THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Q Hawkins**

Respondent: **Cumbria, Northumberland, Tyne & Wear Foundation Trust**

Heard at: **Newcastle Hearing Centre (by CVP)** **On: 28 January 2021**

Before: **Employment Judge Morris**

Members: **Mr G Baines**
Ms R Bell

Representation:
Claimant: **in person**
Respondent: **Ms R Kight of Counsel**

JUDGMENT ON COSTS

The unanimous judgment of the Employment Tribunal is that the claimant shall pay to the respondent the sum of £5,536; that sum being subject to the point of clarification contained in the final paragraph of the Reasons below.

REASONS

Representation and evidence

1. The claimant appeared in person and gave evidence. The respondent was represented by Ms R Kight of Counsel, who appeared in the substantive hearing of the claimant's claim.

2. The hearing was conducted primarily by way of argument and submissions by or on behalf of the parties, the claimant giving evidence in addition. The Tribunal also had before it an agreed bundle of documents comprising some 83 pages. The numbers shown in parenthesis in these Reasons refer first page number of a document in that bundle.

Context

3. Towards the conclusion of the substantive hearing of the claimant's claim held on 28 January 2021 he stated that he had decided to withdraw his claim. In those circumstances, Ms Kight stated that she was instructed to seek an order for costs on behalf on the respondent. Hence today's hearing.

Evidence

4. As indicated above, the only oral evidence before the Tribunal was from the claimant, which he gave to address the fact that although he had provided some relevant documents, the written statement that he had produced did not deal with the issue of his ability to pay any award of costs that might be made. In giving that evidence the claimant stated that he was currently earning some £1,400 per month in employment that was not permanent but could last a year or more. Against the maximum award of costs sought by the respondent of £16,037.40, the claimant stated that he could pay about half that amount now and the remainder in a year.

Submissions

5. After that evidence had been concluded Ms Kight and the claimant made submissions, each by reference to detailed written arguments. It is not necessary to set out the submissions in detail here because they are a matter of record and the salient points will be obvious from our conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, together with the case law referred to, and the parties can be assured that they were all taken into account in coming to our decision. That said, the Tribunal records the key aspects of the submissions below.

6. Ms Kight made submissions on behalf of the respondent (in respect of which she relied upon a comprehensive skeleton argument that included references to relevant statutory and case law, which the Tribunal took into account) including as follows:

    6.1 The claimant's conduct of the proceedings had been unreasonable, abusive and disruptive, and fell squarely within the examples provided in the Employment Tribunals General Case Management Presidential Guidance including as follows:

        (i) The claimant's claim was not based upon truth. It was not true that he was told by the respondent's witnesses, after learning of his fear of heights, that he was going to be interviewed for a different position to the one for which he had been invited to attend an interview. This is a fundamental element of the claimant's claim, without which (for the reasons set out in the skeleton argument) it had no hope of succeeding.

        (ii) The claimant's conduct in pursuing his claim after receiving the three warning letters dated 20 August, 14 October and 17

November 2020 was unreasonable and was suggestive of the claimant treating the proceedings frivolously without any care for the impact on others and causing the respondent disruption and cost.

(iii) This is further evidenced by the claimant's claims history that he has set out in his witness statement in which he describes six previous claims, which similarly appeared to be without merit, and he has brought at least two other claims one of which he withdrew on 28 July 2020 and the other was dismissed following a preliminary hearing on 10 February 2020.

(iv) The claimant's conduct during the preparation of the case was similarly unreasonable and disruptive as referred to in the warning letters. He disclosed and sought to add irrelevant documents to the hearing bundle and failed to comply with the case management orders to provide a schedule of loss.

(v) The claimant's conduct during the hearing was both abusive and highly disruptive: without foundation he claimed that the respondent had or may have tampered with documentation; accused counsel of being "cavalier with the truth"; despite the Tribunal's best efforts to assist him in steering an appropriate path he refused to accept any guidance; ultimately he withdrew his claim at the last possible juncture after the respondent's witnesses had been caused stress, wasting the time of the Tribunal, the respondent and its representatives, and depriving the parties of a judgment.

