EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms S Cabrini	**v**	Key Horizons Limited

JUDGMENT ON COSTS

The judgment of the tribunal is that:

1. The respondent's applications for costs are allowed.

2. The claimant is ordered to pay the respondent the sum of £3,000 as a contribution to the costs incurred by or on behalf of the respondent as a result of the claimant's unreasonable conduct.

REASONS

Introduction

1. This section of the reasons gives a brief outline of the history of the claim, as a background to this costs judgment. Page numbers in these reasons are references to the bundle prepared for the costs hearing.

2. The claimant was employed as the managing director of the respondent, a provider of home care services, for around six months from 31 January 2022 until her dismissal on 14 July 2022. Early conciliation started and ended on 15 July 2022. The claim form was presented on 18 July 2022. The claimant made complaints of whistleblowing detriment and dismissal, and for notice pay.

3. The respondent defended the claim and presented its ET3 on 16 August 2022.

4. The claimant's claim included an application for interim relief. The interim relief hearing was due to take place by video on 5 August 2022. The hearing was postponed on the claimant's application. It was rescheduled and took place by video on 10 November 2022.

5. At the rescheduled hearing I refused the application for interim relief. I arranged dates for the final hearing and made case management orders for the parties to prepare for the final hearing. The case management orders were sent to the parties on 19 November 2022 (page 49). I refused the

claimant's application for reconsideration of the judgment on interim relief (page 61).

6. In her application on 4 August 2022 to postpone the hearing on 5 August 2022, the claimant said that her mother had passed away overnight (page 116). When granting the claimant's request for a postponement of that hearing, Employment Judge Tynan directed the claimant to provide a copy of her mother's death certificate.

7. The claimant failed to comply with the direction and with two subsequent orders to provide a copy of the certificate. This led to the issue of an unless order which was sent to the parties on 20 December 2022 (page 67). I refused the claimant's application to vary the order. The claimant failed to comply with the unless order. On 5 March 2022 the tribunal wrote to the parties to say that the claim had been dismissed because of the failure to comply with the unless order (page 81). I refused the claimant's application to set aside the unless order (page 82).

8. The claimant made appeals to the Employment Appeal Tribunal. On 20 October 2023 the EAT wrote to the parties to say that HHJ Tayler had decided that the claimant's notices of appeal disclosed no reasonable grounds for appeal and that no further action would be taken on the notices of appeal (page 95).

The costs hearing

9. In the course of proceedings, the respondent made two applications for costs against the claimant. The applications were due to be decided at a hearing, but instead I have decided them on the papers. This section of the reasons explains how this change came about.

10. After the claim was dismissed, the respondent's costs applications had yet to be decided. On 7 December 2023 the tribunal wrote to the parties on my direction inviting the parties to make any further comments on the costs applications, and to say whether they thought a costs hearing was necessary.

11. The claimant asked for the costs applications to be decided at a hearing. She said she felt disadvantaged as a litigant in person and wanted to seek representation (page 176).

12. The respondent's preference was for the applications to be decided on the papers, in the interests of proportionality and saving expense (page 178).

13. I decided that the costs applications should be considered at a hearing to allow the claimant the opportunity to respond to the applications in the way she requested. I decided that the costs hearing should be by video, in line with presidential guidance issued on 31 March 2022 on the format of hearings. The notice of hearing was sent to the parties on 23 January 2024 and the hearing was to take place on 22 March 2024 (page 100). The notice

of hearing included case management orders for the parties to prepare a bundle and exchange witness statements.

14. On 15 February 2024 the claimant wrote to the tribunal to ask for the hearing to take place in person rather than by video (page 187). She said she wanted her supporters around her for moral support, and she felt she was at a disadvantage at the previous video hearing. I granted the claimant's application and the tribunal wrote to the parties about this on 28 February 2024 (page 103). At the same time, I made an order for exchange of any written submissions ahead of the costs hearing. I also refused an application by the claimant for disclosure of the respondent's solicitors invoices; I decided it would be disproportionate to require this in circumstances where the respondent had already provided a detailed costs schedule certified by a partner of the respondent's solicitor's firm.

15. On 13 March 2024 the claimant made an application to postpone the costs hearing. The application was made in emails sent at 12.41, 13.17, 16.51, 17.03 and 21.35. The application was made on the grounds of ill health and enclosed a letter from the claimant's doctor. In her various emails, the claimant also enclosed a rebuttal statement and other evidence and asked for these to be considered if the costs hearing went ahead in her absence. (The claimant's evidence is listed below in the section headed 'claimant's response to the costs applications.)

