THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Radia	**v**	Jefferies International Limited

Heard at: London Central **On**: 31 July 2017
(1 August 2017 in Chambers)

Before: Employment Judge Baty

Member: Mrs C I Ihnatowicz

Representation:
Claimant: Mr S Neaman (Counsel)
Respondent: Ms J Stone (Counsel)

RESERVED JUDGMENT

1. **The Respondent's application for costs in case number 2201358/2015 succeeds. As the costs sought exceed £20,000, the matter will be set down for a detailed assessment before an Employment Judge.**

2. **The Respondent's application for costs in relation to case number 2207838/2016 fails.**

REASONS

Background

1. The Claimant has so far brought three sets of proceedings against the Respondent in the Employment Tribunal. These comprise the following:-

   1.1 Claim No 2201358/2015, a claim for multiple allegations of disability discrimination, which was heard before the present Tribunal and Mr D Carter on 3 – 11 November 2016. All of the allegations were dismissed.

1.2 Claim No 2207838/2016, a claim for victimisation under which the Claimant alleged that he had been subjected to three detriments for having brought the first claim. The Claimant subsequently withdrew two of these three allegations.

1.3 Claim No 2200809/2017, a claim for unfair dismissal, victimisation and whistleblowing in relation to the Claimant's dismissal. This claim is due to be heard in October 2017 together with the remaining allegation in the second claim.

2. Following the sending of the Reserved Judgment and Reasons in relation to the first claim to the parties on 3 February 2017, the Respondent brought an application for costs, dated 3 March 2017, in relation to its costs of defending the first claim. That application was listed to be heard today by the Tribunal which heard the first claim.

3. In the interim, the Respondent on 19 May 2017 brought an application for costs in relation to some of the costs incurred in relation to defending the second claim following the withdrawal by the Claimant of two of the three allegations of victimisation under that claim. That application was, by agreement between the parties and a different Employment Judge, listed to be heard at the same hearing as the first costs application, on 31 July 2017.

4. The purpose of the present hearing was, therefore, to hear the two costs applications.

Two Person Tribunal

5. At the start of today's hearing, the Judge explained to the parties that Mr Carter, the third member of the original Tribunal Panel which heard the first claim, was stuck on a train due to a points failure; that there was no guarantee of when he might arrive at the Tribunal, if at all, that day; that Ms Ihnatowicz was from the Employer's Panel of Tribunal Members; and that, although one of the reasons why the first costs application had been listed for today was the imminent retirement of both Mrs Ihnatowicz and Mr Carter, their retirements had been postponed for another year so it would be possible to re-list the hearing before they retired. The Judge then asked the parties, in light of that information, whether or not they wanted to proceed with a two person Tribunal or to seek a postponement. The Judge also suggested that, as the second costs application was not one which arose from findings made by the three person Tribunal, it could potentially be heard by a Judge sitting alone so that, if the parties wanted to postpone the first costs application, the hearing would not be entirely wasted. The Judge asked if the parties wanted some time to consider all this and they said that they did. There was a 15 minute adjournment. When the parties returned, they both confirmed that they wished to proceed with a two person Tribunal today in relation to both costs applications. Mr Neaman added that, given that findings in relation to the Claimant's means would apply in relation to

both costs applications, he did not see the value of hiving off the second costs application in any event.

6. It was, therefore, agreed that the two applications would be heard by a two person Tribunal, comprising Employment Judge Baty and Mrs Ihnatowicz, and the representatives each signed their written consent to this on behalf of the parties.

The Evidence

7. Witness evidence was heard from the Claimant, who produced a five page witness statement with various attachments. In addition, an agreed bundle of documents was supplied to the Tribunal.

8. The Tribunal read in advance the relevant costs applications and the Claimant's statement and those parts of the attachments to which it referred.

9. A timetable for cross examination and submissions was agreed between the representatives and the Tribunal and this was broadly adhered to. Both representatives produced written skeleton arguments (and various authorities with those arguments). They asked the Tribunal to read these after the evidence of the Claimant, who was cross examined by Ms Stone, was completed, and the Tribunal did this. Both representatives then made oral submissions on top of their skeleton arguments.

10. Some of the information relating to the Claimant's finances (which was annexed to his witness statement) was marked in the bundle containing the witness statement and annexes provided to us as being confidential. Mr Neaman made the point that the Claimant did not want the information relating to his finances to be made public. However, following discussion with the Tribunal and representations made by Ms Stone, Mr Neaman accepted that Ms Stone should not be prevented from asking questions of the Claimant about his finances in cross examination (which she made clear she intended to do) and that he was not, as he originally suggested, making an application that the hearing be held in private. As it turned out, although the hearing remained a public one, no one other than the parties and individuals connected to the parties were present at the Hearing.

11. The Judge asked Mr Neaman what his position was in relation to the Tribunal's Judgment and Reasons and whether they should contain any details of the Claimant's finances (although the Judge stated that in the ordinary course the Tribunal would not include details unless they were in the Tribunal's opinion relevant to the determination of the issues before the Tribunal). Mr Neaman took instructions and, when the Judge raised the point again later on in the Hearing, confirmed that, whilst he and the Claimant would appreciate if detail could not be included in the Reasons for the Judgment to the extent that it was not necessary to do so, they appreciated that the issue of the Claimant's finances was one which they

were raising and which was likely to be relevant to the issues. Mr Neaman further stated that he did not have grounds for making an application in this respect under Rule 50 of the Employment Tribunal Rules of Procedure 2013 and was not making such an application.