6.2 The claimant's claim had no reasonable prospects of success (the key question being not whether a party thought he or she was in the right but whether he or she had reasonable grounds for doing so) for the following reasons:

(i) The core factual basis of the claimant's claim was based on an untrue assertion.

(ii) The claimant decided not to properly cross-examine the respondent's witnesses and challenge their evidence, which suggests that he knew his claim had no reasonable prospect of success.

(iii) The legal basis upon which he pursued his claims for indirect discrimination and failure to make reasonable adjustments was flawed.

(iv) The claimant has a long history of pursuing what appeared to be misconceived claims in the Employment Tribunal.

(v) The claimant withdrew his claim after submissions to avoid receiving judgment that he believed would not be in his favour.

6.3 Addressing points arising from the written statement that the claimant had produced for the purposes of this hearing:

(i) He had implied that because no deposit order had been made at an earlier preliminary hearing it cannot be said that his claim had no prospect of success but no application had been made for a deposit order and, therefore, the Employment Judge had no basis to consider such an order. That did not mean that his claim had merit.

(ii) The costs warning letter the respondent had sent to the claimant dated 20 August 2020 (7) clearly set out the respondent's view, the hurdles that the claimant would need to overcome and why he would not succeed in doing so, and that he should take legal advice.

(iii) The claimant did not accept that the burden of proof was on him to prove his case. Saying that something is a fact does not mean that it is. The claimant had failed to put core facts to the respondent's witnesses despite the Judge telling him what he needed to do and he cannot now re-argue his claim. The claimant continued to behave unreasonably and had maintained, again today, that the respondent's witnesses had lied and tampered with documents, which had not been put to the witnesses.

(iv) The claimant had said that it was unreasonable for the respondent to defend itself by instructing lawyers, which was entirely reasonable, and contrary to the claimant's assertions significant efforts had been made to limit the costs by using appropriate levels of lawyers and a junior barrister. The claimant's disruptive conduct had caused additional expense such as the irrelevant disclosure, he had chosen not comply with orders and had not withdrawn his claim despite the flaws having been explained three times. He says that the respondent was funded by the taxpayers, which is all the more reason for it to defend the claim and makes it incumbent on it to recover costs when possible. For the claimant to say that his withdrawal at the end of the hearing was helpful on the basis that "every little helps" was entirely facetious and showed a lack of respect for the Tribunal. All the evidence had been heard and submissions made, a full day at the Tribunal had been wasted and the respondent had incurred all its costs.

(v) The claimant's references to the golden rule in British law, a grotesque outcome and the respondent not profiting from its own wrongdoing are misplaced. The costs rules have been

specifically drafted not to deter a reasonable claim. This case meets both limbs (a) and (b) of Rule 76(1).

(vi) The claimant says that he has the means to meet the entirety of the respondent's costs and does not suggest that he is unable to do so. Even if it is not appropriate for the total sum to be awarded the Tribunal is invited to order a reasonable proportion to cover an NHS Trust having to defend a spurious claim.

7. The claimant made submissions including as follows:

7.1 He had no liability to pay any costs to the respondent, which is a taxpayer-funded public sector corporation.

7.2 The golden rule of British law is that no judicial ruling should create an absurd or grotesque outcome and a ruling that deterred people from bringing tribunal claims would be an absurd outcome. As such, no tribunal should ever order a claimant to pay costs except where it is absolutely clear that the claim should never have been brought in the first place or where it should have been discontinued at some stage: the bar should be set high. If every claimant had to pay costs on the basis that the respondent disputed his or her version of events, very few people would ever bring a claim to an employment tribunal. This Tribunal should not produce a ruling that would undermine employment law.

