Neutral Citation Number: [2024] EAT 125

Case No: EA-2023-000253-DXA

EMPLOYMENT APPEAL TRIBUNAL

Cardiff Civil Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 2 August 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between :

MRS MELANIE CARROLL-CLIFFE

Appellant

- and -

PEMBREY AND BURRY PORT TOWN COUNCIL

Respondent

- -
- -

Ms A Brown (instructed under the Bar Direct Access Scheme) for the **Appellant**
Mr D Bunting (instructed by DWF Law LLP) for the **Respondent**

Hearing date: 10 July 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30am on 2 August 2024

SUMMARY

Practice and procedure - costs - rule 76 schedule 1 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

Having won some, but not all, of her claims before the Employment Tribunal ("ET") the claimant applied for her costs of the proceedings. The ET concluded, however, that the threshold conditions under rule 76(1)(a) and (b) of the **ET Rules** were not met, alternatively that it would not be appropriate to exercise its discretion to make a costs order in this case. The claimant appealed.

Held:

The ET had permissibly had regard to what the respondent knew, or ought reasonably to have known, when determining whether it should make a costs order under rule 76(1); guidance in **Radia v Jefferies International Limited** UKEAT/0007/18 applied. The assessment the ET had undertaken in this regard did not lose sight of the findings it had previously made on liability (which were more nuanced than the appeal suggested) and was entirely permissible given those earlier findings. The ET had, in any event, determined that it would not be appropriate to make a costs order in this case given that there had been measures of success and failure on both sides. The ET did not thereby err by looking at the merits of the defence to other claims when having to assess whether there had been any prospect of success in respect of the claims of constructive unfair and wrongful dismissal; this was a matter that it appropriately considered at the discretion, not the threshold, stage of its assessment. Equally, the ET's reasoning showed it was aware of the degree of overlap in the factual evaluation necessary to determine the various claims; it was best placed to assess the amount of work involved in the different aspects of the case and permissibly concluded that this was not a case where it should (exceptionally) make an award of costs; guidance in **Barnsley Metropolitan Borough Council v Yerrakalva** [2011] EWCA Civ 1255, [2012] IRLR 78 applied.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal raises questions as to how an Employment Tribunal ("ET") is to approach an application for costs where it is contended that the response to some, but not all, of the claims before it had no reasonable prospect of success.

2. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is the claimant's appeal against the judgment of the ET sitting at Cardiff (Employment Judge R Harfield, sitting with members Mr Stephenson and Ms Hurds, on 26 January 2023), sent out on 8 February 2023, by which the claimant's application for costs was allowed to a limited extent (in the sum of £1,000), but only in relation to the respondent's conduct in respect of disclosure and the preparation of the hearing bundle, and was otherwise refused. By her amended grounds of appeal, the claimant challenged the ET's rejection of her application for costs on two bases: (1) in relation to its consideration of the respondent's defence to the claims of constructive unfair and wrongful dismissal; (2) as to what is said to be its error in concluding that she could not be awarded costs for work done before her claim was presented. In oral submissions, the second of these points of challenge was essentially presented as an additional aspect of the first.

3. The claimant was legally represented for part of the proceedings before the ET. She appeared by counsel (not Ms Brown) at the liability hearing, but acted in person at subsequent hearings, including the hearing on costs; she has, however, been represented by Ms Brown at all stages of this appeal. The respondent has been represented by its lawyers throughout, and has appeared at all ET hearings by Mr Bunting, who also represents its interests today.

Costs in ET proceedings: the legal framework

The general approach and the ET rules

4. In ET proceedings, costs do not simply follow the event, and orders for costs are far from the norm; as Sedley LJ observed in **Gee v Shell Ltd** [2003] IRLR 82 CA:

> "35. ... the governing structure remains that of a costs free user friendly jurisdiction in which the power to award costs is not of much an exception as a means to protecting its essential character."

5. The rules governing ET proceedings are contained (relevantly) within schedule 1 of the **Employment**

Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules"), which, by rules 74-84, provide for a power to make an award of costs in specified circumstances.

6. In the present case, the ET was concerned with an application for costs made under rule 76, which provides (so far as relevant to this appeal):

> (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 the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success;
> …
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction ....

7. When deciding whether to make a costs order pursuant to rule 76(1) or (2), as the wording of the rule makes clear, the ET must undertake a two-stage process. First, it must consider whether the relevant threshold has been crossed: whether a party (or their representative) has acted in the way set out at rule 76(1)(a), or pursued a claim or response that had no reasonable prospect of success for the purposes of rule 76(1)(b), or breached an order or practice direction as provided by rule 76(2). Even where satisfied of the relevant threshold condition, however, the use of the word "*may*" makes clear that, although the ET has the power to make a costs order, it is not bound to do so (although it "*shall*" consider whether it should do so if either condition specified by rule 76(1) is made out); in determining whether or not it would be appropriate to make such an award, the ET must undertake a second stage in its reasoning, which requires it to consider whether or not it should exercise its discretion in this regard. It is only if the ET has determined both that the threshold condition has been met *and* that it should exercise its discretion to make a costs order that it must then decide the amount, in accordance with rule 78. Relevant to the exercise of its discretion at the second stage and to any determination of the amount of a costs award, rule 84 provides that, in deciding whether to make a costs order and, if so, in what amount, the ET *may* have regard to the paying party's ability to pay.