16. In an email at 16.34 on 13 March 2024 the respondent objected to the postponement of the costs hearing. The respondent said that the claimant's doctor's letter did not comply with the Presidential Guidance on postponements for health reasons, and that there was reason to doubt the veracity of the letter. The respondent said that it would not be in line with the overriding objective in rule 2 to postpone the hearing given that it had been listed to consider applications to recover costs incurred due to the claimant's conduct, and as it was over a year since the claim had been dismissed. The respondent suggested that if the tribunal decided not to proceed in the claimant's absence, an alternative would be to dispense with the hearing and decide the applications on the papers.

17. In response to the respondent's email, the claimant sent a link to allow the tribunal and the respondent to check the veracity of her doctor's letter. I accept that the letter is genuine.

18. The respondent sent written submissions to the claimant and the tribunal by email on 15 March 2024.

19. I decided that the hearing should not go ahead in the claimant's absence. The claimant's doctor's letter does not address all the points set out in the presidential guidance, but it is clear that the claimant is experiencing severe mental distress and is starting medical management for her symptoms.

20. I decided that, rather than arranging another costs hearing, I should decide the costs applications on the papers. I considered this to be in line with the

overriding objective, in particular to deal with cases in ways which are proportionate, and to avoid delay and save further expense. I reached the decision to decide the costs applications on the papers for the following reasons:

20.1. a lengthy period has passed since the claim was dismissed. Arranging another costs hearing would lead to further delay and there is no evidence as to when the claimant will be well enough to attend another hearing;
20.2. the parties have prepared a costs bundle;
20.3. the claimant has provided the tribunal with rebuttal statements and other evidence (listed below) and so her written submissions can be considered;
20.4. the respondent's initial preference was for the applications to be decided without a hearing, and the respondent has provided a witness statement and written submissions which can be considered.

21. The tribunal wrote to the parties on 18 March 2024 to notify them that the costs applications would be decided on the papers, and that they should not attend the hearing.

Evidence before me

22. In reaching my decision on the papers, I have considered the documents in the bundle which was prepared for the costs hearing by the respondent with input from the claimant as required by the case management orders. It has 250 pages and a 4 page index and includes the respondent's applications and costs schedules.

23. (For the emails on pages 137 and 189 I considered the attachments from the tribunal file as they were not included in the hearing bundle.)

24. I also considered the witness statement of the respondent's solicitor dated 23 February 2024.

25. I also considered the documents sent after the bundle was prepared, including the claimant's emails and attachments, the respondent's solicitor's email of 13 March 2024 and the respondent's written submissions.

26. The information from the claimant which I considered is listed below.

The respondent's costs applications

27. This section outlines the reasons why the respondent says I should order the claimant to pay some of its legal costs.

28. The respondent has made two costs applications. Both costs applications refer to 'wasted costs'. I understand this to mean 'costs unnecessarily incurred' rather than wasted costs in the sense used in rule 80, as rule 80

applies to orders against representatives and the claimant has been representing herself throughout these proceedings.

29. The respondent's first application for costs was made on 10 November 2022 (page 105). The first application relates to the costs incurred as a result of the postponement of the interim relief hearing on 5 August 2022. The application is made under rule 76(1)(c) and rule 76(2), for costs incurred as a result of the claimant's late application to postpone the hearing of 5 August 2022. The respondent seeks an order that the claimant pay its costs arising from the postponement, that is counsel's fee of £3,000 plus VAT and solicitors' fees of £1,500 plus VAT.

30. The respondent's second application for costs was made on 14 March 2023 (page 106). The second application is made under rule 76(1)(a) and rule 76(2). The respondent asks the tribunal to order the claimant to pay costs it says were incurred as a result of the claimant's disruptive or unreasonable conduct, and breaches of tribunal orders.

