EMPLOYMENT TRIBUNALS

Claimant: Miss F Ahmad

Respondent: Human Relief Foundation

Heard at: Manchester **On:** 18 April 2024

Before: Employment Judge Phil Allen
Ms S Howarth
Dr H Vahramian

REPRESENTATION:

Claimant: Ms T Ahari, counsel
Respondent: Mr L Fakunle, solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent shall make a payment to the claimant in the sum of **£9,777** in respect of the costs that the claimant has incurred whilst legally represented.

REASONS

Introduction

1. This hearing was to determine an application made by the claimant that the respondent, or its solicitors, should be required to pay the costs she had incurred from either 13 February 2023 (when a without prejudice save as to costs offer had been made with a full explanation after exchange of documents) or 12 December 2023 (when a further without prejudice save as to costs letter had been sent following exchange of witness statements). The application was made on 5 March 2024.

2. The application followed a liability and remedy hearing which was heard on 29 January to 2 February and 5 to 7 February 2024. The Judgment made on 7 February and sent to the parties on 16 February, was that the complaint of unfair dismissal was well-founded and succeeded; six complaints of detriment for making a protected disclosure were well-founded and succeeded; and a breach of contract complaint succeeded. The claimant was awarded £31,607.16 in total as remedy. The

claimant's other claims were not upheld (nine alleged detriments for having made a public interest disclosure, direct discrimination because of religion or belief, indirect disability discrimination, breach of the duty to make reasonable adjustments, and harassment related to disability), with a claim of direct disability discrimination having not been pursued at the hearing. Full written reasons, following a request, were sent to the parties on 13 March 2024.

3. The claimant had been employed by the respondent as a fundraising officer from 24 September 2018 until 6 November 2020, when she was dismissed. The respondent contended that the dismissal was by reason of redundancy. The dismissal was found to be automatically unfair under section 103A of the Employment Rights Act 1996 (and, if it had not been, it was found that the dismissal would have been ordinarily unfair in any event) and, of particular note, one of the detriments found was the inaccurate scoring for redundancy and there being no proper consultation.

Claims and Issues

4. The application was made under Rule 76(1)(a) and/or (b) of the Employment Tribunal rules of procedure. The application had originally also been made under rule 80, but in the course of the hearing it was confirmed that, as the respondent was not relying upon the advice provided in its defence to the cost's application, the Tribunal did not need to consider or determine the application for wasted costs under rule 80.

5. The application had been made in writing on 5 March 2024. The respondent had objected to the application and therefore this hearing had been arranged before the same Tribunal panel who had conducted the liability and remedy hearing. The claimant had provided a bundle of documents and a skeleton argument for this hearing, together with a document setting out the legal principles in relation to costs and some copy authorities. Early in the morning of the hearing, the respondent had provided a written response to the claimant's costs application, a chronology regarding settlement discussions, and a small additional bundle of documents.

Procedure

6. The claimant was represented at the costs hearing by Ms Ahari, the same counsel who had acted for her at the liability and remedy hearing. The respondent was represented by Mr Fakunle, solicitor. He was not the person who had previously represented the respondent.

7. The hearing was conducted as a hybrid hearing with both parties' representatives and the Tribunal panel present in-person in Manchester Employment Tribunal. The claimant had previously applied to attend the hearing remotely (to observe only) as she was not in the country on the dates the hearing was listed. That application was granted. When it was granted, the parties were informed that if anyone else wished to attend remotely they could apply to do so. At the start of the hearing, the respondent's representative requested that one person from the respondent should also be allowed to attend remotely to observe proceedings and, following the first break for reading, that was facilitated.

8. Where there is reference to a number with a C in front of it, that is reference to the page number in the bundle prepared by the claimant (which ran to 231 pages). Where there is a number with an R in front of it, that is a reference to the page in the respondent's bundle (which ran to 19 pages). During the hearing, the respondent's representative highlighted the absence of solicitor's invoices from the bundle prepared by the claimant (albeit that counsel's fee notes and breakdowns of the solicitor's time had been included). During the lunch break, the invoices and breakdowns for those invoices were provided by the claimant to the respondent and the Tribunal. There has been no need to refer to the detail in those invoices in this Judgment.