7.3 It is normal to award costs in situations where the claim is deemed to be misconceived, vexatious or vindictive. Ms Kight had said that he had been vexatious because he had not asked enough questions at the substantive hearing but he was not aware of any legal precedent that he had to ask a certain number of questions. By reference to the decision in Salomon v A Salomon & Co Ltd, how many questions would be enough to make it not vexatious?

7.4 He alone knew the facts because he was there on the 12 June 2020 and had the telephone conversation with Ms Handyside that day. He had known as he left the building following his interview that he would be going to the Tribunal and had kept full notes, including of the telephone conversation with Ms Handyside.

7.5 Fundamentally, in respect of whenever the respondent said that he had acted unreasonably he invited the Tribunal to ask two questions: what should he have done differently and at what point?

7.6 His claim proceeded on three foundations:

(i) He has altophobia, which is a point of fact. The judge at the preliminary hearing did not appear to see this point as being unworthy of consideration. The claimant had not hidden any evidence and had produced an impact statement. In contrast, the respondent had not produced any evidence to prove that he

was not altophobic and had excluded certain documents from the bundle regarding the issue of honesty.

(ii) Altophobia is a protected characteristic, which is a point of law. This is borne out by a government document about disability that discussed altophobia. If the respondent had produced any law that it was not a protected characteristic, that would have been the key abandoning his claim.

(iii) The behaviour of the respondent on 12 June 2020 was unlawful, primarily due to the respondent's employees interviewing him for a position other than that for which he had been invited for interview thus putting him at a disadvantage. Additionally, as Ms Handyside had advised him that he was rated higher than the other interviewees, he might have been the successful applicant if he had performed only marginally better in the interview. The respondent had chosen to believe Ms Handyside's version over his with reliance being placed upon documents that were very easy to tamper with and even to forge. The respondent had no evidence or reason to doubt his honesty. The differences of evidence between him and the respondent's witnesses about events on 12 June cannot be down to mis-remembering; he put it down to them lying. The respondent clearly has a questionable attitude to the truth. If the respondent's version had been the same as his he would have had a strong case; when he found out that the respondent has a different version should he have withdrawn?

7.7 It would be inappropriate for the Tribunal to make a costs order unless it can be absolutely certain that the respondent's version of events is correct, his is incorrect and he had been dishonest.

7.8 The respondent did not need to be represented but had engaged the services of a law firm and made little or no attempt to keep legal costs within any reasonable constraints: for example, it had chosen to produce two witnesses and two observers had been present. He could think of only two employment tribunal cases where the presence of a lawyer had made any real difference to the outcome. Referring again to the golden rule, it would be absurd and grotesque for the Tribunal to reward or in any way condone the flagrant misuse of public money, which is another reason why the respondent must bear its own legal costs. By contrast, the claimant had taken steps to keep the respondent's costs to a minimum and had withdrawn his claim when he decided that his "chances of success were probably below fifty percent".

7.9 Certain of the case law relied upon by Ms Kight was not relevant as he had not been dishonest

7.10 The Tribunal should not make a costs award lightly as to find in favour of the respondent would create a precedent with repercussions for many others.

The law

8. So far as is relevant to these proceedings, relevant provisions of the Employment Tribunals Rules of Procedure 2013 ("the Rules") provide as follows:

> **When a costs order or a preparation time order may or shall be made**
>
> 76(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.
>
> **Ability to pay**
>
> 84 In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

Consideration and decision applying the facts and the law to determine the issues

9. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law, and also bringing into account Guidance Note 7 of the Employment Tribunals (England and Wales) Presidential Guidance – General Case Management (2018). In the hope that its judgment is made as clear as is appropriate in a case involving a litigant in person, the Tribunal has divided its consideration into the several parts set out below dealing first with findings of fact, then with preliminary matters of general application before (in light of those earlier parts) applying Rule 76(1) so as to make its decision.