31. The respondent says the following conduct by the claimant amounts to disruptive or unreasonable conduct, or failure to comply with tribunal orders:

    31.1. the late application to postpone the interim relief application and the failure to provide the respondent and the tribunal with copies of her mother's death certificate. This was in breach of one direction of the tribunal, two orders and an unless order, and resulted in the claim being dismissed. The respondent believes that the claimant acted dishonestly in requesting a postponement of the hearing on 5 August 2022 and that the claimant's mother did not die shortly before 5 August 2022 as the claimant said. The respondent says this caused the postponement of the hearing on 5 August 2022 and the case to be dismissed, and this caused the respondent 'wasted' costs in relation to responding to the claim and resisting the application for interim relief;

    31.2. the claimant's correspondence and applications to the tribunal regarding her subject access request, made despite the claimant being told by the respondent and the tribunal that the tribunal has no jurisdiction to hear such complaints (the respondent told the claimant it might seek a costs award based on this conduct in an email on 22 August 2022 (page 124));

    31.3. the substantial number of repetitive communications and applications the claimant has made to the tribunal in relation to her failure to comply with tribunal directions, making unfounded accusations that the respondent has a copy of the claimant's mother's death certificate, alleging conflict of interest on the part of the respondent's barrister, and accusing the tribunal of bias against her;

    31.4. the failure to comply with the tribunal's direction for the interim relief application to produce a single bundle.

32. The respondent said in an email to the claimant on 9 November 2022 about her subject access request that unreasonable and disruptive conduct could result in the tribunal awarding costs against her (page 134).

33. The respondent prepared a costs schedule provided in support of the second application, including the costs sought in the first application (page 109). The costs in the schedule extend only to costs incurred as a result of the claimant's conduct.

34. The respondent's costs schedule was updated, most recently on 5 March 2024 (page 112). Again, this includes the costs sought in both applications, with the addition of the costs expected to be incurred for the costs hearing. The total costs sought are £35,446.50 plus VAT, in total £42,535.80.

The claimant's response to the costs applications

35. In this section I summarise the claimant's response to the costs applications.

36. I have considered the claimant's comments on the respondent's costs applications which she has provided in various emails and attachments in the bundle, for example on 15 November 2022 (page 137, I reviewed the costs appeal documents attached to this email from the tribunal file), 14 March 2023 (page 161), 15 March 2023 (page 163), 20 March 2023 (page 166), 23 October 2023 (page 175), 13 December 2023 (page 176), 18 December 2023 (page 179), 26 January 2024 (page 182), 12 February 2024 (page 185), 21 February 2024 (page 189 and I reviewed the costs submissions attached to this email from the tribunal file), 26 February 2024 (page 192), and 6 March 2024 (page 193).

37. I have also considered the claimant's additional submissions and evidence in emails sent after completion of the bundle for this hearing, including those sent on 13 March 2024 as follows:

    37.1. The claimant's rebuttal statements (dated 23 February 2024 and 13 March 2024);
    37.2. An email and statement dated 6 March 2024 from Kirsty McLean, a former colleague of the claimant;
    37.3. The claimant's doctor's letter dated 13 March 2024
    37.4. A letter, policy and documents relating to the respondent's legal expenses insurance;
    37.5. Experian screenshots called 'proof of debt' which show credit card and loan borrowing as at 11 February and 25 February 2024 (other screenshots showing credit card and loan borrowing as at 31 December 2023 and 28 January 2024 are at page 196);
    37.6. an autoreply acknowledgment email from the Financial Ombudsman Service.

38. I do not attempt to summarise everything the claimant says, but I record here what appear to be key points. The claimant says:

38.1. the respondent was ordered to prepare a bundle for the interim relief hearing and failed to comply fully with this order;
38.2. the interim relief hearing was not recorded by the tribunal;
38.3. I recommended that the respondent should make a costs application at the end of the interim relief hearing;
38.4. the respondent has made its costs applications in retaliation for steps she took in proceedings, and the costs applications amount to discrimination;
38.5. the respondent has failed to respond to her subject access request and to respond to communications from the Information Commissioner's Office;
38.6. the respondent has not replied to without prejudice offers she has made;
38.7. as the respondent referred to her inheritance, they must have a copy of her mother's death certificate and must acknowledge that her mother has died;
38.8. the claimant was requested by family to 'honour her mother's privacy' and providing her mother's death certificate in breach of that request would have had knock on implications, both legal and personal;
38.9. the respondent has not had to pay any legal fees because they have the benefit of legal expenses insurance;
38.10. the respondent chose to instruct expensive legal representatives rather than use their legal insurance provider;
38.11. the respondent's barrister and I seemed familiar to each other;
38.12. she has been at a disadvantage because she is a litigant in person, she does not understand the law and has been desperately trying to defend herself;
38.13. the respondent seeks to recover some of its costs twice as there is duplication of costs in the two applications. The claimant says this amounts to misleading the tribunal;
38.14. the respondent owes her money and this should be set off against any order for costs made against her.

