Case Number: 1305608/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant:	**Ms Severine Obertelli**
and	
Respondent:	**Maxxton (UK) Limited**
SITTING AT:	**Birmingham (Midlands West) Employment Tribunal**
ON:	**4 December 2023**
BEFORE:	**Employment Judge G Smart** **Mrs D Rance** **Mrs W Stewart**

RESERVED JUDGMENT
Reconsideration and costs

On hearing for the Claimant in person and Mr. Mampaey (Chief Executive Officer) in person for the Respondent:

1. The application for reconsideration is refused because there are no grounds to vary or revoke the Judgment about liability.

2. The Claimant is ordered to pay to the Respondent its costs, in the amount of £750, with £450 of the sum being settled by way of the deposit payment already paid into the Tribunal for the Claimant to continue with her claims.

REASONS

Background

1. The Claim was originally presented on 28 April 2020 following an effective date of termination of 30 January 2020.

2. Before commencing her case, the Claimant sought advice from a barrister who gave the Claimant a prospects of success estimate of 52%.

3. There is a lengthy background to this case. There have been five preliminary hearings to manage this case as follows:

   3.1. 16 June 2021 – before Employment Judge Britton to clarify the case.

   3.2. 27 September 2021 – Employment Judge Britton to clarify the case.

   3.3. 8 December 2021 – Employment Judge Britton to decide the Claimant's amendment application and further case management.

   3.4. 25 February 2022 – Employment Judge Wedderspoon to decide the issue of whether the Claimant should pay a deposit to proceed with her claims. A deposit order was issued.

   3.5. 5 December 2022 – Employment Judge Clarke to finalise the list of issues following the payment of part of the deposit order and list the case for final hearing.

4. The Respondent was legally represented by a solicitor until the conclusion of the hearing before Judge Wedderspoon on 25 February 2022. After that, the Respondent undertook to represent itself through Mr. Mampaey.

5. Legal fees were therefore paid by the Respondent to assist in its defence of the case between 22 March 2021 and 27 April 2022.

The Claimant's amended case

6. The Claimant attempted to add new issues to her case as the proceedings progressed. This commenced in her further particulars document prepared just before the 16 June 2021 preliminary hearing. This was included in the further particulars on 16 June 2021 just before the hearing as logged by Judge Britton at paragraph 19 of his case management order.

7. A further preliminary hearing was listed for 27 September 2021 to deal with the Claimant's amendment application and further case management as required.

8. Judge Britton also ordered the Claimant to provide a schedule of acts of discrimination by 14 July 2021 including all further particulars relied upon. The Claimant complied with that order and the respondent submitted an Amended Grounds of Resistance in response.

9. However, in addition to the schedule ordered by Judge Britton, the Claimant also submitted a document with the title *"Revised Further and Better Particulars of Claim."*

10. At the preliminary hearing on 27 September 2021, any additions to this document were agreed to be background information to her claim. The actual amendments to the Claimant's Claim were those contained in her table called Schedule of Acts.

11. The final issue to clarify the case was discussed as being the Claimant's application to amend the claim to include the final straw that she said caused her resignation and consequently her constructive dismissal. This was then set down for a further preliminary hearing to decide this amendment point as per paragraph 2 of Judge Britton's order.

12. By this hearing (27 September 2021), the Respondent had made its deposit application.

13. We then get to the Preliminary Hearing that took place on 8 December 2021. This hearing followed the same pattern as previous hearings. The Claimant did not limit her application to amend the claim to the last outstanding final straw point. She sought further amendments on 18 October 2021. Some of these amendments were relabelling already pleaded issues. Others involved entirely new facts and causes of action, which Judge Britton described as incoherent and lacking particularity.

14. Ultimately, its strikes us that the application to amend the Claim on 18 October 2021, to bring in new causes of action was unreasonable conduct on the part of the Claimant. Overall, the Claimant could and should have clarified the case much sooner than she did and certainly before 18 October 2021 some 18 months after it was first submitted. We say this taking into account the fact the Claimant is an unrepresented litigant. The final straw and all other issues in the background to this case were known to the Claimant before she presented her claim to the Tribunal.

15. The effect of the unreasonable conduct was to increase the Respondent legal fees at that time for the time taken in and solicitor preparation time for opposing the application to amend the claim.