8. In **Radia v Jefferies International Ltd** UKEAT/0007/18, His Honour Judge Auerbach provided helpful guidance as to the approach an ET is to take when considering making a costs order under rule 76(1) **ET Rules**; although HHJ Auerbach was concerned with an order made against a claimant, his observations (with appropriate modification) will also hold good for a costs award made against a respondent. Considering first the distinctions between rule 76(1)(a) and (b), and the degree of overlap between those provisions, HHJ Auerbach explained:

> "62. ... The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.
> 63. ... However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.
> 64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 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 (though 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 known or appreciated that?"

9. HHJ Auerbach further considered the approach an ET should take to an application seeking the whole costs of the litigation on the basis that the claim had no reasonable prospect of success from the outset (as before, his observations would, with appropriate modification, equally apply to an application for costs where it is said that the respondent's defence to the claim never had any reasonable prospect of success):

> "65. ... It should first, at stage 1, consider whether that was, objectively, the position, when the claim was begun. If so, then at stage 2 the Tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering these questions, the Tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation.
> 66. This point needs to be considered in a little more detail. It may be observed that the test of "no reasonable prospect of success" appears in both Rule 76(1)(b), and in the strike-out Rule (Rule 37(1)(a)). But the task carried out by the Tribunal under each of these provisions is different. When considering a strike-out application, the Tribunal must decide whether the complaint or argument in question "has" - at the very same time when it decides that application - no reasonable prospect, based on the information available to the Tribunal at that point. Such applications are often considered at an early stage in the litigation, without the benefit of sight of any evidence; and the Tribunal's task is to assess the prospects of the claim succeeding if or when it comes to trial in the future. Those prospects are usually considered, therefore, on the basis of the case asserted, taken at its highest, although the Tribunal can also take account, for example, of key documents that may be before it at that point.
> 67. Where the Tribunal is considering a costs application at the end of, or after, a trial, it has to decide whether the claims "had" no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start, and considering how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the

> question of how things would have looked at the time when the claim began, it may, and should, take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time.
> 68. ... The Tribunal may draw on the evidence that it has read and heard at the full hearing, provided that it does so to inform its view of the prospects at the earlier time, based on what was known, or could reasonably have been known, back then.
> 69. Further, the mere fact that there were factual disputes, which could only be resolved by hearing evidence, and fact finding, arising from the final Hearing, does not necessarily mean that the Tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, nor that it cannot conclude that the complainant could or should have appreciated this from the outset. That still depends on what they knew, or ought to have known, were the true facts, and what view they could reasonably have taken of the prospects of the claims, in light of those facts. ..."

10. In **Cartiers Superfoods Ltd v Laws** [1978] IRLR 315, the EAT (Phillips J presiding) held that the ET's inquiry will require it:

> "... to look and see what the party in question knew or ought to have known if he had gone about the matter sensibly."

11. The ET has a broad discretion as to both the decision to make an award of costs and the amount of such an award. The purpose of a costs order is, however, purely compensatory: questions of punishment are irrelevant both to the exercise of the discretion whether to award costs and to the nature of the order that is made (**Beynon and ors v Scadden and ors** [1999] IRLR 700 paragraph 31). That said, when making a costs order on the ground of unreasonable conduct, the ET's discretion is not fettered by the requirement to precisely link the award to specific costs incurred as a result of that particular conduct; as Mummery LJ observed in **McPherson v PNP Paribas (London Branch)** [2004] EWCA Civ 569, [2004] ICR 1398:

> "40. ... The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the respondent] to prove that the specific unreasonable conduct by [the claimant] caused particular costs to be incurred. ..."

And see **Sunuva Ltd v Martin** UKEAT/0174/17, [2018] ICR D9 per Kerr J at paragraph 22.

12. That is not to say, however, that questions of causation are to be disregarded; as Mummery LJ stated in **Barnsley Metropolitan Borough Council v Yerrakalva** [2011] EWCA Civ 1255, [2012] IRLR 78:

> "41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. …"

In her submissions, Ms Brown suggested that this effectively gives rise to a proportionality test; that seems to

me to be a fair characterisation of the way the ET is to approach its task.

The approach on appeal

13. In considering the reasoning of the ET, I remind myself of the guidance provided by Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021 IRLR 1016 at paragraphs 57-58. More specifically, when considering an appeal against a costs award made in the ET, I bear in mind the observations of Mummery LJ in **Yerrakalva**:

> "7. As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion.
> 8. There is therefore a strong, soundly based disinclination in the appellate tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. …
> 9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties."