39. The claimant has also provided some information about her health. In her rebuttal statement, the claimant says that the costs applications have caused her stress and anxiety, and that she is traumatised by these events. She has referred to anxiety or depression and anxiety in earlier correspondence (for example pages 119, 128, 132, 152, 161). The claimant's doctor's recent letter says she is under severe mental distress and invites the tribunal to postpone her costs hearing. (The letter does not say whether the claimant is well enough to work or whether she is currently working.)

40. In the case management orders sent to the parties on 19 November 2022 and in the tribunal's letter of 28 February 2024, I explained to the claimant that, in deciding whether to make a costs order and if so in what amount, I could have regard to her ability to pay and that, if she would like me to consider her ability to pay, she should provide evidence of this in the bundle or in statements for the costs hearing.

41. The claimant has provided some information about her ability to pay, as follows.

    41.1. I accept the evidence the claimant has given about her debts because overall it appears consistent. In an email on 24 November 2022 (page 138) the claimant said her financial situation was devastating and she had taken out a £10,000 credit card and a £25,000 loan. The Experian screenshots at page 196 show these debts had increased by the end of 2023 and the start of 2024. She had credit card borrowing of £14,741 in December 2023 and loan borrowing of £42,349 in January 2024. The updated versions of the Experian screenshots show that the claimant's borrowing had reduced by February 2024: credit card borrowing was £9,503 and loan borrowing £41,765.

    41.2. I accept that the claimant had a long period of unemployment after her dismissal by the respondent in July 2022. In November 2022 the claimant said she had not worked since her dismissal (page 138). In 18 December 2023 the claimant referred to her 'inability to work for many, many months' (page 179). In March 2024 the claimant said that she had 'many months of unemployment' after her dismissal by the respondent (rebuttal statement of 13 March 2024).

    41.3. The claimant has not provided any evidence about whether she worked between November 2022 and now. The Experian screenshots show that the claimant's credit card borrowing reduced by over £5,000 between December 2023 and February 2024 and that she paid £860 in loan repayments in both December 2023 and January 2024. It appears likely that she obtained employment at some point in 2023 or 2024.

42. In her responses to the costs applications, the claimant has also repeatedly referred to the substantive issues in her claim. Ms McLean's statement also focuses entirely on the issues in the claimant's substantive claim and does not contain any information which is relevant to the costs applications. I return to this below.

The law

43. The power to award costs and to make preparation time orders is set out in the Employment Tribunal Rules of Procedure 2013. Unlike in civil litigation where the successful party can expect to recover some or all of their costs from the unsuccessful party, in the employment tribunal jurisdiction the general position is that parties bear their own costs, unless one of the grounds for making a costs or preparation time order is made out and the tribunal decides to exercise its discretion to make an award of costs. Orders for costs in the employment tribunal remain the exception rather than the rule.

44. The power to award costs is set out in the Employment Tribunal Rules of Procedure 2013. Rule 77 says that an application for costs may be made up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties.

45. Costs is defined in rule 74 as 'fees, charges, disbursements or expenses incurred by or on behalf of the receiving party'.

46. Under rule 76(1), a tribunal may make a costs 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 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 or

(c) a hearing has been postponed or adjourned on the application of a party, made less than 7 days before the date on which the relevant hearing begins."

47. Rule 76(2) says:

"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."

48. There are three stages to the test to be applied by a tribunal considering costs applications under rule 76. The first stage is for the tribunal to consider whether the ground or grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs. If the tribunal decides to make an award of costs, it must then decide the amount of the award.

49. In determining whether unreasonable conduct under rule 76(1)(a) is made out, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398, CA). However, it is not necessary to analyse each of these aspects separately, and the tribunal should not lose sight of the totality of the circumstances (*Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420, CA). At paragraph 41 of *Yerrakalva*, considering an application for costs against a claimant, Mummery LJ emphasised that:

> *"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 has."*

50. The tribunal should also bear in mind that in litigation there may be more than one reasonable approach: the range of reasonable responses test is relevant here (*Soloman v University of Hertfordshire* EAT 0258/18).

