costs when an application succeeds against a party:

a. The ET may summarily assess costs up to a sum of no more than £20,000.

b. The ET may order that the paying party pay the whole or a specified amount of the costs of the receiving party to be subject to detailed assessment either carried out in the county court or by an Employment Judge applying the same principles. This will

likely be the appropriate course where the ET considers it appropriate to award costs in excess of the £20,000 summary assessment cap.

31. *Where the ET considers it appropriate to order detailed assessment either in the county court or by an Employment Judge, the ET is entitled to place a cap on the amount of costs that may be awarded following detailed assessment (Kuwait Oil Company v Al-Tarkait [2021] ICR 718, CA).*

Wasted Costs Applications Against a Representative

32. *The relevant provisions of the ET Rules governing wasted costs applications are as follows:*

Rule 80. When a wasted costs order may be made

(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. […]

Rule 81. Effect of a wasted costs order

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.

Rule 82. Procedure

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 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."

33. *In accordance with rule 84, the ET is entitled, but not obligated, to consider a representative's ability to pay a wasted costs order as part of exercising its discretion as to whether to make an order and if so in what amount.*

34. *The determination of an application for wasted costs requires consideration of a three-stage test. In Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme) UKEAT/0100/08, the EAT, applying the Court of Appeal's judgment in Ridehalgh v Horsefield [1994] Ch 205 identified the three elements of the test as follows:*

    a. *Has the representative acted improperly, unreasonably or negligently?*

    b. *If so, did that conduct cause the applicant to incur unnecessary costs?*

    c. *If so, is it just in the circumstances to order the representative to compensate the applicant for the whole or any part of the relevant costs?*

35. *In Ridehalgh, the Court of Appeal considered how the terms "improper", "unreasonable" and "negligent" are to be construed in the context of wasted costs applications. At pp232-233 the Court of Appeal gave the following guidance:*

    a. *"Improper" conduct includes, but is not limited to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty.*

    b. *"Unreasonable" means conduct which is vexatious and/or designed to harass the other side rather than advance the resolution of the case. It makes no difference if the conduct is the product of excessive zeal rather than improper motive. 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 the (legal) profession.

36. The burden of proof in establishing improper, unreasonable and/or negligent conduct is on the party making the allegation (in this case R).

37. It is clear from the foregoing that there is a higher threshold for "unreasonable" conduct under rule 80 in comparison with rule 76. In the rule 76 context, "unreasonable" is to be given its ordinary English meaning (see Dyer above) whereas, in the context of rule 80, it is to be read as meaning something similar to vexatious.

38. In Ratcliffe, Elias J, as he then was, suggested that it is important for a Tribunal, when considering a wasted costs application, to distinguish between conduct which is an abuse of the Tribunal's process (which may engage the wasted costs jurisdiction) and conduct which falls short of that threshold.

39. It is also important to draw the ET's attention to the House of Lords case of Medcalf v Mardell [2003] 1 AC 120. In Medcalf, the House of Lords stressed that the wasted costs jurisdiction should be approached with caution and endorsed the Court of Appeal's observations in Ridehalgh about the gravity of the conduct required to engage the jurisdiction. The House of Lords also noted that where there is or may be relevant privileged material which cannot be deployed by a representative in response to a wasted costs application, courts must approach a wasted costs application with particular care. If any doubt is raised due to the existence of potentially relevant privileged material which cannot be placed before the court, the court must give the respondent to the application the benefit of that doubt in reaching its decision (Medcalf at eg §§60-61).