16. On looking at the legal fees we could identify as specifically related to the additional amendment application, in terms of both preparation and attendance at hearing, this came to approximately £750 plus VAT as per a portion of the time entries for the preparation and attendance at the preliminary hearing on 8 December 2021.

The Deposit Order

17. On 25 February 2022, this case came before Judge Wedderspoon at a preliminary hearing. The hearing was listed to determine whether the Claimant should pay a deposit because the Respondent argued the Claim as a whole or any arguments/parts of the claim had little reasonable prospects of success.

18. On 25 February 2022, Judge Wedderspoon reserved her decision.

19. On 30 March 2022, the deposit order was sent to the parties with detailed reasons provided by Judge Wedderspoon. At that point the Claimant was on notice that on a summary view of her case, the Tribunal decided all the Claimant's claims had little reasonable prospects of success.

20. The Claimant was warned that the likelihood of an adverse costs order being made against her if she paid the deposit and lost for similar reasons that caused the deposit order to be granted.

21. The deadline for payment of the deposit was extended to 16 May 2022.

22. The Claimant paid £450 for the deposit to consider her claims for constructive unfair dismissal, breach of contract and victimisation complaints.

23. The breach of contract complaints had been relabelled by the time of the final hearing as including pension loss, health care payments, unpaid bonus and expenses as clarified at a Preliminary hearing before Judge Clarke on 5 December 2022.

24. By the hearing itself, the expenses payment had been resolved so the Claimant did not pursue this claim.

25. The reasons given by Judge Wedderspoon for each of those complaints being the subject of a deposit order can be summarised as follows:

    25.1. **Constructive unfair dismissal:** The resignation letter the Claimant sent to the respondent was, on balance, a positive one and did not give the impression that the Respondent had committed a repudiatory breach of contract. The letter also contradicted that there was a repudiatory breach relied upon by the Claimant to base the constructive dismissal case.

    25.2. **Breach of contract:**

        25.2.1. **Bonus payments** – Whilst listed under an unlawful deductions claim at the time of the deposit hearing, there was no evidence to suggest the claimant was contractually entitled to a bonus, but none-the-less received one for the Novasol customer contract win and this claim was on the face of it, out of time.

        25.2.2. **Penson contributions** – that these appeared to have been paid in accordance with the contractual documents shown to Judge Wedderspoon and the Claimant did not appear to be contractually entitled to anything additional.

        25.2.3. **Health care payments** – That the Claimant did not appear to be contractually entitled to health care payments and the respondent had complied with the contract of employment.

    25.3. **Victimisation:** That the Claimant has failed to identify a protected act to

base the claim for victimisation and any allegations put forward as potential protected acts did not appear to complain about issues relating to any protected characteristics.

The Judgment about liability

26. Judgment about the liability of the case was given orally on the final day of the full merits hearing. The Claimant's claims were dismissed and the respondent wished to pursue its costs application. The case was therefore listed for a one-day costs hearing. It was identified by the tribunal that clarity about what order was sought was needed given that the respondent could only claim for preparation time after it stood down its solicitors.

27. The short form Judgment was sent to the parties on 26 September 2023. The Claimant requested written reasons.

Judgment reconsideration request

28. On 11 October 2023, the Claimant applied for the decision to list the case for a costs hearing to be reconsidered and for reconsideration of a number of case management decisions made by Judge Britton years before the full merits hearing. The Claimant's application was refused and reasons given in writing sent to the parties on 22 November 2023.

Written reasons

29. Written reasons were sent to the parties on 24 November 2023.

The costs/preparation time hearing on 4 December 2023

30. The Tribunal had in front of it a Respondent's costs bundle and a number of emails submitted late by the Claimant. All of the Claimant's emails and the costs bundle were considered where we had been referred to documents by the Claimant or Mr. Mampaey.

31. Unhelpfully, neither party had complied with the case management orders of the tribunal sent to them on 22 November 2023. For example, the Claimant had not submitted documents to be included in the bundle in a timely way and the Respondent had failed to send in a written document setting out why it says costs and/or preparation time should be paid by the Claimant.

32. At the start of the hearing, we asked the Respondent whether it had considered if it was pursuing costs, preparation time or both, given that we could not award an order for both costs and/or preparation time in the same proceedings, it was one or the other.

