EMPLOYMENT TRIBUNALS

Claimant: Mr J Lyne

Respondent: (1) Midlands Truck & Van Limited
(2) Mr M Carolan
(3) Mr D Woodbine

Heard at: Birmingham (via CVP) **On:** 18 & 19 May 2023

Before: Employment Judge J Jones
Ms S Outwin
Mr T Liburd

Appearances
For the claimant: Mr K McNerney (counsel)
For the first and second respondent: Mr A Willoughby (counsel)
For the third respondent: No appearance

JUDGMENT

The claimant's application for costs dated 21 October 2022 (as amended) is dismissed.

REASONS

Background

1. The Tribunal heard an application for costs from the claimant following the resolution of these proceedings by a COT3 conciliated agreement via ACAS. Terms were reached very shortly before the final hearing was due to commence – so much so that the parties attended on 12 October 2022, the first day of the final hearing before this Tribunal, to notify the Tribunal that, with the exception of the issue of costs, they had reached terms of settlement.

2. The background to the proceedings was as follows. The claimant was dismissed from his role as a nightshift technician by the respondent on 27 July 2020, after a period of approximately 5 months' employment. The effective date of termination of the claimant's employment was 25 August 2020.

3. The claimant commenced early conciliation through ACAS against the first and second respondents on the 21 August 2020 which ended a month later on the 21 September 2020. The claimant conciliated with the third respondent between 3 September and 3 October 2020. On the 9 October 2020, the claimant lodged his claim with the Tribunal claiming disability discrimination.

4. In summary, the claimant claimed that his dismissal was an act of direct disability discrimination when the respondents became aware of his post-traumatic stress disorder (PTSD). The claimant's PTSD dated back to trauma during his time as a serving member of the armed forces. He also brought claims of indirect discrimination, disability-related discrimination and harassment related to his disability.

5. The events which led to the claimant's dismissal began in May 2020 with a customer complaint to the third respondent that a vehicle which the claimant had passed as roadworthy had a fault that had been overlooked. The respondent extended the claimant's probationary period. The claimant commenced a period of sickness absence on 28 June 2020 (MB, p244). On 24 July 2020 he had a discussion with the third respondent about a return to work and requested to work a fixed night shift, Monday to Thursday. The claimant was dismissed on 27 July 2020 (MB, p274) with a month's notice (MB, p276). The reason for dismissal was in issue.

6. The respondents lodged a combined response to the claims, denying them in their entirety. In relation to the issue of disability, in the grounds of resistance at paragraph 5, the respondents wrote as follows:

> "No concessions are made by the respondents in the absence of medical evidence that the claimant suffered at the relevant time from a disability within the meaning of the Equality Act 2010. The respondents reserve their position on this issue pending evidence and full particulars from the claimant. If it is determined that the claimant did suffer from a disability at the relevant time, the issue of the respondent's knowledge is relevant to these proceedings as set out in the following paragraphs."

The respondents relied upon the fact that the claimant had not highlighted his disability in a pre-employment health screening questionnaire pleading that it was not until the claimant submitted a sick note on 28 June 2020 that the condition PTSD was ever mentioned.

7. In relation to the reason for dismissal, the respondents said at paragraph 15 of the grounds of resistance:

> "David Woodbine (DW) telephoned the claimant on 27 July 2020 and informed him that taking into consideration what the claimant had said during their meeting on 24 July 2020 he did not consider the claimant's request to work Monday-Thursday and then 3 days' rest, safe to authorise[1]. DW felt that the claimant was going against the advice of his own GP. DW advised the claimant that he was unable to accommodate the claimant on a

[1] The parties agreed that this was a reference to doing nightshifts on those dates

> day shift pattern. DW then went on to inform the claimant that due to the business position, as a result of COVID-19, that the claimant's position was being terminated and issued the claimant with one months' notice to terminate his employment stating that his services were no longer required."

The respondent asserted (at paragraph 11 of the grounds of resistance) that, in the meeting on 24 July 2020, the claimant "clearly stated that his doctor had advised him to work dayshift" but he had gone against his doctor's advice and proposed that he work a Monday to Thursday nightshift.

8. Both parties were being advised by solicitors at the time the claim was commenced and the response was lodged. Indeed, these are the same solicitors that have been on record for both parties ever since the commencement of the proceedings and are still on record now. The Tribunal observed that it was regrettable that the solicitors in the case appeared not to have enjoyed a cordial working relationship and, as well as being lengthy, correspondence between them seemed at times to have become somewhat ill-tempered.