40. Lord Bingham explained the approach to be adopted where issues of privilege arise in the following way at §23 of Medcalf:

> *"Even if the court were able properly to be sure that the practitioner could have no answer to the substantive complaint, it could not fairly make an order unless satisfied that nothing could be said to influence the exercise of its discretion. Only exceptionally could these exacting conditions be satisfied. Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the court should not make an order unless, proceeding with extreme care, it is (a) satisfied that there is nothing the practitioner could say, if unconstrained, to*

> *resist the order and (b) that it is in all the circumstances fair to make the order."*

41. *The wasted costs jurisdiction is not limited to representatives who are practising solicitors or barristers or otherwise legally qualified. It is clear from the words "other representative" in rule 80(2) that a wasted costs order can be made against a lay representative. However, per rule 80(2), a wasted costs order cannot be made in circumstances where a representative is "not acting in pursuit of profit". The rule expressly states that acting on a conditional fee basis will amount to acting in pursuit of profit. However, where a representative is acting pro bono, a wasted costs order cannot be made (see Jackson v Cambridgeshire County Council UKEAT/0402/09).*

42. *The wasted costs jurisdiction also requires a different approach to causation than a costs application made against a party. In a costs application against a party, the ET may consider causation as part of the exercise of its discretion, but is not required to strictly apply principles of causation (see McPherson above). However, in the wasted costs jurisdiction, it is a necessary precondition of an application succeeding that the ET must find that costs were incurred due to the improper, unreasonable and/or negligent conduct of the representative. As Langstaff P explained in Hafiz & Haque Solicitors v Mullick and anor [2015] ICR 1085, EAT at §15:*

> *"Mr Cohen argues that it would be unfortunate if, in applying the wording of Rule 80, I were to conclude that there was a causative requirement to be met when this would not be the case in the general costs rule. I cannot accept that submission. The Rule says what it states. It is a different rule from the general costs rule. It clearly requires that the costs which are to be indemnified were incurred as a result of the conduct complained of. The conduct itself need not, it seems to be (sic), be identified with such specificity that it can be said that this particular aspect of improper conduct caused this particular loss. To that extent, I adopt the general approach in respect of what is another rule from another set of rules considered by the Court of Appeal in McPherson v BNP Paribas, but it seems to me it is not for me to ignore the precise wording which is used, which is in contradistinction to the absence of any such wording in Rule 76."*

43. *Where a wasted costs order is made, the order must specify the amount to be paid (rule 81). However, it should be noted that, in contrast to the position in respect of applications against parties in rule 78, the ET cannot order that there be a detailed assessment of wasted costs in the county court. Under rule 81,*

the ET must itself undertake an assessment of the wasted costs to be ordered and stipulate the amount to be paid (Casqueiro (in a Matter of Wasted Costs) v Barclays Bank Plc UKEAT/0085/12 at §10).

44. Moving on from Mr Cook's statement of the law, recently, the EAT has said the following in respect of costs under Rule 76 starting at paragraph 8 in B.L.I.S.S Residential Care Ltd v Fellows EA-2022-000068-AT:

> *"8. If one of the thresholds for making a costs order is reached the employment tribunal still has a discretion to exercise in deciding whether to award costs, and if so, in what sum.*
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> *9. In considering an application for costs the employment tribunal should bear in mind that it is generally a costs free jurisdiction: Gee v Shell Limited [2003] IRLR 82. Where a party considers that a claim or response is misconceived, a costs warning letter may be sent. There is no obligation to do so and a failure to do so does not prevent the employment tribunal making a costs order. However, the failure to do so is a matter that the employment tribunal may take into account in deciding whether to award costs, or in fixing the amount of an award. The respondent did not send the claimant a costs warning letter in the employment tribunal.*
>
> *10. [set out Rule 84]*
>
> *11. The employment tribunal is empowered to consider the paying party's ability to pay, but is not required to do so. If the employment tribunal exercises the discretion to disregard the paying party's ability to pay it should generally give reasons: Jilley v Birmingham and Solihull Mental Health NHS Trust and others UKEAT/0584/06 at paragraph 44. In considering ability to pay the employment tribunal is entitled to have regard to the likelihood that a person's financial circumstances may improve in the future: Chadburn v Doncaster & Bassetlaw Hospital NHS Foundation Trust UKEAT/0259/14/LA. This can include the possibility that money will be received from a third party.""*

COSTS OR WASTED COSTS

11. An initial point that arises is whether the criteria for an award of wasted costs arises.

12. We heard no evidence concerning the basis on which Mr Ogbonmwan had been engaged to represent the claimant. However, during his oral submissions

he said his representation of the claimant was an act of "pure charity" for someone who he regarded as being a member of his own family. From this we take it that he has not and will not be paid (or receive any other consideration) for his work, nor has or will any body or organisation with which he is connected and from whom he may derive a benefit from be paid (or receive any other consideration) for his work in representing the claimant.