9. The Tribunal heard no evidence. Some specific matters in the respondent's chronology were established as being agreed by the claimant.

10. At the start of the hearing, the Tribunal discussed matters with the parties and confirmed that if costs exceeding £20,000 were potentially to be awarded (as claimed), the claimant was seeking an order for costs to be assessed, as the Tribunal was not able to award fixed costs in excess of £20,000. The representatives suggested that the Tribunal read their submissions documents and they also confirmed the pages in their bundles which needed to be read. An adjournment was taken for that reading.

11. After reading, submissions were heard from the claimant's representative. Thereafter submissions were heard from the respondent's representative.

12. The respondent's representative wished to rely upon an additional argument, and he briefly explained it at the start of the hearing. The claimant's representative endeavoured to address it in her submissions, but it was agreed she would be able to respond if it transpired that she had not addressed the point the respondent wished to raise.

13. As it was established during the respondent's representative's submissions that he believed that the actual invoices raised needed to be provided by the claimant, it was agreed that those invoices would be provided during the lunch break. The respondent's representative chose to proceed with his submissions pending receipt of the invoices. The lunch break was taken after the respondent's representative's submissions had been heard, but on the basis that he could return and address the invoices after lunch if he wished to. After lunch, the respondent's representative did not have anything specific to say in response to the invoices. An additional question was asked of him, to which he replied. The claimant's representative did not in fact wish to make any further submissions in response.

14. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

Facts

15. In the liability and remedy Judgment we made extensive findings of fact. We will not reproduce them in this Judgment. In this Judgment we have recorded only the additional facts relevant to our decision in the costs' application. Some of these facts were taken from the respondent's chronology document.

16. The claim was entered on 31 December 2020. The claimant initially conducted her own claim, but later instructed solicitors.

17. On 20 January 2023 the parties exchanged documents. That was the first time that the claimant saw the full redundancy documents including the scoring matrix.

18. On 13 February 2023 the claimant's solicitor sent a without prejudice save as to costs letter to the respondent (C145). In that letter some of the weaknesses in the respondent's case were detailed and explained. The claimant made an offer to settle for £30,000 (being less than the remedy she was ultimately awarded). Amongst other things, in that letter the claimant's solicitor said:

> "*the evidence suggests that redundancy was not the true reason for our client's dismissal. In the absence of a clear business case for her redundancy (which the evidence does not support), it appears our client was simply chased out the organisation less than 6 weeks after she reported, among other things, drug use in the office by her colleagues in her whistleblowing statement dated 11 September 2022 … We contend the respondent will have significant difficulty persuading the Employment Tribunal otherwise. The claimant contends, among other things, that the Respondent dismissed her because of her whistleblowing. In the absence of a good alternative explanation (or indeed any alternative explanation) by your client, our client's claim is highly compelling"*

19. On 11 December 2023 the parties exchanged witness statements.

20. On 12 December 2023 the claimant's solicitor sent a without prejudice save as to costs letter to the respondent (C149). In that letter the weaknesses in the respondent's case were detailed and explained (in the light of the evidence included in the witness statements). Amongst other things, the letter highlighted:

> "*No reason is given by any of the Respondent's witnesses as to why Ms Ahmad was selected for redundancy. The evidence shows it cannot have been the scoring matrix. Iram Khan's suggestion on 8 October 2020 that Ms Ahmad scored "lower than most" is plainly false. Several employees that scored lower than the Claimant were retained by the Respondent, suggesting that redundancy was not the true reason for Ms Ahmad's dismissal. Again, no explanation has been offered by any of the Respondent's witnesses as to why this is the case."*

