EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Dr Esha Sarkar	AND	University Hospital Plymouth NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY from Plymouth **ON** 2 February 2024
Video Hearing by CVP

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mr I Ley
Ms R Hewitt-Gray

Representation

For the Claimant: **In person**
For the Respondent: **Mr S Keen of Counsel**

JUDGMENT ON SECOND COSTS APPLICATION

The unanimous judgment of the tribunal is that the respondent's Second Application for costs is allowed, and the claimant is ordered to pay the respondent's costs from 1 January 2021 in a sum to be determined by way of detailed assessment.

RESERVED REASONS

1. This is the judgment following the respondent's second application for the claimant to pay its costs of defending this claim which was brought against it by the claimant.
2. This judgment should be read in conjunction with three important documents: first, our previous judgment on liability in this matter dated 18 November 2020 and sent to the parties on 24 November 2020 (which we refer to as "the Judgment"); secondly, our Judgment on Costs Application dated 8 August 2022 and sent to the parties on 18 August 2022 (which we refer to as "the First Costs Judgment"); and thirdly, the judgment of HHJ Tayler in the EAT dated 31 May 2023 ("the EAT Judgment").
3. As is explained in the First Costs Judgment, the respondent has made two applications for payment of its costs. The first application was successful, and the

claimant was ordered to pay the respondent's costs for the period from 6 March 2020 to 21 December 2020 in a sum to be determined by way of detailed assessment. The parties reached agreement before the hearing of that detailed assessment, and a consent order dated 14 October 2022 finalised the terms upon which that application, and payment of the respondent's costs, was concluded by consent.

4. Meanwhile, the respondent's second application for payment of its costs after December 2020 was postponed pending the clarification of the position pending further appeals which the claimant had submitted. It is that postponed application which was heard today, and which is now determined by this Judgment.
5. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because all issues could be determined in a remote hearing. The documents to which we were referred are in a supplementary bundle of 148 pages, the contents of which we have recorded. The order made is described at the end of these reasons.
6. We have heard detailed submissions from Mr Keen who presented the respondent's application. The claimant Dr Sarkar appeared in person to oppose the application, and this morning she presented a document entitled "Claimant's Arguments" which ran to nine pages and 44 numbered paragraphs. She also addressed the tribunal and made other submissions verbally.
7. <u>The Second Application</u>
8. The general background to this case is set out in detail in the First Costs Judgment, and it is not repeated here. This is the respondent's Second Application for costs, and it relates to the costs incurred by the respondent in continuing to defend the claimant's claims for the period after December 2020, with effect from 1 January 2021. As originally framed it was for the period from December 2020 until 22 July 2022, and it was in the sum of £21,704.50, exclusive of VAT. As noted above this application was postponed pending potential further appeals by the claimant, and the scope of the application has now been extended to include the further period from 22 July 2022 to date.
9. The steps which the claimant has taken in continuing to pursue this litigation are set out in detail in the EAT Judgment and are not repeated here. The respondent asserts that having lost her case the claimant refused to withdraw any of her remaining detriments. This required further interlocutory hearings one of which involved a contested application for Deposit Orders. These were made and not complied with. The claimant's claim was then struck out for failure to meet the terms of the Deposit Order. The claimant made a number of applications for reconsideration and/or stay of the proceedings, all of which were unsuccessful, and then entered and pursued a number of appeals to the EAT. Despite their rejection at the "sift" stage, the claimant pursued her claims to a hearing under Rule 3(10), and following a hearing in the EAT her appeals were dismissed by HH Tayler under the EAT Judgment.
10. We were told today that the claimant may have appealed to the Court of Appeal, but we were not told whether permission has yet been granted to pursue any such appeal. There was no application before us today to postpone this hearing pending any potential further appeal.
11. The respondent's application is straightforward. It argues that it is clear from both the Judgment and the First Costs Judgment that the claims did not stand reasonable prospects of success at the very outset, and they should not have been pursued; and that the claimant has acted unreasonably and vexatiously in

continuing to pursue them. In addition, the claimant's continuing rationale for doing so is contemptuous of the previous judicial decisions. The claimant continues to make a number of serious allegations today including these: that the respondent produced false evidence at the original liability hearing (despite the clear findings in the Judgment to the contrary); the respondent has been guilty of fraud; that her former senior colleagues were guilty of clinical negligence and/or professional misconduct; and that the respondent continues to lie to her and others in a determined cover-up of clinical negligence. The respondent asserts quite simply that the claimant's continued conduct in this regard and/or her continued pursuit of this litigation is both unreasonable and vexatious.