12. When asked by the Judge, Ms Stone made clear that the costs in relation to the first application which the Respondent sought were in excess of £300,000 and, were the Tribunal minded to make an award of costs, would require a detailed assessment; however, in relation to the second hearing, although the costs allegedly incurred totalled just over £25,000, the Respondent was capping what it sought to recover to £20,000, in which case the Tribunal could, if it was minded to award costs, make its own summary assessment of these without the need for a detailed assessment.

13. In relation to the second application, the Respondent produced a one side summary of the costs incurred. This was very broad brush, and gave no breakdown of which fee earner was responsible for which part of the costs and what their relevant hourly rates were or precisely what work was done to incur those costs. Although, having taken instructions, Ms Stone was able to supply the relevant hourly rates and make a general statement that most of the work was done by herself and a middle level associate at, respectively £280 and £434 per hour, she could not give any detail beyond this. At this point, she suggested that this information might be able to be provided by 6.30 this evening and the Claimant could then have an opportunity to respond to it and make submissions later. However, the Tribunal pointed out that (given that it would have to find extra time to deliberate on its decision because of the timetable which the parties requested which meant that there would not be time for deliberations and decision on the day of this hearing) it had managed to find some time the following day to deliberate on its decision. Furthermore, Mr Neaman said that he was going away on holiday directly after the hearing and would not be there to make submissions on whatever document the Respondent produced.

14. The Tribunal adjourned briefly to consider this. It decided that it would not be just or proportionate to allow the Respondent the opportunity further to submit details of the cost for the following reasons: the Claimant's representative would be away and would not be able to respond to the new material and the Tribunal had managed to fit in time the following day to deliberate on its decision (which, if it did not use, would incur potentially considerable unnecessary delay, particularly as the Judge was due to be away for several weeks from the end of this week); and the Respondent was aware that the Tribunal would have to make a summary assessment of the costs and was represented by experienced Counsel and by a large firm of City Solicitors and had been aware of the date of this hearing for some time and could have supplied this information earlier.

15. In the first set of proceedings, much had been made by the Respondent of the fact that the first time that the Claimant raised allegations of disability discrimination (allegations which went back to 2010) was at a meeting on 29

January 2015, some 5 years later, when the Claimant's manager, Mr Taylor, had put a settlement package to the Claimant. The findings which the Tribunal made at paragraphs 161 to 162 of the Reasons for its Judgment in the first claim reflect this. The point which the Respondent made was that it considered that the reason that the Claimant brought up the allegations of disability discrimination at this point was simply as a tool to try and negotiate a higher settlement package. The Tribunal had deliberately not made a finding in its reasons as to whether or not that was the case as it was not necessary to do so in order to determine the issues before the Tribunal in the first claim. However, having read both parties' skeleton arguments in relation to costs, the Tribunal was surprised that the point did not come up in those skeletons. Having discussed this amongst itself, the Tribunal decided that, as the matter may be relevant to the determination of the costs application, it would only be right to tell the representatives before they made their oral submissions that it was surprised that there was no reference to this point and that, given it may be relevant, the representatives should have the opportunity to make submissions on the issue should they wish to. The Tribunal duly informed the representatives in this manner, setting out the background in this paragraph above.

16. After a short break, Mr Neaman (who had not been at the hearing of the first claim himself as the Claimant was represented by different Counsel), said the Claimant had asked again about the point the Tribunal had raised and asked if the Tribunal could repeat why it had raised it. The Judge duly did so.

17. Both representatives addressed the point in submissions.

The Law

Costs

18. The Tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules of Procedure 2013, at Rule 74-84. The test as to whether to award costs comes in two stages:-

    1. Firstly, has a party (or that party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the Claim or Response have no reasonably prospect of success? If that is the case, the Tribunal must consider making a costs order against that party.

    2. Secondly, if that is the case, should the Tribunal exercise its discretion to award costs against that party? In this respect the Tribunal may, but is not obliged to, have regard to that party's ability to pay.

19. Mr Neaman in his submissions expressed this two stage test slightly differently and suggested that, at the second stage, the Respondent must show "something more" than the, for example, "unreasonableness" or "no reasonable prospect of success" shown at the first stage (which seemed to us like a submission that the test was more akin at the second stage to the requirement there be "something more" to reverse the burden of proof in the burden of proof provisions in relation to discrimination complaints). However, that is not the test. At the second stage, the Tribunal must simply consider whether to exercise its discretion to award costs and to take into account whatever is relevant in this respect. There is no specific requirement for the Respondent to show "something more".

20. We were also referred to various authorities, some of which are relevant, and we set those out here or at the convenient points in our conclusions.

21. In particular, in relation to means, pursuant to Rule 84, the Tribunal "may have regard to" the paying party's ability to pay. However, it is not required to do so (and see Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraph 26 in this respect). However, if it does not do so, it must explain why not. For example, if the evidence given by a Claimant as to means is contradictory or unreliable, it is not necessary to take means into account (see Shields Automotive Limited v Greig UK EAT/0024/10 at paragraph 46.)