21. We were told that on 12 December 2023 the respondent made an offer of £5,000 to settle the claim. On 20 December 2023 the respondent's solicitor emailed the claimant's solicitor on a without prejudice basis, offering to settle for £5,000 (R4). She advised that the respondent felt strongly. She said the respondent failed to see how the claims of discrimination or whistleblowing could be proven by the claimant. As the explanation she said "*This was simply a genuine Redundancy situation in which your client was given full opportunity to participate which she did. The scoring was accordingly reflected*". We particularly noted that the respondent placed the scoring undertaken, and the redundancy process, front and centre of the explanation given for the view taken that the claimant's claims would not succeed. At this

hearing, Mr Fakunle (who had not been the solicitor at the time of the email) was unable to provide any explanation for the position taken when contrasted with the scoring document which did not show the claimant at, or near, the bottom of those scored, when she was the only person made compulsorily redundant. He was also unable to address the paucity of evidence included in the statements of the witnesses which addressed that issue.

22. On 10 January 2024 the respondent increased the offer to settle to £10,000.

23. On 25 January 2024 the respondent increased the offer to £12,500 (R11) and, later, £15,000 (R12). We were shown an email sent by the claimant's solicitor (R13) in which it was highlighted that the claimant had incurred significant legal fees.

24. The claimant's schedule of loss for the final hearing recorded that she was seeking to recover £45,000.

25. The final hearing commenced on 29 January 2024. After the hearing had commenced (or at about the time it did so), an increased offer was made by the respondent of £30,000. We were shown an email from the claimant's counsel sent that afternoon (R17), in which the offer made was rejected and it was said that the claimant sought £60,000 plus an apology to settle the claim.

26. At the end of the hearing, after remedy was determined, the claimant was awarded £31,607.16.

27. We were provided with the claimant's letter of engagement with her solicitors (R156) which set out the entirely appropriate rates which she would be charged for the work undertaken (the respondent did not argue otherwise). The respondent appeared to suggest that the letter did not cover costs being sought, but we did not understand how the argument was relevant to what we needed to decide, and, in any event, did not find there to be any such limitation upon what was covered by the engagement based upon the documents provided. We were also provided with a breakdown of the time spent by the solicitors (C160) which showed the last costs incurred for those at the solicitors' firm was on 26 January 2024 (before the hearing commenced). We were also provided (during the lunchtime break) with the invoices raised by the solicitors.

28. We were provided with the fee note for the claimant's counsel (C166). In accordance with usual practice, the claimant was charged a higher brief fee which included the first day of the hearing (29 January), with a refresher charged for each subsequent day. The brief fee was £5,000 plus £1,000 VAT. Each refresher was £750 plus £150 VAT.

29. We were also provided with a breakdown of costs from the solicitor for the time spent on the costs' application. That recorded that further costs of £2,030.50 had been incurred in the costs' application (C230). A fee note for counsel, recorded that the brief fee for the costs application was £1,500 plus £300 VAT (C231).

30. This Judgment includes only the points which we considered relevant to the issues which we needed to consider in order to decide if costs should be awarded. If we have not mentioned a particular point, it does not mean that we have overlooked

it, but rather we have not considered it relevant to the issues we needed to determine.

The Law

31. Costs in the Employment Tribunal are very much the exception and not the rule. Costs do not simply follow the event. The power to award costs is limited to the specific reasons provided in the Employment Tribunals Rules of Procedure.

32. Rules 76, 78 and 84 of the Rules of procedure are particularly relevant to the award of costs.

> *Rule 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; or (b) any claim or response had no reasonable prospect of success ...*
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> *Rule 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; (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 sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.*
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> *Rule 84. In deciding whether to make a costs, preparation time or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.*

33. Also relevant is the costs section of the Employment Tribunals (England & Wales) Presidential Guidance – General Case Management. The Tribunal has considered that Guidance and will not reproduce it here, save for highlighting the first line of paragraph 1:

> *"The basic principle is that employment tribunals do not order one party to pay the costs which the other party has incurred in bringing or defending a claim."*

34. In **Radia v Jeffries International** [2020] IRLR 431 Auerbach HHJ said:

> *"It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of r 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion …*

in practice, where costs are sought both through the r 76(1)(a) and the r 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (thought there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have know or appreciated that?"