Findings of fact

10. The Tribunal first makes a preliminary point that the context for this application is somewhat unusual in that, given the claimant's withdrawal of his claim at the conclusion of the substantive hearing, although it had heard all the evidence and the principal submissions of the parties, it did not make any findings of fact. The function of the Tribunal now is limited to a consideration of the respondent's application for a costs order and, therefore, the Tribunal considers it neither necessary nor appropriate to make such findings of fact in relation to the entirety

of the claimant's claim. Thus, for example, the Tribunal makes no finding as to whether the claimant was "a disabled person" as that term is defined in section 6 of the Equality Act 2010 ("the Act").

11. It is, however, both necessary and appropriate that the Tribunal makes findings in relation to certain of the key points relied upon by the respondent in the costs warning letters sent to the claimant on 20 August, 14 October and 17 December 2020: respectively (7), (13) and (19). The Tribunal considers the points are relevant to the costs application as they primarily relate to the issue of whether the claimant was, as he has stated, interviewed "for a position other than the one I had been invited to interview for", which assertion goes to the heart of the claimant claim. In making the findings below, the Tribunal has considered the submissions made at this hearing and the submissions and evidence before the Tribunal at the substantive hearing, both written and oral. In respect of the evidence it makes the point to which it returns below that the evidence of the respondent's witnesses was not challenged to any material extent by the claimant despite the Tribunal encouraging him to do. The Tribunal is satisfied as to the following matters:

    11.1 In applying for the post in question, the claimant had not informed the respondent that he suffered from altophobia or suggested that as a result of that condition he was a disabled person or required any adjustments to be made; this despite the fact that in the invitation to interview it was specifically stated as follows, "If you would like to discuss these interview arrangements or have any specific requirements that we should know about for the interview, please contact us as soon as possible." On the claimant attending for interview and making those who were about to interview him aware of his having altophobia, they took such steps as it was reasonable to take to avoid the claimant thereby being disadvantaged by interviewing him in a room on the ground floor of the building, to which the claimant agreed.

    11.2 The post for which the claimant applied with the respondent was as a band 2 Administration Assistant. Within the respondent such posts have a generic job description, which applies regardless of at which of the respondent's offices such Administration Assistant might be located.

    11.3 That notwithstanding, the location of the post for which the claimant applied and was interviewed, and therefore the location at which he would have been based had he been appointed, was at the Oxford Centre, Longbenton, Newcastle upon Tyne.

    11.4 The claimant was invited to interview by email dated 19 May 2020. In answering questions during cross examination the claimant stated that, in addition, he was telephoned by someone within the respondent (whose name he could not remember) who told him that the interview was in respect of a clerical role at the Oxford Centre. The Tribunal does not accept that evidence of the claimant. He had made no reference to such a telephone conversation in his witness statement; neither, is there any

reference to such conversation in the Communications Log that the respondent created in respect of his application.

11.5 Those interviewing the claimant on 12 June 2020 made clear to the claimant that the vacant post for which he was being interviewed was based at the Oxford Centre where he would therefore work, if successful; albeit he was also told that there would be a requirement for the successful candidate to work on some occasions at the respondent's Whitley Bay site to cover staff absences, which the claimant had accepted.

11.6 In respect of all interviews for such Administration Assistant posts, in the interests of equality and diversity the respondent has a set of standard, pre-prepared questions that it asks all applicants to assess their suitability for the role regardless of where the post is located.

11.7 In the above circumstances the Tribunal does not accept the claimant's contention that he applied for and was invited to interview for one post but, having prepared for and attended that interview, he was, in fact, interviewed for a different post to be located in the respondent's offices at Whitley Bay.

11.8 The claimant did not score highly during the interview process; indeed neither did either of the other two candidates and, therefore, the respondent did not appoint to that post that day. Ms Handyside telephoned the claimant later in the day to inform him that he had been unsuccessful but did not tell him that he had scored the highest out of the five people interviewed (as the claimant asserts) not least because only three people were interviewed and his scores with the lowest.