51. In costs applications, litigants in person may be judged less harshly than those who are professionally represented (*AQ Ltd v Holden* [2012] IRLR 648 EAT). Tribunals should not apply the standards of a professional legal adviser to lay people.

52. The insurance arrangements of a party seeking a costs order are not relevant to the tribunal's discretion to award costs. In *Mardner v Gardner* (UKEAT0483/13) the EAT held that a party should not be allowed to avoid the costs consequences of unreasonable conduct because of the other party's prudent decision to obtain an insurance policy. This is based on the public policy principle approved by the House of Lords in *Parry v Cleaver* [1970] AC 1 UKHL.

53. As to the amount of the award, under rule 78, the tribunal can make a costs order which does not exceed £20,000 or it may order payment of costs with the amount to be determined by detailed assessment:

"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 the Tribunal applying the same principles…"

54. Costs orders are compensatory and not punitive. There must be some link between the offending conduct and its effect on costs, but this does not require a minute examination to show a causal link for each item of cost. A broadbrush approach is permitted. Only costs that are 'reasonably and necessarily incurred' may be awarded (*Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420, CA).

55. As to ability to pay and the amount of the order, the EAT in *Vaughan v London Borough of Lewisham and ors* 2013 IRLR 713 suggested that when considering what the paying party can afford to pay, relevant questions could include:

55.1. was there a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and thus to be in a position to make a payment of costs?
55.2. if so, what limit ought nevertheless to be placed on her liability to take account of her means and of proportionality?

Conclusions

<u>Introduction</u>

56. I first set out some general points on issues raised by the claimant.

57. Recording: The claimant says that the interim relief hearing was not recorded. That is correct. The hearing took place on 10 November 2022. The Practice Direction and Presidential Guidance on the recording of employment tribunal hearings was published on 20 November 2023; prior to that date it was not general practice in the employment tribunal to record hearings.

58. Discussion at the interim relief hearing about costs application: I did not, as the claimant suggests in her responses to the costs applications, recommend that Miss Platt make a costs application. Miss Platt said at the end of the hearing that the respondent wanted to make a costs application. I said that the respondent should make the application in writing so that the claimant could provide information on her ability to pay. I also explained this in the judgment reconsidering the interim relief judgment (page 64).

59. The claimant's claims against the respondent: In her responses to the costs applications, and in the statement of Ms McLean, there is a lot of information about the claimant's substantive complaints against the respondent. These complaints are not proceeding. I have not heard any evidence about them. In this judgment I am not making any decision as to whether any of the claimant's complaints succeed. Those are not matters for me to consider, because the claim has been dismissed.

60. I now go on to apply the legal principles to the facts in this case, to decide the respondent's applications for costs.

Stage 1: are there grounds for a costs order?

61. At this first stage, I consider whether there are grounds for a costs order against the claimant.

62. The respondent relies on the claimant's postponement application and failure to provide a copy of her mother's death certificate in its first and second applications for costs. It says the claimant's conduct in this respect gives ground for costs under rule 76(1)(a) (unreasonable conduct), rule 76(1)(c) (postponement of a hearing on an application made less than 7 days before the date of the hearing) and rule 76(2) (breach of an order or practice direction).

63. The claimant's postponement application in itself gives grounds for a costs order under rule 76(1)(c), as it was made one day before the interim relief hearing was due to take place.

64. The claimant relied on her mother's very recent death as the reason for her application. The tribunal made orders that she provide evidence in support. The claimant was given four opportunities to provide a copy of her mother's death certificate in support of the application. She failed to do so and, as I

explained in the order refusing to set aside the unless order (page 89), she did not give a good reason to explain that failure. I have decided that the most likely explanation for the claimant's failure to provide a copy of her mother's death certificate is that her mother did not die when the claimant said she did, and therefore the claimant did not have a good reason for making a late application. The claimant's conduct in making a late application without good reason and misleading the tribunal about her mother's death was also unreasonable conduct under rule 76(1)(a) giving grounds for a costs order.

65. The effect of the claimant's conduct was that the respondent incurred duplicate fees for counsel for the interim relief hearing, and additional solicitor's costs arising from the postponement and duplicated preparations for the second interim relief hearing.

66. The respondent also relies on the substantial number of repetitive communications and applications the claimant has made to the tribunal in relation to her failure to comply with tribunal directions, making unfounded accusations that the respondent has a copy of the claimant's mother's death certificate, alleging conflict of interest on the part of the respondent's barrister, and accusing the tribunal of bias against her.