35. In **Yerrakalva v Barnsley MBC** [2012] IRLR 78 Mummery LJ said:

"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. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

36. In relation to offers to settle, the Tribunal is not bound to award costs where the amount offered is not exceeded, but an offer and the rejection of it is a relevant matter to be taken into account in determining whether the claimant has acted unreasonably. In **Raggett v John Lewis plc** UKEAT 0082/12 the following was said:

"The litigation conduct of a Claimant may also be taken into account in assessing the amount of a costs order. In Kopel v Safeway Stores plc [2003] IRLR 753 the EAT held that "There is no doubt . . . that an offer of the Calderbank type is a factor which the employment tribunal can take into account ..." ...

The following principles can be derived from the authorities set out above:

(1) ETs are not required … to identify the particular costs caused by particular conduct …. The ET should look at the whole picture of what happened in the case and the effects of such conduct in deciding whether to make and the amount of a costs order;

(2) The conduct of the litigation by the Applicant for a costs order can be taken into account in determining the amount of costs ordered to be paid;

(3) The conduct of a Claimant in rejecting a "Calderbank" type offer of settlement can be taken into account in assessing the amount of costs ordered against them provided that the conduct of the Claimant in rejecting the offer was held by the ET to be unreasonable;

> *(4) Although the CPR do not apply directly to ET proceedings, ETs should exercise their powers under the ET Rules in accordance with the same general principles which apply in the civil courts but they are not obliged to follow the letter of the CPR in all respects.*"

37. In her submissions, the claimant's counsel referred to various authorities and explained her view of the law. We will not re-produce what she said in this Judgment (but considered it all). In her submissions, the claimant's counsel placed particular reliance upon **Opalkova V Acquire Care Ltd** EAT 0056/21. The Judgment in that case was provided to us and we read and considered it. That was a case in which James Tayler HHJ carefully analysed what was meant by the reference to a claim or response in rule 76, in the context of whether a claim or response had no reasonable prospect of success where that applied to some of the claims brought (but not others). He said:

> *"Accordingly, in rule 76 where reference is made to a response having no reasonable prospect of success, I consider that means the response made to each of the claims brought by the claimant, rather than the entirety of the response set out in the ET3 response form to all of the claims brought by the claimant in the ET1 claim form. There are certain provisions of the rules, such as those that provide for the respondent to respond by way of submitting an ET3, that suggest that in the specific context the "response" means the response to the claim in the ET1 as a whole, but I do not consider that undermines the analysis that the word "response" in Rule 76 means the response to each of the claims brought by the claimant.*
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> *In this case 6 claims were brought by the claimant. It only makes sense to analyse whether the response to each of those claims had reasonable prospects of success. It does not make sense to consider whether an ET3 as a whole has reasonable prospects of success where it is responding to a number of different statutory causes of action, to some of which there may be a valid defence, whereas the defence to others may have no reasonable prospect of success. The assessment in the case of the ET1 and ET3 must be of the prospects of success of each claim and the defence to each claim.*
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> *My determination that one does not take an overview of the prospects of success of the entire ET1 or ET3 is supported by the approach adopted in Scott v Commissioner the Inland Revenue [2004] ICR 1410, at paragraph 47, and Nicolson Highlandwear Ltd v Nicolson [2010] IRLR 859, at paragraph 34."*

38. We also considered all that the respondent's representative said in his submissions. As with the claimant's submissions we will not reproduce all that he said in this Judgment but did consider all that he said. He emphasised a number of authorities and emphasised that: orders for costs in the Employment Tribunal remain the exception; an award must be to pay costs incurred and compensate the receiving party, not to punish; and we must not only consider whether the basis for awarding costs has been met, but also whether we should exercise our discretion to make a costs award.