33. The Respondent expressly pursued costs, not preparation time. We therefore did not consider any preparation time points.

34. We heard evidence about the costs situation from Mr. Mampaey and from the Claimant about her means to pay any costs order.

Application for reconsideration of the Tribunal's written reasons

35. At the costs hearing, the Claimant requested that the Written Reasons of the Tribunal be reconsidered because she had provided a number of additional documents to the Respondent. The request was made at the hearing within 14 days of the written reasons being sent to the parties.

36. The documents the Claimant relied upon as new evidence were:

    36.1. An undated article about how Maxxton founder Mr. Mampaey prepared his successor Ruben De Looff to be the new CEO.

    36.2. An article dated 15 March 2019 about the "Serviced Apartment Awards".

    36.3. A LinkedIn profile page about Mr. Mampaey.

    36.4. A companies House page about Maxxton UK limited and its officers.

    36.5. Tribunal correspondence from 14 May 2021 attaching the Claimant's request for documents to be disclosed by the Respondent.

37. When asked at the hearing how these documents were relevant to the proceedings, the Claimant could not explain why and admitted that they may not be relevant. In our view, the new documents are wholly irrelevant to the costs hearing and the issues we needed to decide in the original liability hearing.

38. In our view, given the application was made at the hearing and the respondent was prepared to deal with the application at the hearing, we heard submissions from both sides about the reconsideration application and would need to reserve or judgment about both costs and reconsideration due to insufficient time at the costs hearing to deliberate and come to a decision.

Substantially the same reasons as the deposit order

39. When considering the reasons for why the Claimant lost her case, we conclude that the reasons why we found the breach of contract claim and victimisation claim were not well founded were almost identical to the reasons why Judge Wedderspoon came to her decision about the deposit for those claims.

40. When considering the reasons why we found the constructive unfair dismissal case failed, these were not the same as those of Judge Wedderspoon. However, they were similar in that we decided that the request for consultancy agreement post termination went against the Claimant's case she resigned in response to a repudiatory breach of contract and we also found there was no repudiatory breach either cumulatively or otherwise.

41. We conclude that it was therefore unreasonable for the Claimant to have continued with her case by paying the deposit for these claims.

42. This unreasonable behaviour had the effect of the case continuing to a final hearing at the inconvenience of the respondent when, on balance, it should have been disposed of without the need of a full merits hearing. However, because the respondent was not legally represented, no additional costs were argued to have been incurred because of this conduct. We were referred only to legal fees incurred before the date the deposit was paid.

Means

43. Having heard the Claimant about her means, we were not persuaded the Claimant had no means to pay a costs order should we decide to make one. It was clear to us that the Claimant must have a source of income or savings that she has not disclosed fully because she has claimed no benefits since losing her job, says she has £3,000 per month outgoings and was paying off debts from setting up the consultancy.

44. If the Claimant has debts to pay and general household expenditure with no employment income and no savings left as was being alleged, that is not a sustainable financial position for her to be in and no arguments were put forward to us either as submissions or in evidence that the Claimant was struggling financially or destitute in any way. That did not make sense and we therefore found the Claimant's evidence about means unreliable.

45. In our view, on balance, the Claimant still has savings that she is able to utilise, still has access to funds from family members who have been helping her out as she admitted in evidence, and is financially stable enough to not need to claim benefits or is above the relevant financial thresholds to be able to claim particular benefits.

The issues - Reconsideration

46. When considering the reconsideration application, the issues for the tribunal to determine were as follows:

    46.1. Is it in the interest of Justice for the Tribunal's Judgment to be varied or revoked?

    46.2. Whether any of the new evidence presented by the Claimant in support of her application for reconsideration, fulfilled the **Ladd v Marshall** criteria to warrant the original judgement being varied or revoked under rule 72 (2), namely:

        46.2.1. whether the evidence could have been obtained with reasonable diligence for use at the hearing;

        46.2.2. Whether the evidence is relevant;

        46.2.3. Whether the evidence had it been available would have had an important influence on the result of the hearing; and

46.2.4. whether the evidence is apparently credible.

The issues – Costs

47. The issues were discussed at the start of the costs hearing with the parties. Both were unrepresented and therefore the issues summarised below are the tribunal's understanding of the cases put forward.

48. Did the Tribunal dismiss the Claimant's claims for substantially the reasons given by Judge Wedderspoon in the deposit order?