The background

14. Between January 2013 until her resignation on 12 February 2019, the claimant had been employed as the respondent's Town Clerk. On 3 May 2019, she commenced ET proceedings, making claims of constructive unfair and wrongful dismissal, protected disclosure detriment and automatic unfair dismissal, equal pay, and various money claims. The equal pay claim was dismissed at a preliminary hearing in December 2019. Subsequently, after a seven day full merits hearing in January 2021 (with two further days for deliberations),

by a reserved judgment sent to the parties on 11 June 2021, the ET upheld the claimant's claims of constructive unfair and wrongful dismissal but dismissed the remainder of her complaints. Two applications by the claimant for reconsideration were later refused. A remedy hearing took place on 7 January 2022, when (by its reserved judgment sent out on 19 January 2022) the ET made awards totalling £40,299.37 (significantly less than had been claimed in the claimant's schedule for that hearing, of around £120,000 before grossing up). There have been no appeals against any of these decisions.

15. In its liability decision, the ET recorded that there was a degree of overlap in respect of matters relied on as giving rise to breaches of the implied obligation not to act (without reasonable and proper cause) in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence (relevant to the constructive unfair and wrongful dismissal claims) and those said to amount to protected disclosure detriments and/or to give rise to a constructive (automatically unfair) dismissal by reason of protected disclosures.

16. In determining whether the claimant had been constructively dismissed, although not upholding all the claimant's allegations, the ET found the respondent had acted in breach of the implied term in a number of respects, namely: in relation to her treatment at certain times by some elected councillors; in respect of the respondent's conduct of the pay evaluation process and in its handling of the claimant's grievance on issues other than pay; and in its correspondence towards the end of the relationship, in particular its response to the claimant of 29 January 2019. Moreover, although most of the breaches thus found had occurred before autumn 2018, the ET held that some parts of the letter of 29 January 2019 (although not all) amounted to a final straw, leading to the claimant's resignation on 12 February 2019.

17. As for the claims of protected disclosure detriment and dismissal, the ET did not accept the claimant's case that she had made any protected disclosures, but, in any event, found (in the alternative) that any detriments causally linked to matters relied on had ceased by February 2018. The detriment claim was therefore out of time and the ET did not find that any of the matters pre-dating February 2018 could sensibly be said to constitute the reason or principal reason for the respondent's breaching conduct as a whole. The ET further went on to dismiss the additional money claims that had been included within the claimant's case.

The ET's costs decision

The application

18. On 15 February 2022, the claimant made an application for costs, which was put on three bases: (1) the respondent or its representative had acted vexatiously, abusively, disruptively or otherwise unreasonably in the way the proceedings (or part) were conducted (rule 76(1)(a)); (2) the response had no reasonable prospect of success (rule 76(1)(b)); (3) the respondent had acted in breach of an order or practice direction (rule 76(2)). In pursuing her application, the claimant made clear that she was seeking to recover £50,801.66 of the £55,661.66 she had expended on representation in the ET proceedings; this represented her costs post-dating a settlement approach her solicitors had made to the respondent on 14 November 2018.

Reasonable prospect of success

19. Considering first how the claimant put her application under rule 76(1)(b), as to whether the respondent had pursued a case that had no reasonable prospect of success, referring back to its earlier liability decision, the ET noted that the claimant's protected disclosure claims had overlapped with her constructive dismissal case, albeit that would not necessarily have been apparent to the respondent when submitting its response. Recording that the claimant had "*succeeded in respect of some allegations and not in others*", the ET concluded:

> "21. ... We consider it is unrealistic to have expected the respondent, even as a professionally represented respondent, to have anticipated from the outset how all these individual elements would have evidentially panned out to result in the eventual analysis that the tribunal undertook when upholding the claimant's two successful complaints."

20. Descending into a more detailed consideration of the "*broad themes on which the claimant succeeded*", the ET first considered the claimant's successful complaints as to how she had been treated by councillors, recording that the respondent initially contended it was not responsible for the acts of councillors, but had resiled from that position by the time of the full merits hearing. Acknowledging that it might be said that the respondent's initial stance had no reasonable prospect of success, the ET noted that the defence was also put on the basis that the incidents in question occurred long before the claimant's decision to resign and would require a "*final straw*" to revive them; that, it agreed, was the correct analysis. As for the pay evaluation process, another issue on which the claimant had succeeded in showing breaches of the implied term, the ET

noted that, while it had rejected the respondent's position in this regard, it had not found this was based on a deliberate lie; its decision had been based on its examination of all the evidence and the inferences it had then drawn, and it did not consider that the respondent ought to have known from the outset that its evidence was going to be rejected and that its defence on this point had no reasonable prospect of success. Thirdly, the ET acknowledged its findings in favour of the claimant in respect of the handling of her grievance, but considered its criticisms had to be seen within the context of volunteer councillors having a misguided view of the procedure, again concluding that it could not say the respondent ought to have known from the outset that this conduct was inevitably going to be found to be a breach of trust and confidence.