Conclusions – applying the Law to the Facts

39. As set out in her counsel's submissions, what the claimant submitted and sought from her application was one of the following:

39.1 That following the claimant's without prejudice save as to costs letter on 13 February 2023, the respondent knew or ought to have known that its defence had no reasonable prospect of success. She sought £21,914.50 plus VAT in costs;

39.2 That following that letter and having unreasonably rejected the claimant's offer of £30,000, the respondent refused to engage in reasonable settlement discussions which amounted to unreasonable conduct. She sought the same amount in costs as set out in 39.1; or

39.3 Upon receipt of the claimant's without prejudice save as to costs letter on 12 December 2023, the respondent knew, or ought to have known, that its defence to the claims had no reasonable prospect of success. She sought £11,897.40 plus VAT.

40. In addition, the claimant sought the costs of drafting her costs application and the costs of pursuing her application for costs at the costs' hearing.

41. The first question which we needed to address and determine, was whether or not we determined that the requirements of Rule 76(1)(a) or (b) had been met. That is the first gateway to an application for costs, or what was described as the threshold in the **Radia** Judgment.

42. We noted what was said in the case of **Opalkova** as particularly relied upon by the claimant. When considering whether the response had had no reasonable prospect of success, we did not need to consider the response to all of the claims collectively, we needed to consider the response as it applied to each of the claims individually.

43. We started by particularly considering what the claimant's solicitors had set out regarding the respondent's response to the claim in the letter they sent of 13 February 2023 (C145). That letter focussed on the documents and arguments which related to the redundancy process. We do not need to reproduce in this Judgment what was clearly set out in that letter. The letter addressed the respondent's arguments on redundancy and highlighted the fact that the respondent's scoring matrix (which had been disclosed) did not show the claimant as being in a position which could have led to her being fairly selected for redundancy applying the scoring as a criterion. The claimant's solicitor's conclusions were that the claimant had been misled about the true reason for dismissal and the evidence suggested that redundancy was not the true reason for dismissal. The conclusion drawn and explained was that, in the absence of a good alternative explanation by the respondent, the claimant had been dismissed because of the public interest disclosures she had made (with the case described as highly compelling).

44. We noted that what was said in that letter was accurate and was remarkably prescient about the decision we went on to reach and our reasons for doing so.

Factually the letter fully addressed and explained the flaws which we identified in the respondent's case regarding the redundancy and redundancy process and highlighted them to the respondent in clear terms. Factually, the letter explained why the respondent's response/defence had no reasonable prospects of defence for the ordinary unfair dismissal claim, the automatic unfair dismissal claim (section 103A), and the claim for public interest disclosure detriment, that is the scoring for redundancy did not lead to a fair selection and there was no proper consultation.

45. We understood that the letter and the respondent's view of what was said at that time, would have been based only on the documents and not on the evidence which the respondent's witnesses would give about the process. We accepted that there may have remained some doubt at that point.

46. That position would have changed by the time of the second letter upon which the claimant relied, the letter sent on 12 December 2023 (C149). By the date of that letter, the witness statements had been prepared and exchanged. We found that the respondent could have, or should have, known that the responses to the unfair dismissal claim, the automatic unfair dismissal claim, and the redundancy detriment claim, had no reasonable prospects of success by the time it had prepared the witness statements from the witnesses it intended to call and had exchanged witness statements with the claimant (if not earlier).

47. The respondent would have been fully aware that the scoring table relied upon provided no genuine basis for the claimant to have been selected as the only person to be made compulsorily redundant as part of the process, and would have known that there was no evidence to be given by any of its witnesses that would explain the claimant's selection in a potentially fair or genuine way, when the table appeared to require considerable explanation. We agreed, by that stage, with the respondent's view (expressed earlier) that in the absence of any such explanation the case that the claimant had been treated detrimentally (in respect of the redundancy process) and dismissed because she had made a public interest disclosure, was highly compelling and, indeed, the respondent had no reasonable grounds for successfully defending those claims.

48. In the letter of 12 December 2023 (C149), the claimant's solicitor reminded the respondent of the issues with its case as explained in the previous letter and emphasised that no reason had been given by any of the respondent's witnesses as to why the claimant had been selected for redundancy. The claimant's solicitors clearly explained in that letter why the respondent's defence to those claims had no reasonable prospect of success, albeit that it must have been evident in any event to whoever it was at, or on behalf of, the respondent who had prepared the case and collated the witness statements ready for exchange.