12. The Claimant's Arguments presented to us today, and her verbal submissions, continue to make these very points. In the first place they reassert at considerable length her arguments which have been roundly rejected by HHJ Tayler in the EAT Judgment. She accuses the learned Judge of having "failed to resolve the appeal issues". She also continues with her serious allegations against her former employer including these comments today: "[28] the respondent's witnesses concealed clinical negligence during the hearing of the seven allegations … The decision-making process was based on false evidence … [31] the decision "was founded on untrue evidence and the ET judge failed to examine the evidence presented properly" … [41] the respondent "agreed to investigate my concerns regarding Dr Whyte's negligence and cover-up … They avoided the investigation because they feared it could expose the truth … The highest ranked management personnel within the respondent … misled the regulator CQC … [43] the management of the respondent organisation lied to [the investigator]".
13. <u>The Application for Costs</u>
14. The respondent makes an application for its costs under Rules 76(1)(a) and (b) on the basis that the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the continuing the pursuit of these proceedings and the way in which they continue to have been conducted. The application is opposed by the claimant, but in a manner which continues to seek to unravel and/or re-argue the various judicial decisions which have gone against her, and not expressly addressing whether her conduct was reasonable and/or vexatious, or not.
15. <u>The Rules</u>
16. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").
17. Rule 76(1) provides: "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.
18. Under Rule 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.
19. Under 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 …"

20. Under 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.
21. The Relevant Case Law
22. We have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; FDA and Others v Bhardwaj [2022] EAT 97; Vaughan v London Borough of Lewisham [2013] IRLR 713 EAT; Brooks v Nottingham University Hospitals NHS Trust [2019] WLUK 271, UKEAT/0246/18; NPower Yorkshire Ltd v Daley EAT/0842/04; Radia v Jefferies International Ltd [2020] IRLR 431 EAT; Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Kovacs v Queen Mary and Westfield College [2002] IRLR 414 CA; Martin v Devonshire Solicitors [2010] KEAT 0086-10-0812; Bennett v London Borough of Southwark [2002] IRLR 407 CA; Attorney General v Barker [2000] EWHC 453; Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06; Single Homeless Project v Abu [2013] UKEAT/0519/12; and Raggett v John Lewis plc [2012] IRLR 906 EAT.
23. The Relevant Legal Principles
24. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "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." However, the Tribunal should look at the matter in the round rather than dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.
25. In FDA and Others v Bhardwaj it was held that: "The citation of authority in applications for costs must be strictly constrained to those which genuinely establish a point of principle not apparent from the words of the rules themselves. Costs awards do not operate by precedent. They are fact specific and to be determined as summarily as possible. The expectation must be that nothing more

than the words of the relevant rule require addressing before the ET exercises its discretion on the particular facts of the case. When the threshold requirements for an order for costs are met under rule 76(1)(a) and/or (b) of the 2013 ET rules, it by no means follows that, because it may make a costs order, it will proceed to do so. It has a discretion. The discretion is very broad, and it would require a clear error of principle to justify an appeal, whether for or against an order for costs. In a case involving multiple issues, it will often be unrealistic to hive off some issues from others when addressing whether costs should be awarded and, if so, in what amount. Most cases stand or fall as a whole, even though in many cases there will be some issues on which the losing party is successful or partly successful. Issue-based costs orders are on the whole to be avoided.

26. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
27. In Brooks v Nottingham University Hospitals NHS Trust the EAT confirmed that dealing with an application for costs requires a two-stage process. The first is whether in all the circumstances the claimant has conducted the proceedings unreasonably. If so, the second stage is to ask whether the tribunal should exercise its discretion in favour of the claiming party, having regard to all the circumstances. In the case of reasonable prospects of success, the first stage is whether that ground is made out, and if it is, then to apply the exercise of discretion as to whether or not to award costs.
28. Ability to Pay:
29. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu. The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay see Arrowsmith v Nottingham Trent University which upheld a costs order against a claimant of very limited means and per Rimer LJ "her circumstances may well improve and no doubt she hopes that they will." One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means.
30. Assessment of Costs
31. Under Rule 78(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000. Under Rule 78(1)(b) a costs order may order the paying party to pay an amount to be determined by way of detailed assessment, carried out either by the County Court or by an Employment Judge applying the principles of the Civil Procedure Rules 1998. Where the receiving party does not regard the limit of £20,000 to be sufficient an order for summary assessment should not be made in those circumstances, see Kovacs v Queen Mary and Westfield College.
32. Recovery of VAT
33. VAT should not be included in a claim for costs if the receiving party is able to recover the VAT, see Raggett v John Lewis plc which reflects the CPR Costs Practice Direction (44PD).
34. Conclusion

35. Our unanimous judgment is that the claimant has continued to act unreasonably and/or vexatiously in the ongoing pursuit of her claims since the date of the First Costs Judgment. We repeat paragraph 36 of the First Costs Judgment: "[36] The respondent contends that the claimant's conduct throughout this case was unreasonable for the following reasons: (a) her unreasonable approach to the conduct of the litigation; (b) her pursuit of hopeless and baseless allegations of serious dishonesty and collusion; and (c) in her pursuit of these allegations, for the ulterior purpose of impugning the respondent's witnesses' professional judgments, and with the effect of harassing the respondent and its witnesses. In support of its application the respondent makes this final point: "The tribunal conducted a full and thorough examination of the circumstances of the Claimant's employment. It held that the theme of the claimant's unreasonable conduct emerged during her employment and carried over into the allegations made in this litigation. The claimant, when faced with perfectly legitimate criticisms, reacted in an aggressive and hostile manner. This attitude manifested itself in this litigation in the claimant's allegations of dishonesty and collusion. She pursued those allegations even though she had little to no evidential basis for making them and irrespective of her prospects. The allegations were wholly rejected by the tribunal".
36. That was the position at the time of the First Costs Judgment. Despite the clear findings of the Judgment, and the First Costs Judgment, the claimant has simply continued to pursue that same campaign. We agree with Mr Keen that the claimant is simply and continually being contemptuous of a number of clear judicial decisions which have found against her. We unanimously agree that the claimant's conduct in pursuing this litigation from 1 January 2021 has been both unreasonable and/or vexatious.
37. We remind ourselves that an award of course is the exception rather than the rule. We also have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?" This two-stage process is discussed further in both Brooks and Radia. We remind ourselves following Yerrakalva "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".
38. With regard to Rule 76(1)(a) we find that the claimant acted vexatiously, disruptively, or otherwise unreasonably in the continued conduct of these proceedings. We unanimously decide that the costs threshold is triggered. We have identified that conduct above, and why it was unreasonable, and the effects that it had were to put the respondent to even more time, trouble and expense in meeting the claimant's continuing allegations. In these circumstances we unanimously decide to exercise our discretion to make an award of costs. We therefore allow the respondent's application.
39. The claimant declined to give us any information as to her means at the previous hearing which resulted in the First Costs Judgment. Likewise, the claimant has not offered us any information today as to her means.
40. The respondent's application is for payment of its costs from 1 January 2021 to date, which exceed £20,000. The application is therefore for detailed assessment of those costs in accordance with Rule 78(1)(b).

41. In conclusion therefore the claimant is ordered to pay the respondent's costs from 1 January 2021 to date in a sum to be determined by way of detailed assessment. Further directions are now attached in connection that assessment process.

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Employment Judge N J Roper
Dated: 02 February 2024

Judgment sent to Parties on
31 May 2024 By Mr J McCormick

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