21. Lastly, the ET considered its findings in respect of the respondent's handling of correspondence, in particular in relation to its letter of 29 January 2019, again concluding that it could not be said that the respondent ought to have known at the outset that this would inevitably be found to be a breach of trust and confidence and a final straw. On this point, the ET noted that the pleaded allegation was broadly put and had not been entirely accepted; thus, the claimant had said the respondent ignored most of what she had raised and "*did not intend to assist her in resolving her grievance and provide a safe working environment*" but the ET had not found that to be the case. In the circumstances, the ET concluded that, at the point of filing its defence, the respondent "*would not have reasonably anticipated the finer analysis of individual points of the letter that we made in our Liability Judgment*", going on to observe:

> "26. Some of the letter was misguided, such as redirecting the claimant to the Labour Councillors, but we accepted was born of the respondent wanting to set out that what Labour said was not their corporate position. Some of it was more serious ... [b]ut whilst it could be said the respondent if it reflected, ... should have known it was an unsustainable statement, we have to place it within the context that the correspondence that was passing between the parties at the time, which was multifactorial. The correspondence came from a place where the respondent had been seeking to engage on steps to return the claimant to the workplace and hold a round table meeting rather than engage in lengthy combative letter writing. We found the respondent had been largely acting in good faith. We found that some of the claimant's demands had been unrealistic, unreasonable and not focused on assisting with a return to the workplace. Bearing this in mind together with the general way in which the point had been pleaded we do not consider that the respondent knew or ought to have known at the time that our eventual analysis would be what it was. From their perspective at the time of filing their ET3 response, they had an arguable basis on which to say they had been responding, on the whole, reasonably to the situation they were faced with, and in seeking to facilitate discussions to return the claimant to work, and they had a reasonable prospect overall of establishing there was no cumulative breach."

22. In the alternative, the ET was clear that, even if it was wrong in its analysis of whether the respondent ought to have appreciated that its defence to the constructive unfair and wrongful dismissal claims had no

reasonable prospect of success, it would not have exercised its discretion to award costs on that basis:

> "27. ... Here we have to look at the whole picture of the litigation. This was a hard fought piece of litigation on both sides. There were measures of success and loss on both sides. The claimant did not succeed in some significant aspects of her case including the equal pay claim that was taken to a public preliminary hearing before EJ Frazer, in establishing she made protected disclosures, the protected disclosure detriment claim did not succeed on time limit grounds, the protected disclosure dismissal claim was unsuccessful, as were the two breach of contract pay claims. These are matters in respect of which the respondent will have likewise incurred significant legal fees in mounting their defence. At the remedy stage the claimant presented various arguments which were not resolved in her favour. These are not the kind of exceptional circumstances in which we consider it appropriate to award the claimant recovery of her legal costs in what is ordinarily a cost free forum. It was a case, as Mr Bunting put it, where the claimant was entitled to bring her claim, and the respondent entitled to defend it."

Unreasonable conduct of the proceedings and breach of orders

23. The ET then turned to consider the application under rule 76(1)(a), which related to the respondent's conduct of the proceedings. Rejecting the claimant's complaint that the respondent had unreasonably conducted the proceedings by not engaging with Acas or with the possibility of judicial mediation, the ET explained its reasoning as follows:

> "28. The claimant's first complaint is that the respondent did not engage with Acas at the outset or subsequently to consider any attempt at negotiation, despite attempts being made through solicitors. Acas conciliation, is however, confidential and is not a matter that is put before the tribunal, and there is both public policy principles and statutory force behind that. Moreover, Acas conciliation is entirely voluntary and again there are strong public policy principles behind this. The respondent was not compelled to engage and it is not appropriate for the Tribunal to delve into that process. We do not find that it amounts to unreasonable conduct on their part. Acas conciliation that took place before the ET1 claim form was presented would also fall outside the remit of Rule 76(1)(a) in any event as conduct that pre-dates the proceedings cannot be the conduct of the proceedings."

24. The ET similarly took the view that it had not been unreasonable for the respondent not to respond positively to the settlement approach made in the claimant's solicitor's letter of 14 November 2018, observing that this was before she had resigned and before any proceedings had commenced, and was at a time when the respondent was trying to take steps to encourage the claimant's return to work. As for the respondent's position during the course of the proceedings, the ET reasoned:

> "33. The claimant also complains that the respondent did not in the course of proceedings make a better offer than that, or indeed go back and accept her November 2018 offer. There is an overlap here with the claimant's argument that the respondent's response had no reasonable prospect of success, hence why we addressed that point first, above. In our judgement, the respondent did not ought reasonably to have known that its defence to the constructive unfair dismissal claim,

> and wrongful dismissal complaints was inevitably going to fail in the way it did. Moreover, they were entitled to defend the other parts of the claim that they successfully did, including serious allegations of sex discrimination in the form of equal pay litigation and the numerous protected disclosure complaints. It was not unreasonable to defend the litigation and therefore not unreasonable to not make monetary offers to the claimant or to go back and settle in the terms the claimant outlined in November 2018. It also does not follow that the respondent should reasonably have anticipated a picture in which (a) they would lose the litigation in the way that they did, (b) that the claimant would end up receiving the sum she did in the Remedy Judgment (given the complex arguments there were about that), or (c) that they would reasonably anticipate the November 2018 offer was better than that which the claimant would be eventually awarded. Not only was the eventual Remedy Judgment award complex and multifactorial, the claimant there did not succeed in establishing the tribunal should use the pay figures she was putting forward, and the claimant is now, after the event, seeking to put financial figures against the November 2018 offer that were never actually set out at the time. Furthermore evidence as to, for example, mitigation efforts, lay in the hands of the claimant, not the respondent."

