THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE ELLIOTT**

MEMBERS: **MS J MUIR**

MS E THOMPSON

BETWEEN:

Ms A Okweri

Claimant

AND

Changing Lives Housing Trust

Respondent

ON: **15 December 2016**

JUDGMENT ON RECONSIDERATION AND ON COSTS

The unanimous decision of the tribunal is that:

1. The remedies judgment of 29 July 2016 is confirmed.
2. There be no award of costs.

REASONS

1. The Remedies Judgment was delivered orally on 29 July 2016 and the judgment was sent to the parties on 2 August 2016. Written reasons were sent to the parties on 23 August 2016.

2. On 12 August 2016 the respondent applied for a reconsideration of the remedies judgment on the Polkey issue and on 26 August 2016 the claimant applied for costs.

The issues

3. The first issue for the tribunal was whether the remedies judgment of 29

July 2016 should be varied in relation to the decision not to make any reduction of compensation under ***Polkey***.

4. The second issue for the tribunal was whether to make an award of costs in favour of the claimant.

Documents

5. We had a written application from each party on their respective applications and a written response from the opposing party on each application. These applications and the authorities referred to were fully considered even if not expressly referred to below.

6. The parties were informed by the tribunal that they could rely solely on written representations if they wished to do so. Both parties decided to rely on their written representations and chose not to appear before the tribunal.

The reconsideration application

7. At the remedies hearing on Polkey we had to consider not just whether the claimant would have been dismissed in any event but that she would have been fairly dismissed in any event. We were unable to say that the claimant would certainly have been dismissed had a fair process been conducted in relation to the matters which arose in the first two weeks of May 2015. Our finding at the remedies hearing was that a fair process would have allowed the claimant an opportunity to fully state her case including any mitigation.

8. We also found that a fair procedure would have involved consideration of sanctions less than dismissal. We were unable to say that the claimant would have been fairly dismissed within three to four weeks of 14 May 2015 as the respondent submitted and we made no reduction under Polkey.

9. We made a finding of fact at liability stage that the claimant breached an instruction not to discuss a particular client, known as S, with the local authority as Mr Kawaters and Ms Tumler had taken over management of this client. Mr Kawaters responded to this in an email to the claimant on 7 May 2015 (page 342 of the liability bundle) saying:

> *Hi Oge,*
>
> *You were not supposed to talk to Sonny after Danielle and I took this case over.*
>
> *So please do not call him anymore!!.....*
>
> *I am asking you kindly not to discuss this case anymore and get on with your support for S……that means no talk on this case anymore and instead of talk I would like to see professional action, to give her the right support.*
>
> *I will monitor this case and looking forward that you will bring it on the right track.*

10. The claimant said she did not follow the instruction because S was a vulnerable client and she was concerned that S (who is female) was being evicted and was being placed in a male hostel. There were mitigating factors that she would have relied upon had there been a consideration of dismissal.

11. The respondent also instructed the claimant to cancel her appointments on 13 May 2015 so that she could work on her files. The claimant accepts that she did not comply with this instruction. She said it was because she had already cancelled two appointments for the particular client and she had told her team that she was attending the appointment. We found that she did not have the team leader's express permission to attend the appointment although she had informed the team leader.

12. We also found paragraphs 123 and 124 of the liability judgement that there was an admission by the claimant that she had failed to comply with Mr Kawaters' instruction not to attend an appointment, because she apologised for this. We find that the apology was a relevant matter that the respondent would have considered if deciding upon what action to take.

13. In its application the respondent asks the tribunal to consider Mr Kawaters' evidence that the respondent would have dismissed the claimant in any event because of the disobedience to lawful instructions which on the respondent's submission could not be accounted for "by any common sense or tenable reason". The claimant's submission was, put simply, that it was convenient for Mr Kawaters to make this statement.

14. We draw on our finding (liability judgment at paragraph 128) that Mr Kawaters did not have authority to dismiss. It was necessary for him to have that authority delegated to him by Ms Tumler. The same applied to Mr Smikle (liability judgment paragraph 110 – authority from Ms Tumler was needed for dismissal). We did not have evidence that Ms Tumler would have delegated that authority. In relation to the claimant's actual dismissal, she retained that decision making power for herself.

15. We also took account of the fact that Mr Kawaters said in his 7 May 2015 email (set out above) that he would monitor the case and he looked forward to the claimant putting things on the right track. He did not say he was referring the matter to Ms Tumler to make a decision on dismissal or that he was considering recommending her dismissal.