67. I have decided that the claimant's conduct in this respect was unreasonable conduct within the meaning of rule 76(1)(a). In particular:

    67.1. the claimant made repeated and unsupported allegations of bias against the respondent's barrister and the tribunal, including in her responses to the costs applications after these matters had been addressed in the judgment reconsidering the interim relief application;
    67.2. the claimant made repeated allegations that the respondent already had a copy of her mother's death certificate and was deliberately hiding it, again the claimant did this without any reasonable basis;
    67.3. the claimant made repeated submissions and applications about the unless order (including an application to vary the order and an application to set aside the order which was supported by seven separate emails as listed in the footnote to paragraph 21 of the reasons for the refusal to set aside the unless order, at page 87).

68. Even taking into account that she was unrepresented, it was unreasonable of the claimant to make serious and repeated allegations of bias and to allege that the respondent was deliberately hiding a document, without proper evidence to support this. It was unreasonable of the claimant to engage in repetitive applications and correspondence in response to the unless order, when (as I have found is most likely) the real reason she was unable to comply was because her mother had not died when she said she did, and so she was unable to provide evidence in support of her application to postpone. That was conduct which was outside the range of reasonable conduct for a claimant, including for an unrepresented claimant.

69. The nature of the allegations made by the claimant meant that the respondent reasonably felt that it had to reply to the claimant's repetitive correspondence and applications, and the effect was that the respondent incurred additional fees doing so.

70. The other two matters relied on by the respondent as unreasonable conduct were, considering the claimant's status as a litigant in person, not unreasonable:

    70.1. It was not unreasonable for the claimant, after being told by the respondent's representative and the tribunal that the tribunal had no jurisdiction in respect of a subject access request, to repeatedly refer to her subject access request. It was not unreasonable for the claimant as a litigant in person to consider that her subject access request might be in some way relevant to the issues in her claim;
    70.2. I have not been able to identify a tribunal order requiring the claimant (or, as the claimant suggests, requiring the respondent) to prepare a single bundle for the interim relief hearing. Even if there was such an order, it was not unreasonable for the claimant, an unrepresented party, to overlook this and to provide her documents as separate email attachments rather than as one pdf document.

71. The postponement of the costs hearing itself was also referred to in the respondent's written submissions as unreasonable conduct. I do not find the claimant's conduct in this regard to be unreasonable. It was open to her to ask for the costs applications to be decided at a hearing, and to ask for that hearing to be held in person so that she could attend with moral support from supporters, friends and family. The reason that the costs hearing was unable to go ahead on 22 March 2024 was the claimant's ill health, which was confirmed by her doctor. The application for postponement of the hearing for that reason was not unreasonable. However, as I explain below, I accept that the costs the respondent incurred in making the costs applications and preparing to attend the hearing flowed, in large part, from the claimant's earlier unreasonable conduct.

72. In summary, I have concluded therefore that there are grounds to make an award of costs against the claimant as follows:

    72.1. under rule 76(1)(a) and rule 76(1)(c) for making a late application to postpone the hearing on 5 August 2023, without having good reason to do so and misleading the tribunal about the reason for the application; and
    72.2. under rule 76(1)(a) for making repeated communications and applications about the unless order, including unfounded allegations of bias against the respondent and the tribunal, and unfounded accusations that the respondent was deliberately hiding a document.

73. I have referred to these matters below as the claimant's unreasonable conduct.

74. I accept that the respondent made the costs applications because the claimant's conduct of the proceedings led to additional unnecessary costs being incurred by the respondent. Grounds for costs are made out. The costs applications are not themselves discriminatory or any form of improper retaliation by the respondent.

Stage 2: should I make a costs order?

75. Having found that there are proper grounds for making a costs order, I next consider whether I should exercise my discretion to make a costs order.

76. I remind myself that orders for costs in the employment tribunal remain the exception rather than the rule, and that costs are compensatory not punitive.