22. Furthermore, there is no prohibition on making a costs award even if there is no ability to pay it. There is no requirement that the Tribunal make a firm finding as to maximum that it believes a party can pay (see Vaughan at paragraph 28).

23. The Tribunal is not limited to an assessment of the paying party's current means. It may have regard to the prospect that the Claimant's circumstances may well improve (see Arrowsmith v Nottingham Trent University [2012] ICR 159 at paragraphs 37-38.) If there is a realistic prospect that a Claimant might at some point in the future be able to afford to pay a substantial sum, it would be legitimate to make a costs order (see Vaughan at paragraph 28 and Arrowsmith at paragraphs 37-38). Therefore the issue of whether there is a reasonable prospect of the Claimant being able to return in due course to well paid employment may be significant in this respect.

Findings of Fact

24. We make the following findings of fact relevant to the determination of the costs applications. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the costs applications.

25. We reiterate all of the findings of fact made in our Judgment and Reasons in relation to the first claim and do not repeat those here.

26. As noted, the Claimant is pursuing two sets of proceedings in the Employment Tribunal beyond the first claim. In addition, on 28 March 2017, the Claimant served High Court proceedings on the Respondent, claiming not less than £900,000 per annum for the calendar years to 2010 to 2015, a total of over £5,000,000. The Respondent counter claimed against the Claimant for £56,052. During the proceedings before the Employment Tribunal so far, the Claimant has been represented by various different reputable firms of solicitors and various different Counsel. He has engaged other Counsel in relation to the High Court proceedings.

27. Throughout all of the proceedings, therefore, the Claimant has at all material times been legally represented.

28. The Claimant had in place legal expenses insurance which he relied on for expenses in relation to the first claim and the second claim, using the full amount of the indemnity limit of £100,000 in that policy.

29. At no stage, in relation to the first claim, did the Respondent make an application for or seek a preliminary hearing to determine whether or not any of the complaints under the first claim should be struck out as having no reasonable prospect of success or that a deposit order should be paid in relation to them as a condition to continuing those complaints. The Tribunal was never asked to and did not at any stage issue any warning to the Claimant in relation to merits of the complaints under the first claim.

30. On 24 March 2016, the Respondent's solicitors issued a "without prejudice save as to costs" letter in relation to the first claim. Many of the reasons which the Respondent set out in that letter as to why it considered that the Claimant's complaints under the first claim had no prospects of success were duly reflected in the findings of the Employment Tribunal when it dismissed those complaints. The letter warned the Claimant that the Respondent would seek to recover its costs for the Claimant bringing the first claim (which, at the time of the letter, were stated to be anticipated to be in excess of £200,000) unless the Claimant withdrew his claim by 1 April 2016. At paragraph 7 of the Respondent's without prejudice save as to costs letter, the Respondent states:-

> "7. It was only in the course of trying to negotiate an increased severance payout that your client raised these very serious allegations allegedly going back five years. With respect, that action speaks for itself and we have no doubt that an employment tribunal will agree."

31. No reply to this letter was sent to the Respondent.

32. However, the Claimant's solicitors were obliged to disclose the without prejudice save as to costs letter to the Claimant's legal insurers and did so. After taking advice from Solicitors and Counsel, the insurers continued the Claimant's legal insurance in respect of the first claim. The Claimant accepted in cross examination at this Tribunal that the view of the insurers as

to the merits of the claim was to a large extent dependent upon what the Claimant/his Solicitors/Counsel told them.

33. We refer to the findings of fact in our Judgment and Reasons on the first claim at paragraphs 161-162. In summary, we found that on 29 January 2015, the Claimant's manager Mr Taylor offered the Claimant a settlement package at that meeting and indicated that the amount he might get could be approved at £75,000 (which is roughly the maximum compensation payable in relation to an unfair dismissal complaint); and that, at that point, the Claimant raised the issue of disability discrimination and that this was the first occasion that the Claimant made any allegations that he had been discriminated against by reason of disability, the disability being the Acute Myeloid Leukaemia ("AML") which he suffered from in 2010. Whilst the Claimant denies that he only made the allegations of disability discrimination in the context of the settlement negotiations, we refer to our findings of fact made in our decision in relation to the Claimant's credibility in his evidence (see in particular paragraphs 27-33) and to the fact that the Claimant was more than capable of raising complaints when he wanted to do so and of putting his point across to the Respondent when he wanted to in a firm manner (see paragraph 255 of our Reasons) such that we could see no good reason why the Claimant could not have brought those complaints earlier. In addition, it is absolutely stark that nothing was said to the Respondent for 5 years but was only said in January 2015 at the point when a settlement was being discussed and where, to be able legitimately to claim in an Employment Tribunal more than the amount which the Respondent was prepared to offer the Claimant, the Claimant would need to bring claims other than unfair dismissal (for example discrimination claims or whistleblowing claims). In the light of all of these factors, we find as a fact on the balance of probabilities that the Claimant only raised these issues at this point to try and increase his bargaining position in relation to settlement negotiations and that he did not consider that there was genuine merit in the allegations.

34. The Claimant is a highly intelligent individual with a first class degree in economics from Cambridge University. During his career he has been earning substantial sums of money. During the period of his career at the Respondent, from 21 June 2006 to 6 March 2017, the Claimant earned substantial sums. His earnings information from his last 5 or so years at the Respondent is recorded in our findings of fact. In summary, over those years, he was earning remuneration in the hundreds of thousands of pounds.