13. While this is not formally evidence it is the most we have to go on as to whether Mr Ogbonmwan meets the criteria of acting as a representative "in pursuit of profit". There is nothing from the respondent to suggest that he has, in this case, been acting in pursuit of profit. Accordingly it seems to us that the wasted costs jurisdiction is not engaged.

14. If Mr Ogbonmwan had been acting in pursuit of profit, we would have been very hesitant about making a wasted costs award in circumstances where litigation privilege has not been waived and the claimant has never said that Mr Ogbonmwan is acting without instructions (c.f. Ridehalgh and Medcalf).

15. If there is a costs award to be made in these circumstances, it should be against the claimant herself, not Mr Ogbonmwan, although we note that none of the actions criticised by the respondent have in fact been carried out by the claimant. Everything the respondent has criticised has been done by Mr Ogbonmwan on the claimant's behalf.

THE APPLICATION AND OUR FINDINGS ON THE FACTS

16. At para 15 of her written application Ms Gould sets out the behaviour she criticises, and we will consider those points individually against the criteria for a costs award.

Fabricating authorities and providing untruthful and evasive answers

17. It is not in dispute that Mr Ogbonmwan did fabricate authorities. In support of the claimant's claim he submitted propositions of law that he said were set out in named cases which did not exist. There has never been any sensible explanation for this and it is reprehensible. If Mr Ogbonmwan was a regulated legal professional this would have had serious consequences for him. It is unreasonable and abusive behaviour.

18. Ms Gould gives no particular examples of untruthful or evasive answers given by Mr Ogbonmwan. There have been times when Mr Ogbonmwan's arguments have been difficult to follow, or when he has not seemed to appreciate the point being put to him by the tribunal, but we do not consider this reaches the threshold of unreasonable behaviour or otherwise meets the criteria for a costs award.

Making a vexatious application to strike the respondent's response out

19. At the start of the hearing the claimant made an application to strike out the respondent's response, which we do not consider to have been properly made.

This was unreasonable conduct of the proceedings by Mr Ogbonmwan on the claimant's behalf.

Wasting time

20. It is true that Mr Ogbonmwan has repeatedly returned to particular themes and shown a marked unwillingness to move on when that is suggested by the tribunal.

21. A particularly contentious point, and one that Mr Ogbonmwan has repeated returned to, is what are said to be failures in disclosure by the respondent.

22. EJ Quill held a last-minute preliminary hearing in January specifically to address issues of disclosure raised by the claimant and appears to have produced a comprehensive outcome addressing matters of disclosure. We have repeatedly said to Mr Ogbonmwan that if we are to take these points further then we will need to know why he did not raise these alleged failures before EJ Quill, or if he did, what EJ Quill did about it and whether it is said that the respondent has failed to comply with EJ Quill's order. If there is anything in this failure of disclosure then it surely should have been raised earlier by the claimant. (We had referred to EJ Hyams in our oral reasons for this decision, but the preliminary hearing was in fact heard by EJ Quill.)

23. We do not consider that this, yet, amounts to unreasonable conduct of the claim. However, we caution Mr Ogbonmwan to approach matters such as this in a more constructive manner. Further complaints about disclosure without addressing the point set out above may well amount to unreasonable conduct.

Challenging the list of issues only shortly before the final hearing

24. The way in which the respondent frames this is instructive: the alleged failure is challenging the list of issues only shortly before the final hearing.

25. Much of Mr Ogbonmwan's submissions were taken up with reminding us that the drafting of the disputed list of issues originated with the respondent. This is true. We have also previously referred to the process described by EJ Cowan of working through the list of issues with the parties before arriving at a list of issues that appeared to be agreed.