16. The respondent submitted that our finding that the claimant would not necessarily have been dismissed a short time later was contrary to the evidence and that we substituted our own view of the potential options "rather than those which in all probability would have been exercised".

17. The respondent submits that in cases of purely procedural unfairness, it will be rare that no percentage reduction is made. However, this was not a case where our finding was based purely on procedural unfairness. Our

finding was that the claimant was unfairly dismissed based on the reason for dismissal which was automatically unfair.

18. The respondent's submission is that there was a "plethora of evidence" that the claimant would have been dismissed and that it was "not even vaguely likely that she would have kept her job indefinitely". Our finding was not that the claimant would have kept her job "indefinitely". Our finding was that we could not say that she would have been dismissed in any event because of the May 2015 breaches of instructions, within three to four weeks of 14 May as submitted by the respondent. The effect of our findings go no further than saying that the claimant would have remained in employment for a further 17.5 weeks. Our finding was therefore that the claimant would have remained employed for only two months longer than submitted by the respondent.

19. Whilst there was evidence that there were two breaches of instructions on the claimant's part, there was not a "plethora of evidence" that she would have been dismissed in any event. The claimant did not have any existing disciplinary warnings and we find that the question of sanctions less than dismissal would, on a balance of probabilities, have been considered by this employer. We find support for this in Mr Kawaters' email saying he would monitor the claimant rather than moving to disciplinary action or seeking authority from Ms Tumler to dismiss the claimant.

The costs application (preparation time order)

20. The claimant was represented by Mr E Carey, a trade union casework officer. The claim is for a preparation time order.

21. The claimant alleges that the respondent's counsel was abusive towards him on the instructions of the respondent. We were not entirely clear as to what the nature of this abusive behaviour was said to be. The claimant was at pains to say that this was not a criticism of the respondent's counsel personally as it was accepted that he acted on instructions.

22. The claim form was presented on 12 August 2015. Any matters relied upon by the claimant predating 12 August 2015 is not conduct within the proceedings for the purposes of Rule 76.

23. The claimant also submitted that there was unreasonable conduct by the respondent in the proceedings. The claimant relied on the respondent's refusal to hold an appeal hearing or to investigate complaints of bullying which the claimant submits was open to the respondent both before and after proceedings had been issued. Anything that did or did not take place prior to the issue of proceedings is not conduct within these proceedings. We also find that the conduct of the respondent in terms of any internal procedure (such as in relation to an appeal hearing or an internal investigation), is not part of the conduct in these tribunal proceedings.

24. The claimant also submits that the respondent did not engage meaningfully in the ACAS Early Conciliation. They are not obliged to. It is not unreasonable conduct to fail to negotiate. Parties are entitled to defend proceedings and there is no obligation upon them to negotiate within the EC Rules.

25. The claimant submits that attending the tribunal was stressful and challenging for her and she had to arrange childcare and that is why she made a settlement offer which was rejected.

26. The claimant submits that the respondent unreasonably refused an offer to settle. In an offer marked "without prejudice save as to costs" dated 14 April 2016 the claimant offered to settle for the sum of £10,000. This was less than the sum ultimately awarded to the claimant of £12,223.02.

27. We have considered whether despite the costs warning, the conduct of the respondent was unreasonable in refusing to settled for £10,000. Based on ***Kopel*** below, the fact that the respondent did not "beat the offer" does not of itself lead to an order for costs in the claimant's favour. It is a factor for us to consider.

28. This was a finely balanced case. The claimant succeeded in part on her discrimination claims and not on all her allegations of discrimination. We therefore find that it was not unreasonable for the respondent to refuse to settle a case upon which it succeeded in part. Costs warnings are not uncommon in employment tribunal proceedings and do not amount to unreasonable conduct in themselves.

The law

Reconsideration

29. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

30. In relation to Polkey reductions, the test was set out by the EAT in ***Granchester Construction (Eastern) Ltd v Attrill EAT/0327/12*** Langstaff P, that it is not for a tribunal to ask in general what a reasonable employer would do but to focus upon the employer that is in fact before it. What were the chances of this employer carrying out a fair dismissal?