35. The Claimant provided in his witness statement a lot of material relating to his financial means.

36. At present, the Claimant and his wife are in receipt of Jobseekers Allowance and Local Housing Allowance, which are means tested benefits. This is their only income. The Claimant's wife does not work, having childcare responsibilities for their young child. The Claimant's current liabilities are in total £235,791. This comprises loans from his parents of £108,000; school fees arrears of £27,602 (in relation to the Claimant's children by his earlier

marriage), an overdraft of £11,516, and a car loan of £22,472, with the remainder comprising five separate credit card debts.

37. The Claimant recently realised a property which he owned, but the roughly £400,000 proceeds were then dissipated on paying back debts and other expenses of the Claimant.

38. The Claimant is obliged to pay £50 per month maintenance in relation to his previous marriage.

39. The Claimant has accepted large loans from his parents in the past, some of which he has repaid, albeit £108,000 remains outstanding.

40. The Claimant's legal fees in relation to the various pieces of litigation currently ongoing are currently being paid by his parents who are retired. When asked in cross examination how this litigation would be funded going forwards, the Claimant said that this was currently under discussion. Since his dismissal by the Respondent in March 2017, the Claimant has contacted a couple of head-hunters. He also said he made three to four applications on LinkedIn (although we were not taken to details of these applications).

41. When the Claimant's name is Googled, information comes up about the litigation which he brought against the Respondent, the fact that he lost, and the fact that the Tribunal found that in a number of respects the Claimant either did not tell the truth or mislead the Tribunal.

Conclusions on the Issues

42. We make the following conclusions, applying the law to the facts found in relation to the two costs applications.

First Costs Application – Stage One

Unreasonable Conduct – Dishonesty

43. Ms Stone has submitted that the first claim was conducted unreasonably because the Tribunal found that "in a number of respects … the Claimant either did not tell the truth or mislead the Tribunal" (paragraph 28 of our decision in the first claim) and that he "persistently failed to answer the questions put to him and was on lots of occasions evasive". She cross refers to the various examples we gave in this respect at paragraphs 27-33 of our decision.

44. In addition, she cites our finding at paragraph 32 of our findings that the Claimant "behaved cynically in relation to his claim by sitting on serious allegations (whether or not he believed them to be true) and choosing to

deploy them tactically when he considered it in his interest to do so many years later".

45. Firstly, Mr Neaman spent a considerable part of his submissions, both in relation to this heading and others, trying to put a gloss on the findings which we had made and to interpret them in a way which was less critical of the Claimant. However, it is not open to him to go behind our decision or to try and put a gloss on it. What we rely on here are the findings of fact that we actually made in our decision.

46. The fact that Mr Neaman maintains now that the Claimant himself may not agree with these findings, but did not appeal them or ask for a reconsideration makes no difference to this; the fact remains that our decision was not appealed and no application for reconsideration was made in relation to it and the findings are what they are.

47. Ms Stone referred us the case of Nicolson Highlandwear Ltd v Nicolson [2010] IRLR 859 EAT at paragraph 21 where it was held that a "Tribunal can be expected to conclude that there has been unreasonableness on the part of a party who was shown to have been dishonest in relation to his/her claim and then to exercise its discretion as to make an award of expenses in favour of the other party". As she submitted, and this is not in dispute, a lie in itself is not necessarily sufficient to find an order for costs, each case is fact sensitive and the Tribunal must consider the context, including the nature, gravity and effect of the lie (Arrowsmith at paragraph 33). She also referred us to Daleside Nursing Home v Matthew UK EAT/0519/08/RN where the EAT held that where there was a "clear cut finding" that a central allegation was a lie, it was perverse for the Tribunal not to have found unreasonableness (at paragraph 20) and that was "plainly a case where some order for costs ought to have been made".

48. Many of these cases relate to the second stage of the test in relation to costs.

49. However, concentrating for the moment on the first stage, we consider that the fact that the Claimant either did not tell the truth or mislead the Tribunal and sat on the serious allegations both amount to examples of unreasonable conduct on his part. Mr Neaman suggested that the examples which we gave were just exaggeration on the Claimant's part. However, that does not tie in with our findings; we found that he did not tell the truth or mislead the Tribunal. In those circumstances, we consider that that behaviour in itself was clearly unreasonable.

50. In terms of whether or not we should at Stage Two go on to exercise our discretion toward costs in this respect, one issue, which we deal with at this point, is as to whether or not the lies were indeed deliberate, serious or central to the case. We set out the examples that we did at paragraphs 27-33 of our decision as part of an exercise in judging the respect of credibility

of the Claimant and Mr Taylor and from that, we decided that, in other situations where it was simply one person's word against the other, we would prefer the evidence of Mr Taylor to that of the Claimant because of these examples of unreliable evidence. We did not find that, therefore, everything which the Claimant said and every allegation which he made was a lie. To that extent, it cannot be said that the whole claim was a lie as a result of the various examples which we gave and that there is therefore a case for all costs in defending the claim being part of a cost award.