The costs warning letters

12. The Tribunal further finds in respect of the warning letters referred to above that each was written in line with expected professional standards, in clear terms and not in a threatening tone; and in this respect the Tribunal has in mind the decision in Vaughan v London Borough of Lewisham [2013] IRLR 713 EAT. Each letter invites the claimant to withdraw his claim and informs him of the following matters:

12.1 The respondent's intention to make an application to recover legal costs if it was required to defend the claim to a full hearing at which the claim failed.

12.2 Although costs awards are not often made, the statutory basis upon which such awards can be made.

12.3 Fairly full reasons why it was considered that the respondent would be successful in defending the claim.

12.4 If he accepted the invitation to withdraw his claim the respondent would not make any application to recover its costs up to the day proposed in

each letter but providing details of costs to the date of each letter and anticipated costs in the future.

12.5 He should consider taking independent legal advice; a number of sources of free legal advice being identified.

13. The second and third letter make additional points including that in relation to his complaint of indirect discrimination the claimant had failed to identify a provision, criterion or practice of the respondent, that the claimant had disclosed documents to be included in the bundle that the solicitors considered to be irrelevant to the issues and, when requested, he had failed to provide any explanation and had failed to comply with the Order made at the preliminary hearing on 11 September 2022 to provide a Schedule of Loss.

14. The Tribunal is satisfied that the claimant did not engage with any of the above letters. It considers his response to the first letter (10) (to the effect that he had been present on 12 June while the solicitors had not and, therefore, he might know better what had actually happened, and that if the respondent was genuinely interested in saving money they should stop employing those solicitors) to be, at best, terse and, at worst, rude. The claimant's replies to the second and third letter did not respond to the substance at all and merely restated that in the event of a successful claim he would be seeking a year's salary as compensation (17 and 23).

The exception rather than the rule

15. It is well-established that making an award of costs is the exception rather than the rule: see, for example, Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255 in which the Court of Appeal noted that a tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts.

A litigant in person

16. As Ms Kight rightly accepted, it is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than one who is professionally represented. In AQ Ltd v Holden [2012] IRLR 648, EAT it was held that a tribunal cannot and should not judge a litigant in person by the standards of a professional representative. That is not to say, however, that litigants in person are immune from such orders but proper allowance must be made for their inexperience, lack of objectivity and limited knowledge of the law and practice.

Ms Kight's submissions

17. As set out above, the Tribunal has had regard to all the submissions made by or on behalf of the parties. It records, however, that there were three aspects of Ms Kight's submissions that it has not brought into account in coming to its decision.

13.1 First, Ms Kight referred the Tribunal to the claimant's "claims history", as detailed above. The Tribunal accepts that such matters may be relevant to

a determination of whether to exercise the discretion to make an order for costs but in its consideration of this application the Tribunal is satisfied that it should have had regard only to matters arising in the course of this claim and not that claims history.

13.2 Secondly, Ms Kight referred to the claimant's unreasonable conduct during the preparation of the case, again as detailed above. The Tribunal does not give weight to that submission given that it heard no evidence in this respect. A similar point made by the claimant is his suggestion that the respondent had excluded from the Tribunal bundle of documents certain documents that he had wished to have included but he then said that he had no issue with that. Once more, therefore, the Tribunal does not give weight to that aspect.

13.3 Finally, Ms Kight referred to the claimant's conduct during the substantive hearing, which she suggested was both abusive and highly disruptive. While the claimant might have pushed at the boundaries somewhat the Tribunal reminds itself here as elsewhere that the claimant was a litigant in person and is satisfied that his conduct reflected little more than what he considered to be the normal 'cut and thrust' of litigation. Had the claimant crossed those boundaries the Tribunal would have intervened to draw him back.