77. Some factors mentioned by the claimant in her response to the applications are not relevant here or cannot be taken into account in the exercise of my discretion. These include:

    77.1. The fact that the respondent had legal expenses insurance is not relevant. The definition of 'costs' in rule 74 includes fees and expenses incurred by or on behalf of the receiving party. That includes costs paid by an insurer. The paying party should not benefit from the prudence of the receiving party's decision to obtain insurance cover. This is confirmed by the case of *Mardner v Gardner*, referred to above.
    77.2. The issues relating to the claimant's subject access request are not relevant to the exercise of my discretion.
    77.3. I cannot take the substantive merits of the claimant's complaints into account, as I have not heard any evidence about them. The substantive complaints are no longer being considered as the claim has been dismissed. My assessment of the merits for the purpose of the interim relief hearing does not assist me with my decision on the costs applications.
    77.4. Without prejudice settlement discussions are confidential to the parties. There is no suggestion that the respondent has waived that confidentiality or that any discussions were 'without prejudice save as to costs' so that I could consider them at this stage.

78. The claimant's status as a litigant in person is relevant to my decision as to whether to make a costs order. The claimant should not be judged by the same standards as a represented party. However, the claimant's unreasonable conduct in applying for a late postponement for no good reason, misleading the tribunal about her mother's death and subsequently sending repetitive communications and applications about the unless order is not entirely attributable to a lack of legal knowledge or understanding about the tribunal process. Even without legal advice, the claimant ought to have appreciated the unreasonable nature of her conduct. Her unreasonable conduct has resulted in the respondent incurring additional unnecessary costs.

79. The claimant's ability to pay any costs order is also relevant to this question. I have accepted that she has substantial debts and was unemployed for many months after her dismissal. She has also had some ill-health. However, her financial situation appears to have improved more recently, and it is likely that she has obtained alternative employment.

80. The costs warning made by the respondent on 9 November 2022 is also relevant. (An earlier warning was in relation to the subject access issues only.) The claimant was warned by the respondent that unreasonable and disruptive conduct could result in the tribunal making an award of costs against her. The claimant can be expected to have understood from this that if she acted unreasonably, she would face an application for costs.

81. Taking these factors into account, I have decided that I should exercise my discretion to make a costs order. It is fair to expect the claimant to pay or contribute towards the costs the respondent incurred as a result of her unreasonable conduct.

Stage 3: in what amount?

82. Finally, I consider the amount of the costs order that I should make against the claimant. I can either make an order not exceeding £20,000, or I can order payment of costs with the amount to be determined by detailed assessment.

83. As costs are compensatory not punitive, I have first reviewed the costs sought by the respondent to make a broad-brush assessment of the costs which were incurred by or on behalf of the respondent as a result of the claimant's unreasonable conduct.

84. The claimant has raised concerns that there has been duplication of costs sought, arising from the fact that the respondent has made two applications for costs. The respondent's solicitors explained that the costs schedule supporting the second application includes the costs of both applications. They have said that they seek the costs in the second application if the first application is not awarded in full or in part (page 178) and that if both applications succeed, they seek the costs set out in the schedule to the second application (page 181).

85. It is understandable that this has led to some confusion for the claimant, a litigant in person, but I fully accept that the respondent has not, as the claimant suggests, sought to mislead the tribunal in its costs applications. I have assessed the two applications separately, taking care to avoid including any costs claimed in the first application in the assessment of the costs claimed in the second application.

86. I have started with the costs set out in the first application (page 105). That application succeeded in full, as I have accepted that the claimant's conduct in relation to the postponement of the hearing on 5 August 2022 was unreasonable. I accept that all the costs sought in the first application are

additional costs incurred by or on behalf of the respondent as a result of the claimant's unreasonable conduct, that is:

86.1. Counsel's brief fee for 5 August 2022 of £3,000 plus VAT;
86.2. The additional fees for work carried out by the respondent's solicitor between 5 August 2022 and 10 November 2022, in relation to the postponement of the interim relief hearing, assessed by the respondent as £1,500 plus VAT.

87. The second application did not succeed in full. I have found that some of the conduct relied on by the respondent in the second application was not unreasonable. The claimant does not have to pay towards costs incurred in respect of those aspects of her conduct.

88. Further, the schedule supporting the second application includes costs incurred in defending the claim generally and in defending the interim relief application. These are not costs arising from the claimant's unreasonable conduct. The claimant's unreasonable conduct did not cause the respondent's costs of responding to the claimant's claim and her application for interim relief (as the respondent suggests in paragraph 6 on page 107). The respondent did not suggest that the claimant's claim had no reasonable prospect of success under rule 76(1)(b). I have not found that it was unreasonable for the claimant to bring a claim or to make an application for interim relief.