51. However, two of the examples we gave related, both deliberately, seriously and centrally to various of the allegations (specifically the untruth about his weight which the Claimant told Professor Marks and the suggestion in the ET1 that the Claimant was "forced to miss his holiday" in Mexico when in fact he did not).

52. This included, in the case of the allegation regarding weight, the reasonable adjustments complaints (as that evidence went directly to the issue of whether the Claimant was placed at a substantial disadvantage) and the discrimination arising from disability complaints, as the Claimant's fatigue was relied upon as being a consequence of his disability). The issue regarding the holiday was central to most of the reasonable adjustment complaints and one of the individual complaints of direct discrimination, discrimination arising from disability and harassment.

53. Therefore, to the extent that costs were incurred in defending these particular complaints, we would, subject to the other factors that we consider in relation to the second stage later on, be minded to make an award of costs in relation to the costs of defending those specific allegations. We would not have considered that other costs incurred in defending the claim flowed from these examples of unreasonableness and would not on this particular basis have made an order in respect of the costs of defending those other elements of the claim.

No Reasonable Prospect of Success

54. Ms Stone submitted that the complaints had no reasonable prospect of success because the vast majority of them were out of time. It is true, as we found, that the vast majority of complaints were out of time. However, we also found that there could be no continuing act such as to bring such complaints within time by linking them to a successful in time complaint because all of the complaints, including the in time complaints, failed. However, looking at the time limits argument alone, we accept Mr Neaman's argument that, had any of these complaints succeeded on their merits, there was at least an argument that there was a continuous course of conduct such as to bring earlier successful complaints in time because the alleged perpetrators were generally similar throughout (in other words Mr Taylor and Mr Black). The fact that this argument dropped away because we found that none of the complaints succeeded on their merits does not adjust this. We consider that it could not be said that the vast majority of the complaints had

no reasonable prospect of success because they were prima facie out of time.

55. Turning to the substantive merits of the various complaints, however, we note first of all that, as Ms Stone submits, many of the large number of complaints in the long list of issues failed on multiple grounds. Firstly, in many of them, even the treatment which was said to be unfavourable/less favourable/harassment was not even established. Furthermore, in relation to all of the complaints, notwithstanding Mr Massarella's ingenious arguments trying to convince us that the burden of proof should shift, we found that there was nothing which would shift the burden of proof in relation to these discrimination complaints.

56. Mr Neaman has suggested that there might have been things which might make the burden of proof shift which were not necessarily put at the time; however, that is not the point; in our findings of fact in this respect (and we refer in particular to paragraphs 190 – 200) we found that there was nothing to shift that burden. This was not a case where there was a chance that the burden might have been shifted; given that the Claimant is an intelligent individual with professional representation, it was apparent that there was nothing beyond assertion that could realistically be put forward as evidence as to why the burden of proof should shift. Furthermore, this was not something which was not apparent until the evidence was heard; given the state of knowledge of the Claimant, this would have been apparent from the start. We also refer to paragraphs 171 – 174 of our findings of fact in the decision in this respect.

57. Mr Neaman has drawn us to much of the case law about the difficulty of proving discrimination/unconscious bias and the difficulties that arise from this which, he submits, should make it difficult to find that, in discrimination cases, there was no reasonable prospect of success in showing that the allegations of detrimental treatment were for a discriminatory reason. We are very conscious of the case law in this respect. However, in the context of this case, with an intelligent Claimant and good legal representation, we find that the Claimant should have been well aware from the start that there was no reasonable prospect of success in showing that any of the alleged treatment was for a discriminatory reason; or of us finding that any of the alleged treatment was for a discriminatory reason; or of the Respondent failing to show that all of the treatment alleged (to the extent that it even took place) was for an entirely non-discriminatory reason. In addition, we refer to our earlier finding of fact that the Claimant only brought up allegations of discrimination at the point when he was trying to negotiate a settlement agreement some 5 years after the first of these alleged acts is said to have taken place; in the light of that we similarly find that he knew or should have known from the start that there was no reasonable prospect of success in showing that any of the alleged treatment was for a discriminatory reason; or of us finding that any of the alleged treatment was for a discriminatory reason; or of the Respondent failing to show that all of the treatment alleged

(to the extent that it even took place) was for an entirely non-discriminatory reason.

58. We therefore find that, on their merits, all of the complaints in the first claim had no reasonable prospect of success from the start: there was no reasonable prospect of success in showing that any of the alleged treatment was for a discriminatory reason; or of us finding that any of the alleged treatment was for a discriminatory reason; or of the Respondent failing to show that all of the treatment alleged (to the extent that it even took place) was for an entirely non-discriminatory reason. We therefore will need to consider whether to exercise our discretion as to whether to award costs for this reason and do so below.

59. We deal with two issues relevant to Stage Two which have been raised in relation to the "no reasonable prospect" basis of this application at this point.