49. As **Opalkava** makes clear, when considering whether the requirements for a costs award in Rule 76(1)(b) have been met, we needed only to determine that the response to one or some of the claims had little reasonable prospects of success, we did not need to determine that the response to all of the claims did so. We found that the respondent would have known as at 12 December 2023 (if not before) that the grounds of response had no reasonable prospects of success for the unfair dismissal claim, the automatic unfair dismissal claim, and the redundancy detriment claim. It clearly did have reasonable prospects of success for some of the other

claims, for the reasons explained when we found that the claims did not succeed. There was also a reasonable prospect of successfully defending some of the other claims for which we found for the claimant, but which the respondent might have been able to defend. However, for the gateway/threshold to costs required for our discretion to apply, rule 76 requires only no reasonable prospects for some of the claims.

50. There was no requirement for us to go on and consider whether the claimant had also shown that the way in which the proceedings had been conducted by the respondent had been unreasonable in the light of the respondent proceeding to defend claims lacking in merit, and in refusing to accept an offer made which was to settle for a sum lower than that which was ultimately awarded. As we have found that a costs award may be awarded applying Rule 76(1)(b) (the threshold having been crossed), there was no need to also determine whether it might have been awarded applying Rule 76(1)(a) as well.

51. We then needed to determine whether or not we should exercise our discretion to award costs. We noted, as the respondent's representative emphasised (and as we are well aware) that costs are very much the exception not the rule. They do not simply follow the outcome. Nor do they simply follow from a proposal from a claimant to settle being made for a lower figure than the one they are ultimately awarded. As the respondent quite rightly argued, an employer is able to defend the claims brought in the Tribunal and, in this case, defended a claim which included within it a number of claims which did not succeed. Whilst we have accepted that **Opalkava** means that we must not consider only all of the claims when considering whether the gateway/threshold set out in Rule 76 has been met, nonetheless we did accept that it was relevant to the exercise of our discretion to take into account the fact that many of the complaints pursued by the claimant did not succeed and were not found.

52. We reached the decision that in this case we would exercise our discretion to award the claimant some of her costs. As we have already addressed, the respondent defended claims which had no reasonable prospects of success, and it should have been plain that was the case (at least for the two/three complaints we have explained) from 12 December 2023 at the very latest (following exchange of witness statements and the claimant's solicitor's letter (C149)). Eight days later, on 20 December 2023 (R4), the respondent's solicitor at the time explained the respondent's position. She did do so by stating that the dismissal was not related to any of the concerns raised and, it was stated to simply be a genuine redundancy situation. Reference was made to the scoring. That was the argument which was put forward by the respondent at the forefront of its response. That was an explanation which had no reasonable grounds of success, as should have been clear from the documents, the flawed matrix, and the absence of any genuine explanation for the claimant's unique selection for compulsory redundancy in any of the witness statements.

53. From the date when witness statements were sent to the other party, until the start of the hearing, nothing materially changed. The respondent proceeded to defend the claims. We did note the offers made as recounted in the facts above. However, not until the day of the hearing (or very shortly before), did the respondent

make an offer which reflected the genuine value of the claim (or close to that value as found by us when determining remedy).

54. We accordingly found that it was appropriate for us to exercise our discretion to award costs where: the respondent did not have any reasonable prospect of successfully defending the claims of unfair dismissal (ordinary or automatically unfair) or redundancy detriment and that would have been clear from the letter of 12 December 2023 (if not earlier); liability in those claims was not conceded; an offer to settle for less than we ultimately awarded had been made a long time prior to the hearing and had not been accepted by the respondent; and the respondent proceeded to defend the claims.

55. Turning finally to the question of what costs should be awarded, we have already explained the process followed and the moment when we believe it should have been clear that the particular claims addressed had no reasonable prospects of being successfully defended. Accordingly, we have accepted the claimant's third argument, that from the letter sent on 12 December 2023 the costs incurred by the claimant should be paid by the respondent. We have decided that it is correct to do so in this case. We noted that the claimant was pursuing claims which ultimately did not succeed, and some claims where she did succeed but the defence had some reasonable prospects of succeeding. However, the absence of any admission of liability on the matters we have highlighted and the fact that the respondent positioned its argument with those claims/issues at the forefront (when the arguments were flawed) meant that we decided that costs should be awarded from that date.