89. The respondent would still have had to defend the claim and the interim relief application even without the claimant's unreasonable conduct in relation to the postponement, the reason she gave for it and her failure to provide evidence in support. The bulk of the costs included under the heading 'Documents' in the respondent's updated schedule of costs relate to the defence of the claim in general and are not costs caused by the claimant's unreasonable conduct. This is likely to apply to the fees set out in the correspondence section as well.

90. Therefore, I have assessed which of the respondent's costs in the second schedule (page 112 to 115) were:

90.1. incurred after 10 November 2022 (to avoid duplication with the first application); and
90.2. incurred as a result of the claimant's unreasonable conduct (the conduct summarised at the end of the stage 1 section above).

91. I have decided that the respondent's costs arising from making the costs applications themselves should be included in this assessment. They are costs which are attributable in large part to the claimant's unreasonable conduct. I make a reduction of 20% of these costs to reflect the fact that some of the time spent on the costs applications was in relation to elements of the second costs application which did not succeed.

92. I have decided that the costs in the updated schedule incurred by or on behalf of the respondent after 10 November 2022 and attributable to the claimant's unreasonable conduct are as follows.

93. Documents section of the schedule: £101.25 in total:-

    93.1. one of the applications for an unless order £101.25 (page 142, page 126 having been made before 10 November 2022).

94. Fees incurred in making the costs applications from documents section of schedule: £1,900 in total made up of:-

    94.1. Reviewing schedule of costs £55.00;
    94.2. Drafting costs application and schedule £832.50;
    94.3. Preparing bundle for costs hearing £562.50;
    94.4. Drafting witness statement for costs hearing £337.50 and
    94.5. Revising costs schedule: £112.50.

95. The costs for the respondent's solicitor attending the costs hearing were not incurred as the hearing did not go ahead, but counsel's brief fee for the hearing was already incurred when the hearing was postponed (respondent's email of 13 March 2024). Counsel's fee was £3,500 plus VAT.

96. I make a reduction of 20% to the costs of the costs applications to reflect the fact that the second costs application did not succeed in full and also that a substantial part of the work on the schedule of costs related to entries that were not attributable to the claimant's unreasonable conduct. That means the costs incurred in making the costs applications are £1,520 (solicitor's fees) and £2,800 (counsel's fee).

97. The correspondence costs are not broken down in the schedule. The correspondence costs up to 10 November 2022 are already included in the first application. A proportion of the correspondence after this date would have been dealing with the claimant's unreasonable communications and applications. I adopt a broadbrush approach to this. I assess these costs as a further £1,000.

98. Overall, my assessment of the total costs attributable to the claimant's unreasonable conduct is as follows.

Costs	Amount	Totals
First application	£4,500.00	
Second application:		
Documents	£101.25	
Costs applications	£1,520.00	
Counsel's fee for costs hearing	£2,800.00	
Correspondence	£1,000.00	
Total		£9,921.25
Total with VAT 20%		£11,905.50

99. The total including VAT is £11,905.50. I find that this was reasonably and necessarily incurred. The respondent's solicitor's hourly rates are not expensive as the claimant suggests: they are within current HMCTS guideline hourly rates. Counsel's fees are reasonable.

100. I next consider again the claimant's ability to pay a costs award.

101. It is likely that the claimant is now working, although she has not given any information as to how much she currently earning. This suggests that she may be able to afford to pay a costs award. However, she already has a large debt and pays a substantial sum towards that each month. She has mental ill-health which could impact on her future ability to earn. Taking these factors into account, there may be a reasonable prospect of the claimant being able to pay a costs order of a moderate amount but payment will most likely have to be in small instalments.

102. It is not in the interests of justice for the claimant to be saddled with further substantial debt which she is unlikely to be able to pay off within a reasonable period. Taking into account proportionality and the information I have about the claimant's financial position, I have decided that the amount of the costs order should be £3,000. This is a fair contribution towards the respondent's costs which were incurred as a result of the claimant's unreasonable conduct.

103. The claimant has asked for sums owed to her by the respondent to be set off against this award. As her claim has been dismissed no award has been made to her, so there is no amount to be set off.

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Employment Judge Hawksworth

Date: 8 April 2024

Sent to the parties on: 14/5/2024

N Gotecha
For the Tribunals Office