25. In any event, the ET did not consider that it would be appropriate to exercise its discretion to award costs in this regard, explaining:

> "82. We do not exercise our discretion to award the claimant the costs that she is seeking. Our reasoning for this is similar to that set out above in relation to rule 76(1)(b). This was litigation where both parties had measures of success and measures of loss. The respondent was entitled to defend the claim and successfully defended the protected disclosure, equal pay, and breach of contract (wages complaints). The case always needed to go to hearing and preparation for that hearing would always have needed to be done. To award the claimant the full costs she is seeking would be penalising the respondent out of proportion to the unreasonable conduct in question. The claimant pursues her costs application on the basis that the respondent had an unreasonable mindset throughout the proceedings that coloured everything that they did, including as the claimant would term it, the clinical removal of pivotal documents and the manipulation of the proceedings. That no doubt reflects how the claimant views things but it simply does not reflect the findings of fact that we made in this case."

26. The ET did, however, find that the respondent had acted unreasonably in its conduct of the disclosure exercise in the course of the proceedings, although it by no means accepted all the claimant's complaints. It further considered it appropriate to exercise its discretion in this regard to make an award of costs against the respondent, although not to the degree sought by the claimant.

27. The ET further considered the claimant's application under rule 76(2), but took the view that the complaints that she was making were better viewed as relating to the respondent's conduct of the proceedings, which it had addressed in dealing with the application under rule 76(1)(a).

The claimant's appeal and submissions in support

28. The claimant's first ground of appeal addresses the ET's approach to the question whether it should make an award of costs on the basis that the defence to the claims of constructive unfair and wrongful dismissal had no reasonable prospects of success. Although the ET had approached this under rule 76(1)(b) **ET Rules**, Ms Brown noted that it had not applied a purely objective test but had asked whether the respondent had known, or ought reasonably to have known, that its defence to the constructive dismissal claims had no reasonable prospect of success. While that approach might be more applicable to the question of unreasonable conduct under rule 76(1)(a), it was accepted (*per* **Radia**) that this was a distinction without any real difference: the question of the respondent's (actual or deemed) knowledge would, in any event, be relevant to the ET's exercise of its discretion under rule 76(1)(b).

29. That said, it was the claimant's case that the question of what the respondent knew, or (had it approached the matter sensibly; *per* **Cartiers Superfoods**) ought to have known, arose not just in relation to the outset of the claim but throughout the proceedings; in a multi-claim matter (as here), that required the ET to consider whether the defence to the constructive unfair and wrongful dismissal claims (or part) had no reasonable prospect, and to then analyse the amount of preparation and hearing time which could sensibly be viewed as having been taken up as a result of the respondent's failure to concede those matters (adopting a proportionate approach; *per* **McPherson v BNP Paribas** and **Sunuva**). The claimant contends the ET erred in failing to consider whether the respondent had acted unreasonably *at any stage* from her settlement proposal of November 2018, her resignation on 12 February 2019, the presentation of her ET1 on 3 May 2019, and thereafter *throughout the proceedings*. Moreover, while legally very different, the claimant emphasises that the core factual basis for all her claims was fundamentally the same, founded on the respondent's conduct; the enquiry thus required of the ET took up a very substantial proportion of costs and resources, which should then be reflected in the approach to the costs award (*per* **Sunuva**).

30. More specifically, the claimant submits that whether the respondent knew or ought to have known its defence had no reasonable prospect of success should be assessed on what it would have known about the way in which she had been treated, and why she had been treated in that way, rather than what it may have anticipated could be the potential outcome arising from pursuing a defence, however tenuous. In this regard, the claimant says the ET erred by failing to properly consider its findings on liability. Thus, the respondent

had maintained that it was not vicariously responsible for conduct of councillors right up to the liability hearing when (as the ET acknowledged) that was a position which it ought to have known was untenable from the outset; it should sensibly have conceded the point and agreed that the conduct in question amounted to a breach of the implied term. As for the pay evaluation process, the ET's reasoning demonstrated its focus was on whether the respondent could have anticipated that it's defence may be rejected, rather than whether it was well-founded given the facts that were, or ought to have been, known. Similarly, in relation to the way in which the claimant's grievance was handled, the ET's finding was essentially that councillors could not have anticipated that their conduct might be judged to have breached trust and confidence, but there was no rationale as to why, even as volunteers, the councillors would not have anticipated what was expected of them as elected officials (particularly as there was evidence that their conduct had been called into question by another councillor). As for the respondent's approach to correspondence and its letter of 29 January 2019, having found this conduct breached the implied term, the ET then deemed it excusable when considering costs, which meant the respondent was not being held responsible for its unreasonable behaviour and the impact that had on frustrating, misleading and protracting the litigation process.