60. Firstly, it has been submitted that the fact that the Respondent did not at any stage seek a strike out order or a deposit order on the basis of the prospects of the claim should be a relevant consideration pointing against us making a costs order in this respect. However, we refer again to the case of Vaughan (in particular paragraphs 14, 17, 18 and 19) where it was held that the fact that the Respondent did not apply for a strike out or deposit order should not be taken against the Respondent. Furthermore, this is a case, unlike Vaughan, where, although the Respondent did not seek an order for strike out or deposit, it did set out clearly its views on the lack of merits; this was done both in the grounds of resistance at paragraph 109 and in the costs warning letter of March 2016, which was ignored. As Underhill J noted in Vaughan at paragraph 19, there may be good reasons why a party may prefer not to seek a deposit order (including the difficulty of ascertaining whether the complaints have no reasonable prospect of success before evidence is heard as opposed to after the evidence is heard (which is what we are considering now)). In any case, the Claimant was, unlike in Vaughan, clearly put on notice by the grounds of resistance and costs warning letter of the Respondent's views on the merits. We do not therefore consider the absence of a strike out/deposit application a relevant factor as to whether we should exercise our discretion to award costs; by contrast, we do consider the fact that a costs warning letter, which set out reasons why the complaints had no prospects which are similar to the reasons we found that the complaints failed in our decision, is a relevant factor in relation to the second stage of the test, which points towards us making an award of costs.

61. Secondly, Mr Neaman has submitted that the fact that the Claimant's insurer continued to keep up its cover, even after the costs warning letter was sent to it, is evidence that the insurer was satisfied that the claim had a better than 51% chance of success. Whether the insurer was so satisfied does not impact upon the assessment of whether those complaints did indeed have any reasonable prospect of success (an exercise carried out by the Tribunal after having heard several days of evidence). Furthermore, as noted in our findings of fact, the insurer could only go on what it was told by the Claimant

and his representatives. We do not therefore consider that the fact that the insurer continued to maintain its cover is a relevant factor as to whether or not we should award costs at Stage Two under this heading.

Unreasonable Conduct – Bringing the Proceedings and Persisting in them

62. Ms Stone has submitted that, in view of the lack of prospects of the complaints and the fact that the Claimant knew, or should have known of that lack of prospects (by reason of, inter alia, his knowledge of the true events and his legal representation), the Claimant acted unreasonably in commencing and/or pursuing the first claim. We accept that submission and, in view of our findings in relation to the merits set out above, we similarly accept that it was unreasonable conduct on the part of the Claimant to bring the proceedings under the first claim in the first place. We are therefore obliged to consider the exercise of our discretion in relation to costs under this heading as well.

63. In addition, we would add that our finding of fact that the Claimant knew or ought to have known that the complaints had no prospect from the start is, in addition, relevant to the above findings.

64. It is not, therefore, strictly necessary to consider Ms Stone's alternative submission under this heading, but we do so for completeness. We find that, unsurprisingly and following our finding above, it was unreasonable for the Claimant to have persisted in complaints following receipt of the grounds of resistance and certainly following the costs warning letter. As noted, in that letter, the Respondent's solicitors explained in terms why the claims had no prospect of success and there is considerable overlap between the reasons set out in that letter and the reasons for our decision to dismiss all of the complaints. We accept it was unreasonable for the Claimant to have failed to engage properly with the points raised in that letter; the Claimant in fact never replied to it.

65. In addition, in terms of whether to exercise our discretion to award costs at Stage Two in relation to this heading, Ms Stone notes that the Claimant has been represented by two different well known firms of solicitors and by the time of the hearing no less than three experienced employment barristers (that he has since instructed two further barristers in the Tribunal as well as a Silk in the High Court) and that the claims failed for reasons which would or should have been apparent to the Claimant from the outset. We accept that these factors are relevant at Stage Two and would point towards us exercising our discretion to award costs (subject to the other factors referred to below).

Procedural Unreasonableness

66. Ms Stone submitted that the complaints brought by the Claimant were needlessly complicated and included many complaints which were hopeless.

As we have found already, none of the complaints had reasonable prospects of success and this particular ground of the application in some respects repeats the reasonable prospects ground referred to earlier. However, one point which strikes us in relation to the submission that the complaints were "needlessly complicated" is that there appears to us to have been no thought or analysis on the part of the Claimant and his representatives of which of these complaints, if any, ought to be brought as, for example, direct discrimination, discrimination arising from disability, harassment and so forth but large numbers of allegations were simply presented as being examples of all three (which resulted in the eight page list of issues before the Tribunal and required additional time to deal with). We consider that this too was unreasonable.

67. Ms Stone has also submitted that the Claimant's Counsel, Mr Massarella, withdrew some of the allegations from the long agreed list of issues on the morning of the second day of the hearing and then later on in the hearing and then during his submissions. Ms Stone's submission is not that withdrawing allegations is inherently unreasonable; rather that there was no reason why the allegations should ever have been made because they were unsustainable and that they could have been withdrawn far earlier without putting the Respondent to the cost and expense of disclosing documents and preparing witness evidence in relation to them. One example is the withdrawal of the complaint in relation to the Claimant suffering detrimental treatment by being subjected to compliance proceedings in relation to Anite, when the Claimant knew full well that he never had been subjected to compliance proceedings in relation to Anite. For these reasons we consider that these late withdrawals were also unreasonable.

68. Finally, Ms Stone submitted that it was unreasonable on the first day of the hearing for Mr Massarella to seek to expand the allegations at that late stage. One suspects that his attempt to do so was because of his recognition of the inherent weakness of the allegations that he sought to expand (in relation to the Anite and Cap Gemini compliance issues). In this respect, whilst it would have been far preferable if this application had been made at a much earlier stage, we do not consider that it crosses the bounds of unreasonableness to have been made on the first day of the hearing. In any event, the Tribunal turned down the application and relatively little Tribunal time was wasted in dealing with it.