The Rules

18. In making its judgment the Tribunal is required to apply Rule 76(1), which is set out above. It follows from the structure of that Rule that the approach to be taken by the Tribunal is as follows: first, if it considers that any of the grounds in that Rule are made out it must consider whether to make a costs order; secondly, following such consideration, it has a discretion whether to make a costs order and in that second respect, in accordance with Rule 84, it may have regard to the paying party's ability to pay both in relation to the exercise of the discretion and, if relevant, the amount of any order.

The grounds – acting unreasonably etc

19. The Tribunal addresses first the question of whether the grounds for making a costs order are satisfied and considers first the ground of whether the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted.

20. It can deal fairly swiftly with the first limb of whether the claimant acted as described in the bringing of the proceedings. The Tribunal is not satisfied that he did. To the contrary, the Tribunal is satisfied that at the point at which he presented his claim form (ET1) the claimant was satisfied, on an understandable basis, that he had been treated less favourably than others because of what he genuinely considered to be his disability. The Tribunal accepts the repeated submissions of the claimant that any employment tribunal should be hesitant to dissuade claimants, especially litigants in person, from having access to justice.

21. The second limb of whether the claimant acted as described in the conduct of the proceedings is more problematic. While it might be, as the Tribunal has just found, that the claimant had an understandable basis for believing that he had been discriminated against at the point of presenting his claim, matters then developed in a way that might have led him to take stock and reconsider. First, in little over a month the claimant received the respondent's grounds of resistance, which clearly set out the respondent's position including as to the findings of fact that the Tribunal has made above. The Tribunal is prepared to accept, however, that such an exchange of claim and response is the norm in litigation and it would be unreasonable for it to find that that alone ought to have led the claimant to withdraw his claim.

22. There then came, however, the three costs warning letters that the Tribunal has fully considered above. Arguably, any one of those letters written in such comprehensive and clear terms might have caused the claimant not to proceed with his claim. The question for the Tribunal, however, is whether him not doing so amounted to him acting vexatiously, abusively, disruptively or otherwise unreasonably. On balance, the Tribunal considers that the claimant should be given the benefit of the doubt and does not find that in not withdrawing his claim at the point of receipt of those letters, and on the basis of those letters alone, the claimant was so acting.

23. There is, however, a further factor that applies in relation to the third of those letters. By that time (17 December 2020) the parties had exchanged witness statements on 3 December 2020. The respondent's witnesses had provided unequivocal evidence (the one corroborating the other) as to all matters relevant to the issues in the claim such as the following: the post of Administration Assistant within its organisation; how individuals are recruited to such post; the claimant's application for that post; the arrangements that had been made for his interview; the measures that had been taken on the day to accommodate his altophobia; importantly, what had been said regarding the post for which he had applied and to which he would be appointed if he were to be successful; why neither he nor either of the other two candidates had been successful. In this regard, the Tribunal records, first, that it is satisfied that each of the respondent's witnesses gave compelling evidence and, secondly, the claimant declined to challenge their evidence in any material way despite having been encouraged by the Tribunal to do so and warned of the consequences if he did not.

24. Any claimant should have considered carefully the content and weight of such evidence, corroborated as it was by not only by the evidence of the other witness but by the contemporaneous documents that had by then been provided by the respondent to the claimant. In that respect the Tribunal does not accept the somewhat scurrilous remarks of the claimant as to certain of the documents having been tampered with or even forged. The Tribunal is not satisfied that his submissions in that respect "that we inhabit a world which is shaped in large part by dishonesty", which he considers to be borne out by "Saddam Hussein's weapons of mass destruction have never been found" and the British government having "sought to have Clive Ponting imprisoned for exposing an act of dishonesty" have any relevance.