9. The claim came before Employment Judge Meichen on the 6 September 2021 for case management. EJ Meichen made a series of orders regarding disclosure of medical evidence and an impact statement from the claimant. These orders were complied with by the claimant (page 259, costs bundle). The impact statement served by the claimant was relatively brief. It was not in the form of a witness statement from the claimant himself, but was a document signed by his solicitors setting out the answers to the questions that were posed in EJ Meichen's case management order. There was nothing in the wording of that order to preclude such an approach, however. In the impact statement, the claimant stated that his medical records confirmed he had been suffering from PTSD since May 2011. He then provided a list of effects on his day-to-day activities, but these were not specific to any particular period in time. At the same time as receiving the impact statement, the respondents received copies of the claimant's medical notes.

10. The claimant and the respondents attended a further preliminary hearing before EJ Meichen on 28 March 2022 to consider next steps in the proceedings, in light of the respondents' failure to admit, based on the evidence it had received, that the claimant was disabled at the material time. The parties agreed that the material time was February to July 2020 during the short period of the claimant's employment by the respondents.

11. EJ Meichen heard argument from both parties on the question of whether or not it would be necessary for the Tribunal to have expert medical evidence to determine the issue of disability. He concluded as follows (see paragraph 10 of his order).

> "I decided that an expert report was reasonably required in this case. I also considered that obtaining a report was in accordance with the overriding objective. I took into account that obtaining of the report will not cause delay, the cost will be borne by the respondents voluntarily and the report may remove the need for the Tribunal to determine

disability at a preliminary hearing (which I understand the claimant may find traumatic). Further written reasons for this decision, will not be provided unless a request is received within 14 days."

12. Neither party sought written reasons for or challenged EJ Meichen's determination on the issue of expert evidence. The claimant consented to being examined by the respondent's expert, Dr Mangan, who is a Consultant Psychiatrist, and an appointment took place on the 17 May 2022.

13. The Tribunal next had cause to consider the case on the 1 August 2022 when the issue of disability was due to be determined at a preliminary hearing in public. The parties attended the hearing but indicated that Dr Mangan's report following his examination of the claimant was not yet available. There were a number of reasons for this which are set out in the Tribunal's order following that hearing. Suffice it to say that the Tribunal postponed the preliminary hearing on disability in light of the absence of that evidence, but relisted it in short order on 20 September 2022, so as to preserve the final hearing dates. The postponement of the preliminary hearing on disability was granted on the understanding that the parties would very soon be in receipt of Dr Mangan's report and the respondent would make a prompt decision as to whether or not disability remained in dispute before the postponed preliminary hearing.

14. The Tribunal also observed at the hearing on 1 August 2022 that the respondents had not exchanged their witness statements in accordance with the Order of EJ Meichen. The respondents were ordered to do so by 7 September 2022. The respondents did not, however, disclose their witness statements in accordance with that Order. On 13 September 2022 Employment Judge Camp considered the case on paper and made an Unless Order requiring the respondents to disclose their witness statements by a specified date, which they then did.

15. Employment Judge Perry heard the reconvened preliminary hearing to deal with the question of disability on 20 September 2022. In the interim, on 24 August 2022, the parties received the report of Dr Mangan, although he backdated it to the date of his examination of the claimant – i.e. 17 May 2022. The report was before the Tribunal at page 493 of the costs bundle (CB). Dr Mangan's report was a full medico-legal report which included detail of the investigations carried out, such as the taking of a full family history from the claimant together with his personal history. Dr Mangan also recorded his review of the claimant's previous psychiatric medical history, his medication history and his examination of the claimant's GP and other medical notes.

16. In the section about the claimant's GP records (at the bottom of page 498), Dr Mangan wrote " there was an entry of 14 January 2020 where the claimant reported that he had been feeling good mentally, it said he wants to turn his life around, keen on re-joining the Army next year, wants to come off as many medications as possible and didn't feel he needed the Mirtazapine anymore". The claimant was described by his GP at that stage as "alert, pleasant, good eye contact, smiling appropriately, normal mood and effect".

17. Dr Mangan gave his opinion by answering a series of questions at the conclusion of his report. He said that the claimant did have a mental impairment concluding that the claimant had PTSD as well as an "adjustment disorder". He then went on to look at the nature of the impairment and, in answer to the question, "did the impairment affect Mr Lyne's ability to carry out normal day-to-day activities"? Dr Mangan opined "whilst the impairments associated with his post-traumatic stress disorder condition were undoubtedly distressing, I do not believe that during the material time his impairments affected his ability to carry out normal day-to-day activities". He said next that he did not consider the impact on the claimant to be substantial (in the sense of more than trivial) although it had persisted for 12 months. In conclusion, Dr Mangan expressed the opinion that "at the material time, the claimant's mental health impairments did not have a substantial impact on his ability to carry out normal day-to-day activities over a long term period".

18. This was the state of the evidence on the issue of disability at the reconvened preliminary hearing before EJ Perry on 20 September 2022. The claimant had not at that stage submitted any further witness evidence about the impact of his condition on his normal day-to-day activities. At the preliminary hearing, respondents' counsel discussed the evidence about disability with EJ Perry. As a consequence of that discussion, the respondent conceded that the claimant had an impairment at the material time. The order of EJ Perry following that preliminary hearing reads (at paragraph 1.8) as follows:-

> "Following requests for clarification from me, how the disability issue was pursued, the impairment of PTSD was conceded by the respondent at all material times. The question of knowledge was also conceded by the respondents".