69. In relation to the examples of "procedural unreasonableness" which we have found above, in terms of Stage Two of the test for costs, any costs which might be recovered as a result of these examples of unreasonableness in relation to the withdrawal complaints should be limited to those incurred in connection with defending those allegations.

<u>Second Costs Application – Stage One</u>

70. The basis of the Respondent's application in relation to the withdrawn parts of the second claim was that they had no reasonable prospect of success

and that the Claimant acted unreasonably in bringing/pursuing them and should have realised that they were hopeless from the outset, upon service of the grounds of resistance and/or the preliminary hearing and/or the Respondent's service of its summary grounds for the strike out application.

71. In this respect, it is necessary to set out the chronology of events in relation to the second claim. It was presented on 21 September 2016 and in it the Claimant alleged three distinct acts of victimisation against him for having brought the first claim (which is admitted in the response to the second claim by the Respondent to have been a protected act for the purposes of these victimisation complaints).

72. The Respondent served an ET3 and Grounds of Resistance on 17 February 2016 which stated that it considered that the claim was hopeless and gave clear reasons for this. The claim was not withdrawn.

73. In an exchange prior to a case management preliminary hearing in relation to the second claim of 10 March 2017, the Respondent sought a strike out (or alternatively a deposit order) in relation to two of the three complaints of victimisation and a hearing was listed to consider the application to be held on 6 June 2017. The two complaints were not withdrawn at this stage.

74. The Respondent served a detailed application of summary grounds in support of its strike out application on 30 March 2017, again setting out why it considered that the two complaints had no reasonable prospect of success.

75. The Claimant withdrew these complaints on 21 April 2017, roughly 6 weeks before the hearing.

76. The two allegations that were withdrawn were in relation to the Claimant's bonus award for the financial year 2015 and a failure to deal with the Claimant's request for his revenue share entitlement.

77. We have had the opportunity to read the various documents referred to in the chronology above. However, unlike in relation to the first claim, we have not heard full evidence on these allegations. In other words, what we are being asked to do is to make a finding that these complaints had no reasonable prospect of success as if it were at a preliminary hearing stage, before full evidence was heard.

78. We consider that, looking at the complaints and the documents responding to them, these two complaints appear on a very peripheral view to be weak complaints. We also in this respect take into account the findings that we made in relation to the first claim where complaints were brought by the Claimant which were also weak on the surface and, as we have found, ultimately had no reasonable prospect of success. However, without the benefit of hearing evidence, we do not feel that we are in a position, in relation to the two allegations of the second claim, to make a finding that they

had no reasonable prospect of success. Perhaps if the issue were whether a deposit order should have been made, we would be prepared to find that they had little reasonable prospect of success. However, for the purposes of this costs application we do not find that they had no reasonable prospect of success.

79. Therefore, in terms of their prospects, our obligation to consider whether to exercise our discretion in relation to costs is not triggered.

80. Similarly, for the same reasons, we cannot say that it was unreasonable for the Claimant to have brought the complaints in the second claim.

81. As to the alleged late withdrawal, this was done some 6 weeks before the hearing. Whilst the Claimant could have withdrawn the complaints earlier (at the ET3 stage or at the case management preliminary hearing), it did so 3 weeks following the receipt of the submissions for the strike out preliminary hearing and, given that there was still 6 weeks to go before that preliminary hearing, we do not consider the decision to do so at that stage to have been one which was unreasonable.

82. Therefore, our obligation to consider our discretion in relation to costs is not triggered in this respect either and the costs application in relation to the second claim is therefore refused.

83. Whilst, in the light of our finding above, it is not necessary to go on and consider whether or not the costs sought in relation to the second costs application were reasonable, we consider it worthwhile making certain observations in this respect. Firstly, the one page schedule of costs which we were provided with was inadequate for us properly to be able to carry out the summary assessment which (in relation to applications for costs of up to £20,000) we are expected to do as part of an exercise in ascertaining what costs it is just for us to award. In particular, we were not provided with details of the hourly rates of the relevant fee earners and which fee earners did the work set out in that schedule. This was mitigated to a large extent when Ms Stone took instructions and was able to inform us of the rates but, apart from a general assertion that it was she herself and the middle ranking associate at the instructing solicitors (as opposed to the partner and the trainee) who did most of the work, we were not able to ascertain this. More importantly, we were only provided with broad general headings as to what work was done rather than a proper breakdown of how the roughly £25,000 was incurred. That would have made it very difficulty for us to assess whether the costs were reasonably incurred. For example, around £6,000 was listed being for “reviewing ET1”. The attachment to the ET1 is only a three page document. Without further detail, that seems to us to be a disproportionate amount in relation to a review of a three page document (and we note that in fact this sum represents only two thirds of the amount spent reviewing the ET1 as the Respondent only sought two thirds of that item on the basis that they were only seeking costs in relation to two of the three allegations of victimisation brought under the second claim).

84. We should make clear that we do not accept Mr Neaman's suggestion that, in the light of the inadequacy of the information provided, we should not be in a position (were our obligation to consider exercising our discretion triggered) to make any costs award at all; it would still be possible to carry out a summary assessment using our own knowledge of what it is likely reasonably to cost to carry out that sort of work; however, the absence of information would make that more difficult and would be likely to result in a figure which was to the Respondent's disadvantage on the basis that they had not demonstrated that the costs incurred were justified.