25. At the costs hearing the claimant said, somewhat unrealistically, that had the respondent's version of events been the same as his he would have had a strong case; perhaps unsurprisingly, the respondent's version of events was not the same as his. At this point the claimant ought to have realised that the principal basis upon which he had founded his claim (in short, that he had been interviewed for a post other than that for which he had applied and had expected to be interviewed) actually lacked foundation. If the claimant did not carefully consider the evidence that had been provided to him and would be given to the Tribunal, that would amount to him acting unreasonably. If he did carefully consider such matters, he did not act upon them to change his position with regard to his claim, even following receipt of the third costs warning letter. On either basis, it is at this point (if indeed not before) that the Tribunal is satisfied that the balance tipped and, thereafter, the claimant did act at least unreasonably and possibly also vexatiously in the way that he conducted the proceedings.

26. Ms Kight also referred to the claimant acting frivolously but that is no longer a word that appears in the Rules although obviously to act frivolously would be likely to amount to acting unreasonably. Also of some relevance in this respect is that the claimant's focus was very much upon the question of his honesty, suggesting that the Tribunal should not make an award unless it could be absolutely certain that the respondent's version of events was correct and his was incorrect and he had been dishonest. As was pointed out to him, however, that is neither the test contained in Rule 76(1) nor the standard to be applied in the consideration of that test.

The grounds – no reasonable prospect of success

27. In relation to any assessment of whether a claim has no reasonable prospect of success, general principles in relation to a complaint of discrimination are relevant considerations. One such general principle is the shifting of the burden of proof provided for in section 136(2) of the Act, which states, "If there are facts from which the court could decide, in the absence of any other explanation that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred." It is well-established (e.g. Igen Ltd v Wong [2005] ICR 931) that this involves a two-stage approach. At the first stage the claimant is required to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. Thus a tribunal is required to make an assumption at this stage which may be contrary to reality. This first stage has been explained as the claimant establishing what has been referred to as a 'prima facie case of discrimination'. Although the burden of proof is on the claimant at this stage and the standard of proof is the usual civil standard of balance of probabilities, the threshold of "could" decide/conclude is not particularly high; albeit something more is required than a difference in 'status' between the claimant and her comparators (i.e. in this case disability) and a difference in treatment between them: see Madarassy v Nomura International plc [2007] IRLR 246 CA.

28. Within the above general principle there is a second, which is also referred to in Igen Ltd, that at this first stage it is appropriate for a tribunal to draw inferences

from primary facts and, in doing so, must assume that there is no adequate explanation for those facts. If the burden of proof thus shifts to the respondent it is then for the respondent to prove that its treatment of the claimant was in no sense whatsoever on the ground of disability.

29. The Tribunal brings these general principles of the reverse burden of proof and the drawing of inferences into account in its consideration of whether it can be said that the claim of the claimant had no reasonable prospect of success.

30. The test of "no reasonable prospect of success" sets a high standard. It is also applicable in a consideration of whether a claim or response should be struck out. In that respect in the decision in Balls v Downham Market High School and College [2011] IRLR 217 Lady Smith stated as follows:

> "…. the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

31. In this regard the Tribunal reminds itself that it was held in the case of Scott v Inland Revenue Commissioners Development Agency [2004] ICR 1410 that the key question is not whether a party thought he or she was in the right but whether he or she had reasonable grounds for doing so. This is particularly pertinent in this case in light of the general approach of the claimant at both the substantive hearing of his claim and the costs hearing and the evidence that he gave in respect of which he clearly thought that he was in the right but perhaps not on reasonable grounds.

32. That notwithstanding, stepping back and considering holistically everything that has been put before the Tribunal including the findings of fact and the preliminary matters set out above, including that the claimant is a litigant in person, the Tribunal is not satisfied that what is referred to in the decision in Balls as "a high test" has been satisfied; we cannot say that there were "*no* reasonable prospects".

The discretion

33. In summary, as to the grounds upon which a costs order can be made the Tribunal is satisfied that the claimant acted, in part, unreasonably in the way in which the proceedings have been conducted but it is not satisfied that his claim had no reasonable prospect of success. Being thus satisfied that one of the grounds in Rule 76(1) is made out, the Tribunal must consider whether to make a costs order and, having undertaken such consideration, it then has a discretion whether or not to make a costs order.