31. The assessment of a Polkey reduction is predictive. The tribunal has to consider could the employer fairly have dismissed and, if so, what were the chances that it would have done so? The tribunal is not called upon to decide the question on balance answering the question what it would have

done. It must assess the chances of what the actual employer would have done – ***Hill v Governing Body of Great Tey Primary School 2013 IRLR 274, EAT.***

32. In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal – ***Software 2000 Ltd v Andrews 2007 IRLR 568.***

Costs

33. Costs do not follow the event in employment tribunal proceedings and an award of costs is the exception and not the rule (Mummery LJ in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***).

34. The power to award costs is contained in Rule 76 of the Employment Tribunal Rules of Procedure 2013 which provides that:

> *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;*

35. The Court of Appeal held in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78*** that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

36. There is no general principle that there should be a costs warning letter in advance of a costs application. In ***Peat and others v Birmingham City Council UKEAT/0503/11*** Supperstone J said that failure to engage with arguments in a costs warning letter can be a factor to weigh in the balance as to whether an award of costs should be made.

37. The EAT in ***Kopel v Safeway Stores 2003 IRLR 753*** said that a failure by a claimant to achieve an award in excess of a rejected offer should not by itself lead to an order for costs. Before the rejection of the offer becomes a relevant factor, the tribunal must first conclude that the conduct of the claimant in rejecting the offer was unreasonable. The ***Calderbank*** principle does not apply to employment tribunal proceedings as it does in matrimonial proceedings. It is a factor to be considered.

38. Rule 84 provides that in deciding whether to make a costs order and if so in what amount, the Tribunal may have regard to a paying party's ability to

pay.

39. In ***Vaughan v London Borough of Lewisham No2. 2013 IRLR 713*** the EAT (Underhill P) said that affordability is not the sole criterion for the exercise of the discretion on costs.

40. The grounds for making a preparation time order are the same as for an order for costs for a represented party, under Rule 76.

41. Preparation time is defined in Rule 75(2) as an order that a party (the paying party) make a payment to the other party (the receiving party) in respect of the receiving party's preparation time while not legally represented. "Preparation time" means the time spent by the receiving party (including any employees or advisers) in working on the case, except for time spent at any final hearing.

42. Rule 79 sets out the amount of a preparation time order. The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of the information provided by the receiving party and the tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spent on preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required.

43. The hourly rate is set by Rule 79(2). The relevant amount is £34 as from 1 April 2015 rising to £35 from 1 April 2016.

44. Under Rule 75(2) preparation time means time spent by the receiving party in working on the case, except for time spent at any final hearing.

45. In ***Mardner v Gardner EAT 0483/13*** the claimant had been funded by an insurer and was not personally out of pocket in relation to her costs. The respondents in that case were volunteer members of a management committee of a charitable body. HHJ Eady held that there was a public policy principle that served to prevent respondents avoiding the costs consequences of their unreasonable conduct because the claimant prudently entered into a policy of insurance, which would otherwise allow them to appropriate that benefit for themselves. The EAT held that the insurance policy was an irrelevant consideration.

Conclusions on the reconsideration application

46. Whilst there were concerns in May 2015 about the claimant adhering to instructions we were unable to find that this would have resulted in her dismissal in any event had these matters been considered. The respondent has not taken us to evidence that supports this contention.

47. The respondent submitted that dismissal was "a certainty" and therefore we should have made a reduction under Polkey. Based on our findings above we find against the respondent and find that the interests of justice

do not require a variation of our remedies judgment. We therefore confirm our remedies judgment of 29 July 2016.

Conclusions on costs

48. The claimant submitted that there is no difference in this case, where the claimant has union representation, to the situation in ***Mardner v Gardner*** where the claimant had the benefit of insurance in respect of her legal costs. The respondent submitted that the claimant is only entitled to be indemnified for the actual liability incurred, the indemnity principle. The respondent, whilst making reference to ***Mardner v Gardner*** in terms of awards of costs being the exception rather than the rule, did not address in its submission the substantive public policy issue in that case.

49. Given our finding that the respondent did not cross the threshold for an award of costs to be made, it is not necessary for us to make a finding on the application of ***Mardner v Gardner*** to the facts of this case.

50. We also make the observation that under Rule 75(2) preparation time means time spent by the receiving party in working on the case, *except for time spent at any final hearing*. The claimant had included the costs of conducting the tribunal hearing and conducting the remedy hearing and this would not have been recoverable in any event.

51. Based on our findings above we make no award of costs in favour of the claimant.

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Employment Judge Elliott

Date: 15 December 2016

Judgment sent to the parties and entered in the Register on: 20 January 2017

for the Tribunal Office