49. If so, has the Claimant proven that this should not be considered to be unreasonable conduct?

50. In addition, or alternatively, has the Claimant behaved vexatiously, abusively disruptively or otherwise unreasonably in in the way the proceedings have been conducted in either whole or part under rule 76 (1) (a) in particular with regards to the changing nature of her case at preliminary hearings?

51. If so, should the tribunal exercise its discretion to make a costs order when taking into account the following:

    51.1. All relevant facts and circumstances of the case;

    51.2. The nature, gravity and effect of any objectionable conduct when considering the totality of the case and whether this generally increased the respondent's costs.

    51.3. The paying party's means to pay a costs order.

52. If the Tribunal exercises its discretion to award costs, what should the amount of the costs order be? Or should it be reduced in part or no payment ordered when taking into account the Claimant's means and that a costs award is compensatory not punitive in nature?

The Law - Reconsideration

53. Reconsideration is covered by the Employment tribunal rules 2013 rules 70 – 73, which state:

"Principles
70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Application
71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other

written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process
72.—
(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Reconsideration by the Tribunal on its own initiative
73. Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused)."

54. Reconsideration of a judgment is usually not appropriate where both parties have had a fair opportunity to present their case and the decision was made in light of all available arguments put forward **Trimble v Super Travel Limited [1982] ICR 440.**

55. Similarly, the interests of justice test is not open ended and must be exercised in a principled way and past case law cannot be ignored about it **Newcastle on Tyne City Council v Marsden [2010] ICR 743.**

56. When exercising the power in Rule 70, appropriate weight must be given to

the principle of finality **Flint v Eastern Electricity Board [1975] ICR 395** and **Ebury Partners UK v Davis [2023] IRLR 486.** In Ebury, HHJ Shanks said at paragraph 24:

"…The employment tribunal can therefore only reconsider a decision if it is necessary to do so 'in the interests of justice.' A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a 'second bite of the cherry' and the jurisdiction to reconsider should be exercised with caution. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error alleged is one of law which is more appropriately corrected by the EAT."

57. Often reconsiderations of decisions are made in light of new evidence. However, it can only be in the interests of justice to admit new evidence at review stage if the principles in **Ladd v Marshall** have been met **Outasight VB Limited v Brown UKEAT/0253/14** and **Ministry of Justice v Burton [2016] EWCA Civ 714.**

58. The **Ladd v Marshall [1954] 3 All ER 745** principles are:

    58.1. Whether the evidence could have been obtained with reasonable diligence for use at the hearing;

    58.2. Whether the evidence is relevant;

    58.3. Whether the evidence had it been available would have had an important influence on the hearing; and

    58.4. Whether the evidence is apparently credible.

Discussion and conclusion - reconsideration

59. The application for reconsideration was made by the Claimant on the following three grounds given verbally at the hearing:

    59.1. That she was not given certain documents by the Respondent when disclosure happened.

    59.2. The Claimant attempted to argue points in the case that had been decided at the full merits hearing such as Mr. De Loof not liking her, that she was organising the awards event whilst being harassed and that she had no preparation time for some of the points raised at the hearing because the respondent had not disclosed certain emails until the final hearing.

    59.3. There was new evidence we needed to consider.

60. When considering the disclosure argument, the Claimant had raised disclosure years before the final hearing took place. Neither side was represented in March 2023 when the trial bundle appeared to have been prepared and the Claimant was given time at the hearing to consider the new documents and questioned the respondent about them. This was an attempt to revisit issues already decided and is no ground for reconsideration after this decision has been aired, resolved and determined with all arguments put forward about it at the final hearing having been considered following **Trimble.**

61. The second ground was also weak. All the submissions put forward about issues in the case could and should have been put forward at the full merits hearing. Both sides were given a fair opportunity to put forward their arguments about the case and the points made here about harassment and Mr. De Loof not liking her, were all considered in the round at the final hearing when considering the alleged repudiatory breaches of contract as part of the Claimant's constructive dismissal case.

62. Both of the above grounds for reconsideration were, in our view, an attempt at a second bite of the cherry envisaged in **Flint** and **Edbury Partners.** Consequently, when balancing the need for finality of litigation, finality must take precedence here.