First Costs Application – Stage Two

85. We have already dealt with some of the issues relevant (or not relevant) to the consideration of exercising our discretion under Stage Two in relation to the costs application from the first claim in our conclusions above. Those elements which we considered relevant are all elements which point towards exercising our discretion.

86. What remains in terms of Stage Two is the issue of the Claimant's means.

87. As we have found, the Claimant has debts of around £235,000. At the moment, he is not working. Therefore, on the face of it, he appears to be in a position where he may not have the ability to pay.

88. However, we note that the Claimant is continuing to bring Employment Tribunal and High Court litigation against the Respondent. He continues to instruct reputable firms of solicitors and experienced barristers in the Employment Tribunal and has instructed a Silk in the High Court proceedings. This is clearly involving a significant amount of expenditure (particularly as he no longer has legal expenses insurance). We have been told that his parents are funding the litigation at the moment (although no decision has been taken as to whether they will continue to fund it in the future). However, we have also seen large sums of money (in terms of six figures) transferring between the Claimant and his father in the past and, whether it is from his parents or otherwise, the Claimant seems to have a stream of income which enables him to pursue expensive litigation. For these reasons, notwithstanding the documents we have seen in relation to his personal actual prospects, we do not take his means into account, as we are entitled to do, in terms of considering whether or not to exercise our discretion in relation to costs; he apparently has access to funds for bringing litigation, whether it is through borrowing this money from his parents or otherwise. In any event, it seems to us inconsistent for him to be able to fund future litigation and yet plead poverty in order to defeat any costs award made in relation to previous litigation brought by him.

89. Furthermore, although the Claimant specifically stated in his witness statement before this hearing that he and his wife "collectively have no capital in the form of property, cash balances or any other financial assets",

we are, particularly in the light of the huge sums of money which the Claimant has earned over the years and in the light of the findings which we have made in our previous decision in relation to his credibility and tendency not to tell the truth or mislead the Tribunal, we are not prepared to accept this evidence. In the light of these concerns that we have about his credibility, and in line with the principles in Greig, we do not, for this reason as well, have regard to the Claimant's means.

90. Therefore, we do not take into account the Claimant's means in relation to this costs application at all.

91. If, however, we had decided to take into account the Claimant's means, we would also have noted the fact that the Claimant is currently claiming £5,000,000 in the High Court. Whilst the Respondent disputes the merits of this complaint, that is a potential source of income for the Claimant if he is indeed successful in that litigation (and we make no finding as to the chances of success given that we are not in any way involved with those High Court proceedings). Furthermore, the Claimant has earned huge sums of money with the Respondent. Although he is not earning at the moment, and he appears to have made only minimal efforts to try and secure further employment, the Claimant is a highly intelligent individual, with a first class degree in economics from Cambridge University, and a track record. Notwithstanding the fact that his efforts to find further employment may be hampered by the information which comes up when one Google searches him in relation to the Employment Tribunal litigation, we consider that there is every chance that the Claimant will be able to obtain employment in the medium term under which he earns significant remuneration. Coupled with the submission by Ms Stone that the Respondent is not intending to bankrupt the Claimant if a large award of costs is made against him such that a schedule for payment of any such costs could be arranged which would enable him to pay them out of future earnings, we consider that, in accordance with the principles in Vaughan, there is a reasonable prospect of the Claimant being able at some point in future to afford to pay a substantial sum of costs, in the region of the £300,000 plus sought by the Respondent (subject to detailed assessment). Therefore, for these reasons, even if we had taken the Claimant's ability to pay into account, we would not have considered that it should prevent us from making the costs award sought.

92. In terms of the amount of that award, we have found at the first stage that the complaints under the first claim had no reasonable prospects of success from the beginning and were unreasonably brought from the beginning. Therefore, all costs incurred by the Respondent in defending these proceedings flow from the fact that the proceedings had no reasonable prospect of success and that they were unreasonably brought.

93. For these reasons, we therefore make an award of costs, payable by the Claimant to the Respondent, in relation to the first claim in the full amount sought, subject to a detailed assessment.

94. In terms of that detailed assessment, Ms Stone submitted that the assessment should be carried out by the County Court rather than by an Employment Judge on the basis that the Part 36 procedure is available in the County Court. We do not, however, consider this to be a good reason why the County Court should be preferred in this respect. It is possible for offers of a similar nature to Part 36 offers to be made between the parties in Employment Tribunal litigation as well.

95. Furthermore, whilst only certain Employment Judges are specifically trained to deal with detailed assessments, such Judges are available at this Tribunal, and we consider that not only is it the Tribunal's normal practice for any costs award which requires a detailed assessment made by an Employment Tribunal Judge who has not been so trained to be put before an Employment Tribunal Judge who has been so trained but that practically, it makes more sense for the matter to remain at the same Tribunal office where all the papers in relation to the case are kept in any case.

96. Therefore, the matter will be set down for a detailed assessment before an Employment Judge.

97. Further orders will be made in due course in relation to the provision of a schedule of costs.

Employment Judge Baty
7 September 2017