31. As for the ET's approach at the discretion stage (see the ET's reasons at paragraphs 27 and 83), the claimant says that the correct approach was to consider whether the respondent ought reasonably to have known that the behaviours in which it had engaged were indefensible. In its judgment on liability, the ET had found substantial and serious breaches of the implied term by the respondent, spanning a significant period (four years), and relating to the conduct of elected public servants, fixed with a duty to maintain standards in public life (the main protagonists being serving councillors). Given its findings on liability, the claimant says it was perverse of the ET not to exercise its discretion to make a costs award. Moreover, the claimant argues that the ET fell into further error in concluding that "*The case always needed to go to hearing and preparation for that hearing would always have needed to be done*" (paragraph 82); that, she submits, cannot and should not be taken as a finding that the respondent's defence to the constructive dismissal case had reasonable prospects of success or that it had been reasonable to defend that claim.

32. By her second ground of appeal, the claimant had initially complained that the ET's reasoning at paragraph 28 demonstrated an error of approach, in holding that she could not be awarded costs for work done before the proceedings had started. In oral submissions, however, Ms Brown agreed that was not what the ET

had said at paragraph 28; it had, rather, made the point that conduct pre-dating the proceedings could not be conduct of the proceedings, as required by rule 76(1)(a), which was accepted to be a correct statement of the law. Re-characterising the claimant's case in this respect as essentially an additional consideration under the first ground of challenge, Ms Brown said that the ET ought properly to have clarified that, had the threshold condition been met under rule 76(1)(a) **ET Rules**, any award of costs it then decided to make would not need to be limited to work undertaken during the course of the litigation.

The respondent's case

33. In respect of the first ground of appeal, and the ET's approach to considering whether the response had no reasonable prospect of success, the respondent agreed that consideration of what it knew, or ought to have known, was relevant whether viewed under rule 76(1)(a) or (b) (albeit, in the latter regard, it went to the ET's exercise of discretion; *per* **Radia**). The ET had, however, done what was required of it; it had not simply considered the constructive dismissal claims in the round but drilled down to the detail, permissibly taking into account that the claimant had not succeeded on all her allegations. Considering the allegations on which the claimant had succeeded, the ET was entitled to have regard to the fact that accepting vicarious liability for the actions of elected councillors would not have been determinative of her case; the length of time between the actions in issue and the claimant's resignation went to the question of affirmation, and meant that it was reasonable for the respondent to continue to resist that part of the case. That was also true in relation to the findings made against the respondent in respect of the pay evaluation and the claimant's grievance. In contrast to **Cartiers Superfoods**, this was a case with a complex factual matrix and with difficult evidential considerations (that there was evidence of another councillor criticising the actions of other elected members was reflective of the political manoeuvring involved; this was not a case where there was only one perspective).

34. As for the letter of 29 January 2019, as the ET had recorded (paragraphs 225-230 of its liability decision), the claimant's case had included objections to the respondent's responses (which she contended were "*evasive, misleading, untrue or completely outrageous*") to each of the 17 steps she had proposed. The ET had, however, rejected a number of her complaints, finding - in context - the respondent's position was not entirely unreasonable (ET liability decision, paragraph 225). The claimant had pursued myriad allegations and the ET was entitled to find that the respondent ought not to be held to too high a standard when determining

whether it ought to have been aware that some part of its case would fail.

35. More generally, the ET had permissibly exercised its discretion to decline to make a costs award, finding these were not exceptional circumstances. In having regard to the fact that the claimant had not succeeded in other claims, the ET had not wrongly taken this into account when determining the threshold question of whether the response to the constructive unfair and wrongful dismissal claims had no reasonable prospect of success, but had appropriately considered this to be relevant to the exercise of its discretion. That gave rise to no error of law and its conclusion could not be said to be perverse.

36. As for the second ground of challenge, as the claimant now acknowledged, paragraph 28 of the ET's costs decision demonstrated no error of law (on this point, **Health Development Agency v Parish** [2004] IRLR 550 EAT had not been overturned by the ruling in **Sunuva**: on the threshold question, the unreasonable conduct still needed to post-date the proceedings, although it was now clear that any costs that the ET might then award could take into account work that preceded the litigation). As the ET had not found the threshold to have been crossed, no additional issue was raised in this regard.