63. Then we come to the **Ladd** test for the new evidence. In our view, none of the new evidence was relevant to the case and almost all of it could have been disclosed before the full merits hearing with reasonable diligence. Consequently, the **Ladd** test is not met.

64. The Claimant has fallen very short of persuading us to reconsider our written reasons in light of **Ladd**. Consequently, it is not in the interests of justice to vary or revoke the Judgment following **Outasight.**

65. The application for reconsideration is therefore refused.

The Law – Costs

66. The Tribunal rules relevant to costs are as follows:

"General power and applicable rules

Definitions

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

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

(a)has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

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

(c)is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Costs orders and preparation time orders

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

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

(b)the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c)another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

When a costs order or a preparation time order may or shall be made

76. (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that

> *(a)a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted*
>
> *…*

Procedure

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

The amount of a costs order

78. (1) A Costs order may

> *(a)order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;*
>
> *…"*

67. The case law about the order in which the tribunal must approach the costs issue is to first determine whether the Claimant meets the threshold for making a costs order, then determine whether we should exercise our discretion to make a costs order and finally to consider what amount the costs order should be.

STAGE 1 - GROUNDS

68. Have any of the circumstances allowing consideration of making a costs order or mandating a costs order been triggered?

69. Every Tribunal needs to be careful about how they have expressed themselves in the decision made about liability, before a costs application has been made so that they do not fall into the trap of apparent bias following the case of **Oni v NHS Leicester City UKEAT/0144/12/LA.**

70. If therefore it is the same tribunal hearing the costs application that also determined liability, the tribunal should satisfy itself that it did not step over the mark with its stated findings on liability to an extent that overlaps with the test for costs before arguments about costs have been fully aired.

71. Rule 39 of the tribunal Rules says:

"Deposit orders

39.

…

(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.*

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

STAGE 2 - EXERCISING DISCRETION

72. Where a Claimant honestly believed that they had a case, but this was not based on any reasonable view of reality, the ground of no reasonable prospects of success is still made out, but the fact the Claimant subjectively did not believe that, is more relevant to whether the tribunal should exercise its discretion under stage 2, after **Topic v Hill Bakery [2012] All ER (D) 250 (Nov).**

73. If the ground relied upon is that a party behaved unreasonably, after McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA [40], per Mummery LJ.

> *"…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 the receiving party to prove that specific unreasonable conduct by the paying party caused particular costs to be incurred"*

74. Therefore, there need not be a causal link proven between the conduct complained of and the specific costs incurred. There just needs to be a review of the whole picture and that the adverse conduct caused an increase in costs generally. The costs award is not obliged to reflect the full costs incurred by the innocent party, which are attributable to the unreasonable

conduct decided upon.

75. In deciding whether to make an award of costs, a litigant in person is not to be judged by the standards of a legal professional: see **Vaughan v London Borough of Lewisham & Others [2013] IRLR 713** at paragraph 25.

76. In deciding whether the conduct of litigation is unreasonable, the Tribunal must bear in mind that in any given situation, there may be more than one reasonable course to take. The Tribunal must not substitute its view for that of the litigant about which course of action was taken: **Solomon v University of Hertfordshire, Hunter and Hammond (UKEAT/0258/18-19/DA)** at para 107. If the course of action was reasonable, but the Tribunal or costs applicant would have followed a different route, the Tribunal should not interfere with the decision of the person who is defending the costs application.

77. Notice of costs is relevant to exercising discretion but is not a pre-requisite - **Millin v Capsticks Solicitors LLP [2014] All ER (D) 12 (Dec).**

78. If means are not raised by any party, the tribunal is obliged to raise the issue of means and to, at least, consider whether or not to take them into account **Doyle v North West London Hospitals NHS Trust [2012] UKEAT/0271/11** and **Pranczk v Hampshire County Council [2020] UKEAT/0272/19/VP.**

79. In addition, the consideration of means must be done judicially as per **Pranczk** above at paragraph 79.

80. Following the decision in **B.L.I.S.S Residential Care Ltd v Teresa Eileen Fellows [2023] EAT 59:**

> *"11. … 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."*

81. If an order would be beyond a party's means then the tribunal can still order the costs it ordinarily would, but state that the paying party need only pay a percentage of those costs **Jilley** above.