34. Factors that can be relevant to the exercise of the discretion include that costs are compensatory not punitive (Lodwick v Southwark London Borough Council [2004] ICR 884, CA) and, therefore, it is necessary to examine what losses have been caused to the respondent, limiting those losses to costs "reasonably and necessarily incurred": Yerrakalva. In this regard the Tribunal accepts the submissions made by Ms Kight that the respondent used appropriate levels of lawyers and a junior barrister, and that the fees of all concerned were appropriate. In this latter respect the Tribunal notes, for example, that the input of the Partner in the respondent's solicitors was limited to two 6-minute units.

35. A further factor, although not a precondition, is the giving of costs warnings: Oko-Jaja v London Borough of Lewisham EAT 417/00. The Tribunal has already set out fully above that the respondent in this case gave three costs warnings and that it is satisfied that each was written in line with expected professional standards, in clear terms and not in a threatening tone.

36. There is also the point made above that the claimant was not legally represented, and he should not be judged by the standards of a professional representative but, as also set out above, he is not immune from orders were costs: Holden.

37. The final factor to which the Tribunal has had regard, pursuant to Rule 84, is the claimant's ability to pay, which can be relevant both in relation to the exercise of the discretion and, if appropriate, the amount of any order. In this case, when giving evidence the claimant explained (without any questioning from Ms Kight) that he was currently earning some £1,400 per month in employment that could last a year or more and, importantly, that he could pay about half of the £16,037.40 sought by the respondent now and the remainder in a year.

38. In, Yerrakalva Lord Justice Mummery stated as follows:

> "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."

39. In light of that guidance, the Tribunal has once more stepped back and considered all the evidence and submissions before it in the round. For the reasons set out above the Tribunal is satisfied that there has been unreasonable conduct by the claimant in his conduct of this case from the point at which he received the third costs warning letter on 17 December 2020, having by then also receive the witness statements of the respondent's two witnesses and the supporting documentation. Put simply, addressing the key points from the quotation above:

    39.1 The conduct was the claimant continuing to pursue his claim.

    39.2 That was unreasonable because, once seized of that knowledge in the witness statements and documents, the claimant, acting reasonably, ought to have realised that his claim was not well-founded. In this regard it

is notable that the claimant stated that he had withdrawn his claim when he decided that his "chances of success were probably below fifty percent". As nothing new had emerged during the course of the substantive hearing over and above that which was contained in the respondent's witness statements and documents that the claimant had had before 17 December 2020 (not least because, it is repeated, that the claimant did not materially challenge the respondent's evidence) the Tribunal is satisfied that that assessment of the chances of success could and should have been made on or shortly after that date.

39.3 There were several effects of that unreasonable conduct including putting the respondent's witnesses through the process of giving evidence but, in the context of this costs application, a principal effect was the unnecessary expenditure of public money on legal costs unnecessarily incurred from 17 December 2020.

40. In light of the unreasonable conduct referred to above, the Tribunal is satisfied that it should exercise its discretion to make a costs order.

41. The Tribunal has considered the schedule of legal costs produced on behalf of the respondent (26) in light of its finding that legal costs were unnecessarily incurred from 17 December 2020. It is apparent that from that date the legal costs incurred totalled £4,624.50 plus VAT of £911.70 making a grand total, from that date, of £5,536.20.

Conclusion

42. In all the circumstances (and again having regard to the claimant's ability to pay) the Tribunal is satisfied that an appropriate order is that the claimant shall pay to the respondent the sum of £5,536. It is the Tribunal's understanding that an NHS Trust such as the respondent is unable to recover the VAT that is payable upon services such as the legal services that it has procured in this case. That sum is ordered on the basis of that understanding. If the contrary is the case and the respondent is able to recover the VAT, the Tribunal orders the claimant to pay, instead, the net amount (in round terms) of £4,624.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 3 March 2021