Analysis and conclusions

37. Summarising the background to this appeal cannot begin to provide the detail of the history of the events (going back to 2015) with which the ET had to engage when determining the liability issues raised by the claimant's claims. The 94-page, 311-paragraph liability decision sets out that history, which included long-running concerns on the part of the claimant relating to a poorly handled pay evaluation process, a procedurally inept response to her grievance, and a number of issues relating to how the claimant was treated as an employee of the respondent caught in the cross-fire of an acrimonious political battle between elected members. The litigation was made all the more complex by the range of claims pursued by the claimant and the overly long (some 98-pages of relatively close type text) witness statement in which she had set out her evidence. Save that the ET would have benefitted from a more focused statement from the claimant (as it observed at paragraph 5 of its liability decision), none of these observations are intended to be critical of the case that the claimant pursued; they merely provide an indication of the scale of the task faced by the ET, and relevant context when considering how it might be the case that the claimant could achieve (partial) success in her claims but still end up out of pocket given the essentially "no costs" nature of the jurisdiction.

38. Given her increasing concerns about how she was being treated in her employment, the claimant had sought legal advice some time before her resignation, and before commencing her ET proceedings. Had the ET considered its costs jurisdiction was engaged, and that it should exercise its discretion to make an award of costs against the respondent, it would have been entitled to take into account the sums thus expended by the claimant, notwithstanding that they pre-dated the litigation (per **Sunuva**, applying **McPherson v BNP Paribas**). As has been common ground on this appeal, however, what it could not do was to take into account the respondent's conduct prior to the commencement of the proceedings when determining whether the relevant threshold was crossed for the purposes of rule 76(1)(a) **ET Rules**. The claimant's acknowledgement of that point means that her second ground of appeal falls away: the ET did not err at paragraph 28 of its costs decision (or elsewhere) in (correctly) stating that it could not have regard to conduct pre-dating the proceedings when determining whether there had been unreasonable conduct of those proceedings.

39. Turning to the claimant's first ground of appeal, as both parties observed in oral argument, there are difficulties with the ET's approach to the costs application under rule 76(1)(b), in that it appears to have lost sight of the objective nature of the threshold test when determining whether the respondent's response had no reasonable prospect of success. That said, however, as was also common ground, the question of what the respondent knew (or ought reasonably to have known) was, in any event, relevant to the ET's exercise of its discretion. Even if the ET had found that the response to the claims of constructive unfair and wrongful dismissal had (objectively assessed) no reasonable prospect of success, it would have needed to go on to ask (paraphrasing HHJ Auerbach in **Radia**): did the respondent in fact know or appreciate that? If not, ought it reasonably to have known or appreciated that?

40. In carrying out that assessment, whether seeing it as relevant to the threshold stage (and I note that there was an overlap in this regard with the claimant's application for costs under rule 76(1)(a); see the ET's observations at paragraph 33 of its costs decision) or to the exercise of its discretion, it would not have been right for the ET to adopt the same approach as required when considering whether a response should be struck out under rule 37(1)(a) **ET Rules**: it had heard all the evidence and could form a view as to what the respondent could, or should, have appreciated; it was not bound to take the respondent's case at its highest. That said, the ET would still need to carry out its assessment from the perspective of the respondent at the relevant time. Whether it would be appropriate to make an award of costs against the respondent would depend upon what it

knew, or ought reasonably to have known, were the true facts, and what view it should sensibly have taken as to the merits of its defence in the light of those facts. That, moreover, was an assessment that the ET ought properly to have considered over the course of the proceedings: although the claimant was seeking costs for the entirety of the litigation (and, to some extent, for work done in advance of that litigation), even if the ET did not consider that the respondent should reasonably have appreciated the flaws in its evidence or legal arguments from the outset, any change in that position during the course of the proceedings would plainly be relevant to its determination.

41. For the claimant, it is contended that, in determining whether it should make an award of costs, the ET lost sight of its findings on liability, effectively allowing the respondent to avoid responsibility for its unreasonable behaviour and the impact that had on frustrating, misleading and protracting the litigation process. That submission, however, might seem to suggest that costs ought to be used to penalise a respondent, which would not be an appropriate basis for such an award (see **Beynon**). Moreover, although the ET's reasons for its decision on costs might at times seem focused on the respondent's assessment of litigation risk (rather than on what it ought reasonably to have understood to be the true facts relevant to the case), that has to be seen against the fuller reasoning provided in its earlier liability decision. Reading the two decisions together, it is thus apparent that any concession relating to the respondent's vicarious liability for the conduct of elected councillors would never have been determinative of the claims; there were more nuanced submissions relating to whether particular conduct relevantly impacted upon the claimant and an entirely reasonable argument on affirmation, arising from the delay between the councillors' actions and the claimant's resignation. As for the handling of the pay evaluation process, the ET explained its decision as having been based on its examination of "*all the evidence*" and the "*various inferences*" it made. More generally, in relation to this and the way the respondent dealt with the claimant's grievance, it is apparent that the ET found much of what had happened to have been the product of genuine mistake. Given its findings on these points, I cannot say it was perverse for the ET to consider the respondent could not reasonably have appreciated that its response would be rejected.