STAGE 3 - AMOUNT

82. The Claimant's means can be considered at this stage or when considering whether to exercise discretion.

83. Costs orders are compensatory and must not be punitive: **Lodwick v Southwark London Borough Council [2004] IRLR 554, CA [23].**

84. The tribunal may only order costs up to the cap specified in the Rules of £20,000 without detailed assessment (Rule 78 (1)) or a higher amount subject to detailed assessment (Rule 78 (1) (b – e) and (3)).

Discussion and conclusions - Costs

85. Applying **Oni,** the members of the tribunal reviewed the judgment, case documents and written reasons. We concluded we had not over stepped the mark either in our thought processes or in writing, and were satisfied that no inference of bias could be drawn from our conclusions about the case from the full merits hearing.

86. Applying **Millin,** the Claimant has had notice that costs would be sought by the Respondent before the full merits hearing commenced. The respondent made this clear in its witness statement of Mr. Mampaey exchanged before the final hearing took place.

87. There is no evidence of abusive or vexatious conduct of the proceedings or in bringing the proceedings.

88. Applying rule 39 (5) of the Tribunal rules, the Claimant has behaved unreasonably in continuing with the case and has failed to prove otherwise. However, by that stage, the Respondent had stopped incurring any legal costs.

89. Ordinarily, we would have exercised our discretion to award costs against the Claimant for paying the deposit because the reasons for dismissing her claims are substantially the same as those given for ordering the deposit.

90. However, we are unable to make an award of costs because, applying **Lodwick**, there has been no increase in costs as an effect of this unreasonable behaviour because the Respondent has represented itself at all times after the deposit order was made. There is therefore nothing to compensate the Respondent for that we were referred to.

91. At all times before the deposit order was paid and afterwards, we conclude that the Claimant genuinely believed she had a winnable case against the Respondent given the advice she received from her barrister of the prospects of success of 52%. Therefore, applying **Topic,** this is a situation where we believe the Claimant had a subjective view that her case had reasonable prospects of success. However, she ought reasonably to have known that her case did not have anything more than little reasonable prospect of success, after the deposit order was made.

92. It is only after the deposit order that her genuine view could not be reasonably maintained. We find no unreasonable behaviour about the actual bringing and pursuit of the original claims, in terms of prospects, before 30 March 2021.

93. We then come onto the unreasonable conduct of the proceedings we have

found took place in October 2021 with the additional application to amend the claim.

94. We have taken into account the Claimant is a litigant in person as per **Vaughan** and the fact that there may be a number of reasonable responses to a situation as per **Solomon.**

95. We have also considered all the circumstances of the case as per **AQ Ltd** and the effects the Claimant's unreasonable conduct had on the case and costs incurred by the Respondent, following **Yerrakalva.**

96. Ultimately, it was simply not reasonable at all by 18 October 2021 to pursue the case by wanting to add more and more allegations and issues to it, when Judge Britton had already indicated the next preliminary hearing would be to resolve a single issue on amendment, that being, the last straw argument to finalise the list of issues and the case had then been ongoing for 18 months.

97. This had the effect of increasing the Respondent's costs, but not for the entirety of that preliminary hearing given the 8 December 2021 hearing would also be determining the deposit order application the Respondent had submitted.

98. The effect this had can be quantified when taking into account there need not be any causal link to specific legal fees incurred. A general overview is all that is required.

99. We have considered the Claimant's means as required to by **Doyle** and **Panczk** and consider her to have means to pay at least a modest costs order some of that income being received from third parties as envisaged in **BLISS.**

100. We therefore conclude the threshold for costs has been met. The Claimant behaved unreasonably in seeking to change her already significantly expanded case on 18 October 2021, she has means to pay costs order and we therefore exercise our discretion to order costs against the Claimant.

101. When considering the impact this had on the Respondent's legal fees, we think the impact is modest and in the amount of £750. The VAT on those costs can be claimed back by the Respondent who confirmed in evidence that it was VAT registered in the UK.

102. In our view, the Claimant can afford to pay such an award given out findings about her means and we therefore make a costs order against the Claimant in the amount of £750.

103. The deposit paid into the Tribunal of £450 is ordered to be paid by the Tribunal to the Respondent in part payment of the costs order in accordance with rule 39 (6).

104. The balance of the costs order against the Claimant payable by the respondent is therefore £300.

EMPLOYMENT JUDGE SMART

Signed on: 25/02/2024