56. On the first day of the final hearing, the respondent revised its offer to £30,000 being close to the figure that we eventually awarded and being the figure which the claimant had previously sought to settle her claim. That offer was rejected. We fully appreciated and understood that in the time since the claimant had made the offer, she had incurred significant costs. We noted what was said by the claimant's counsel in the email informing the respondent that £60,000 (and an apology) was now being sought. Notably, that response was not positioned with reference to the costs incurred, but instead to expectations about what the respondent might offer for other reasons. We read the email as stating that the claimant had effectively closed the door to settlement at that stage, at least to a settlement which was likely to be offered (when the schedule of loss was limited to £45,000). The claimant was perfectly entitled to refuse to settle and to choose to ensure that her claims were heard and determined. However, when exercising our discretion to award costs, we decided that we would not require the respondent to pay the claimant's costs which were incurred after that offer was made when she decided to proceed with her claim in any event. That was her choice. She was able to do so. However, where £30,000 had been offered by the respondent to settle the claims, we have exercised our discretion to decide that the costs incurred thereafter should not be awarded.

57. Based upon the information provided to us, the costs incurred by the claimant for the services provided by her solicitor from 12 December 2023 to hearing were £3,015.50 excluding VAT. The claimant was required to pay the VAT which was included in the bills on top of that figure. She is an individual and there was no evidence that (or any reason why) she would otherwise recover that VAT (as might have been the case for a company). We also awarded her the VAT charged on the

solicitors' fees, which she was required to pay. At 20%, that would result in an additional £603.10, making the total for solicitors' fees including VAT as £3618.60.

58. The claimant also incurred the costs of disbursements during that period, at the cost of £132 plus VAT of £26.40. Accordingly, we award the claimant those costs as well.

59. The brief fee for counsel had already been incurred prior to the respondent making its substantial offer. The refresher fees for the subsequent days of hearing were incurred after the claimant chose to reject the significant offer made. We therefore awarded the claimant the costs of the brief fee. Those costs were £6,000 including VAT.

60. As a result, and adding together those costs, we awarded the claimant the costs of £9,777 in total. The respondent is required to pay to the claimant that amount of the costs she incurred.

61. The claimant also sought to recover the costs incurred in pursuing this costs application. Whilst the application has succeeded, we thought that there was nothing unreasonable in the fact that the respondent chose to defend the application for costs. As we have highlighted, costs are the exception and not the rule. Costs do not follow the event in Tribunal proceedings. We decided that we would not exercise our discretion to award the claimant the costs incurred in the costs' application.

62. In his submissions, the respondent's representative challenged whether the costs sought had actually been incurred. It was clarified with him that he was not alleging that the claimant's counsel or solicitor were acting contrary to their professional obligations. It was not entirely clear how it was that he advanced the argument that he put. Nonetheless we considered it. In our view it had no merit whatsoever. We accepted that the claimant incurred the costs which she pursued in this case and that she genuinely was required to pay both the solicitors' costs claimed, and the counsel's fees claimed. There was certainly no genuine evidence that she did not have to. We also found there to be no merit in the respondent's argument that VAT might not be payable.

63. We did note and consider the fact that the respondent is a charity. We took that into account when considering whether to award costs. We concluded that the fact that it was a charity did not give it a licence to breach the law or to pursue a defence which had no reasonable prospect of success. It did not mean that a costs award should not be made. There was no evidence presented to us that the respondent would be unable to meet any costs awarded, albeit that we were mindful that the costs awarded would be required to be paid by a charity which had needed to downsize and who had very positive and laudable aims.

Summary

64. For the reasons explained above, we made the costs award detailed in this Judgment.

Employment Judge Phil Allen
15 May 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
28 May 2024

FOR THE TRIBUNAL OFFICE

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