42. The difficulties that arose in assessing the respondent's position when responding to the claimant's claims are perhaps best illustrated when considering the ET's findings in respect of the letter of 29 January 2019. Although holding that this was "*not entirely innocuous*" and amounted to a final straw (ET liability decision, paragraph 255), the ET rejected many of the claimant's complaints relating to this response.

Specifically, it did not accept that the respondent had ignored almost all her proposals (which is how the claimant's case was put), and considered the response had to be seen in context:

> "Long multi-factorial letters about contentious and emotive issues tends to lead to misunderstandings, comments being taken out of context, and the hardening of people's views." (ET liability decision, paragraph 225)

Given the respondent's focus in its response to seeking to work with the claimant towards a round-table meeting to discuss mediation (which the ET found to be "*eminently sensible and appropriate*"), I do not see that it can be said that the ET did other than reach a permissible conclusion that the respondent:

> "... had an arguable basis on which to say they had been responding, on the whole, reasonably to the situation they were faced with, and in seeking to facilitate discussions to return the claimant to work, and they had a reasonable prospect of establishing there was no cumulative breach." (ET costs decision, paragraph 26)

43. I have further considered whether the ET's reasoning on costs might evince a failure to properly take into account any change in position during the course of the proceedings; what might be a reasonable position for a party to take at the outset of proceedings, might not be so at a later stage (for example, after disclosure, or after receipt of the other side's witness statement/s). There is a difficulty in considering this question in the present case as the claimant's application appears to have been put very much on a "whole costs" basis; certainly, it is not easy to identify any argument on her part that the respondent's position ought sensibly to have changed during the course of the proceedings. In any event, I am not persuaded that the point can go anywhere: the matters identified by the ET as demonstrating that it was not unreasonable for the respondent to pursue its defence would hold good throughout the liability proceedings. Thus, its arguments on affirmation were not rendered less compelling by any particular event in the litigation; nothing in the ET's reasoning would suggest that there came a point in the proceedings when the respondent ought to have revised its view as to its case on the pay evaluation or grievance processes; similarly, there was nothing that would have required it to consider it had no arguable case on its 29 January 2019 attempts to move forward in its relationship with the claimant.

44. Accepting that the claimant will no doubt have a very different view on these points, I note the ET's clear findings at paragraphs 21-26 and at paragraph 33. In reaching its conclusion, even if it did not repeat all its earlier findings, I do not infer that the ET in any way lost sight of the views it had previously reached at the liability stage (and see **DPP v Greenberg**); indeed, a thorough engagement with that earlier decision reveals a rather more nuanced evaluation on each group of allegations than the claimant's submissions allow.

Ultimately, the ET was best placed to form a view as to whether - adopting a sensible approach to the litigation throughout - the respondent ought reasonably to have appreciated that its response to the claims of constructive unfair and wrongful dismissal had no reasonable prospect of success. This is not a case where the claimant has met the high threshold required to demonstrate that the ET's decision can be said to be perverse and, accordingly, I am bound to defer to its assessment.

45. Even if there was any doubt as to the correctness of its assessment as to the reasonableness of the respondent's defence to the constructive dismissal claims, the point is, in any event, rendered academic by the ET's conclusion, in the alternative, that it would be inappropriate to exercise its discretion in this case to make an award of costs. In this regard, the claimant objects to the fact that the ET had regard to the other claims she brought (unsuccessfully), contending that the fact that those matters might still have had to go to trial could not be relevant to the question whether the respondent's defence to the constructive dismissal claims had any reasonable prospect of success or was reasonably maintained. She further complains that the ET ought to have adopted a proportionate approach to its assessment, which would have led it to the conclusion that the majority of the work involved in these proceedings had related to the findings of fact necessitated by the respondent's failure to concede constructive dismissal.

46. On the first of the claimant's objections, I do not accept that the ET erred by having regard to the fact that there were other claims, which the respondent was plainly entitled to defend (not least because it successfully did so), and which meant that this was always a case that would have had to go to trial (ET costs decision, paragraph 82). The ET was not thereby confusing the merits of the response to the constructive dismissal claims with the strength of the defence to the other matters; having moved on from the threshold stage, it was permissibly looking at the wider picture when determining whether or not this was a case in which it should (exceptionally) exercise its discretion to make an award of costs. As for where the balance of costs lay, the ET was clearly mindful of the overlap in the factual allegations relevant to the constructive dismissal and the protected disclosure claims (see its summary at paragraph 21 of its costs decision), and was best placed to assess the work required to address different aspects of the case in this context. Doing so, it is plain the ET considered the position to be fairly evenly balanced, observing that the claimant had failed to make good some significant aspects of her case, at both the liability and remedy stages (ET costs decision, paragraph 27).

47. Ultimately the answer to this appeal is to be found in the guidance of Mummery LJ in **Yerrakalva**:

the first-instance tribunal, that had managed, heard and determined this case, was best placed to make the necessary balanced assessment of the interaction of factors affecting the discretionary power afforded under rule 76 of the **ET Rules**. For all the reasons provided, I therefore dismiss this appeal.