26. It appears to be Mr Ogbonmwan's position that the list of issues has always been defective but that this is the respondent's fault rather than his. However, even if he is right about this he had never addressed the point made by the respondent. He has had years in which to challenge or correct the list of issues but did not attempt to do so in any way until shortly before the final hearing. There has never been any proper explanation for this or why he delayed so long. The respondents are not making out their application on the basis simply that the claimant is challenging the list of issues. If that had been done around the time of the case management hearings perhaps there could be no objection to that, but it is clearly unreasonable behaviour to wait until shortly before the final hearing before disputing the list of issues and, at that point, not simply

attempt corrections to the list of issues but produce a fresh list of issues to apply in addition to the previously established list of issues.

27. This late identification of problems with the list of issues is one of the primary reasons why the previous listing of the final hearing was ineffective. It is unreasonable conduct of proceedings.

Other points

28. The remainder of Ms Gould's points relate to general conduct of the hearing by Mr Ogbonmwan, including what she says are misrepresentations of the steps taken in preparation for the hearing, "*making baseless allegations against the judge and the respondent's counsel*" and disruptive behaviour.

29. There has been much dispute between the parties as to the preparatory steps immediately prior to the hearing. We do not consider the claimant's behaviour in this respect steps into being unreasonable conduct of the hearing.

30. The "*baseless allegations*" are said to include the claimant's second application for recusal, incorporating allegations of actual bias. That application was not well founded, but we consider that we should adopt a generous view of this, lest proper applications for recusal are discouraged for fear of being seen as unreasonable conduct. It was not unreasonable conduct, nor, for the avoidance of doubt, was the initial application for recusal made on the basis of apparent bias.

31. It is true that there have been some breaches of tribunal etiquette by Mr Ogbonmwan, but we do not consider this to be disruptive behaviour of the kind that amounts to unreasonable conduct.

32. Finally, for sake of completeness, we note that there are events which occurred during the hearing that the respondent correctly does not criticise, such as the claimant's application to postpone the hearing on account of her bereavement.

A COSTS AWARD IN PRINCIPLE

33. Just because there has been unreasonable conduct of proceedings does not mean that are should award costs. It remains a discretionary step. We consider that we should exercise our discretion to award costs in this case. The behaviour of Mr Ogbonmwan on behalf of the claimant has been too bad to ignore, and has certainly caused additional expense to the respondent. In saying this, we particularly have in mind the late challenge to the list of issues.

34. The single worst element of Mr Ogbonmwan's conduct of the claimant's claim has been his falsification of authorities. However, this was spotted by the tribunal almost immediately and does not seem to have added substantially to the respondent's costs.

MEANS

35. The claimant (and Mr Ogbonmwan) have had the opportunity to produce evidence as to their means in accordance with a tribunal order, but have not done so. In the absence of such evidence there is nothing for us to take into account as regards her means, so we cannot and do not take her means into account.

THE AMOUNT OF THE COSTS AWARD

36. The respondent's costs application totals £20,000. This includes costs yet to be incurred.

37. We consider the best way of proceeding is to take it that the respondent has incurred costs of around £2,000 (consisting of a reasonable refresher of £1,250 and solicitor's fees of £750) per day of this hearing. We do not consider these rates unreasonable, nor do we consider the attendance of both counsel and (at the time) trainee solicitor unreasonable in the circumstances of this case.

38. The lack of progress over seven days is profoundly unsatisfactory, but is only due in part to unreasonable behaviour on the part of Mr Ogbonmwan. Adopting a generous approach to the claimant, we consider that the proper award to reflect the scope of the unreasonable behaviour is the respondent's costs for two days of that hearing – that is, £4,000.

39. Our disallowance of costs not yet incurred should not be taken as any indication that those costs may not later be taken into account if a further application for costs is later made based on the circumstances at the time. However, we hope that one result of this order will be that claimant and Mr Ogbonmwan will reflect on their approach to the hearing and circumstances in which such an application may later be made will not arise.

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Employment Judge Anstis
Date: 17 April 2024.

Sent to the parties on: 22/4/2024

N Gotecha

For the Tribunal Office

Notes

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/