19. In the next paragraph of his order EJ Perry went on to refer to the respondent as "conceding the disability point" which of course is a broader concession than conceding impairment. However, nothing seemed to the Tribunal to turn on that as it was common ground between the parties that there had been a clear concession at the Perry preliminary hearing that the question of disability would no longer be contested nor would the respondent be contesting knowledge. That being so, further case management orders were made for what was then a fast approaching final hearing due to commence on the 12 October 2022.

20. There was a dispute resolution appointment (DRA) in the afternoon of the Perry preliminary hearing. All this Tribunal knows about that appointment is that it was not immediately successful. However, 3 days later, on 23 September 2022, the respondent wrote to the claimant (page 575 in the costs bundle), making an offer "without prejudice save as to costs" to settle the claim in the sum of £45,000.00. In a schedule of loss that the claimant had served a week before the DRA on 13 September 2022, the claimant had valued his claim at £53,414.00, £40,000.00 of which was attributed to injury to feelings and £10,000.00 of which was attributed to aggravated damages. On this basis, the respondent asserted that the offer of £45,000.00 was, or ought to have been seen as, a very attractive one to the claimant, and should have been accepted accordingly in full and final settlement of his claims.

21. The claimant rejected the respondents' offer to settle a week later on 30 September 2022 in a letter from his solicitors (page 590 in the costs bundle). This was a lengthy letter containing all the claimant's reasons for his rejection of the respondents' offer. It referred in particular to the fact that at that stage the claimant's costs including VAT exceeded £50,000. The claimant's solicitors maintained that if the claimant accepted the offer of £45,000.00 he would therefore gain nothing. The claimant's solicitors maintained that the respondent had behaved unreasonably, particularly in not conceding the issue of disability sooner, and asserted that there should be an offer that reflected the costs that the claimant had incurred in the case. The letter from the claimant's solicitors also referred to the fact that there had been no admission by the respondents of liability or any apology to the claimant.

22. On 5 October 2022, the respondents duly made an open admission of liability in correspondence which was sent to the Tribunal and the claimant. The admission was of a number of the disability-related discrimination complaints and the harassment complaints, but the respondent did not admit liability in relation to the direct disability discrimination. The respondents offered an apology and made an open offer to settle the claims for £37,500.00. The claimant accepted this offer shortly before the full merits hearing due to start on the 12 October 2022, on the basis that he intended to continue to contest the issue of costs, which was then listed to be heard before this Tribunal.

The application

23. The claimant's costs application was submitted in writing on 25 October 2022. It was to be determined on 8 December 2022. On that occasion, however, the claimant applied to amend his application with the result that the hearing was postponed to give the respondent adequate time to respond and for an extended listing of 2 days to be provided. An issue of specific disclosure was also resolved on that occasion.

24. In preparation for this hearing, the Tribunal was sent a schedule of costs from the claimant's solicitor indicating that the claimant's costs are now £68,000, which is the approximate amount that the claimant seeks to recover from the respondent in accordance with this application.

25. The parties agreed that the Tribunal should decide the question of entitlement to costs and that, if successful, there should be a detailed assessment of those costs.

26. The Tribunal received helpful submissions from both counsel in writing. There was a skeleton argument from claimant's counsel accompanied by a summary of the legal principles. The respondents also submitted a skeleton argument together with an addendum submission (after the hearing on 8 December 2022) and that was also accompanied by some caselaw. The Tribunal was provided with a costs bundle (CB) running to 767 pages and also referred to documents in the main bundle that had been prepared for the merits hearing, 442 pages in length (MB).

27. In summary, the claimant's application was put on 2 alternative bases. First, that there had been no reasonable prospect of the respondents' response succeeding and secondly, that the conduct of the proceedings had been unreasonable.

28. Factually the claimant relied principally on the following arguments. First, that the respondent had knowingly advanced a false reason for dismissal, namely redundancy. He argued that such a reason was inconsistent with the contemporaneous exchange of emails that had taken place between the decision-makers and that it had been deliberately false and misleading. Secondly, that the respondent had been unreasonable to contest the issue of disability. In addition, on the question of alleged unreasonable conduct, the claimant referred to the respondent's failure to disclose its witness statements until EJ Camp made the Unless Order on the 13 September 2022. This is a summary only of the full arguments clearly outlined in counsel's skeleton argument, which were all taken into account.

29. The Tribunal was directed to the witness statements of Steven Hunt (CB p542) and Michael Carolan (CB p548). The former was the respondent's Managing Director and the latter was (at the time) the Non-Executive Service Director who heard the claimant's grievance/appeal against dismissal. In his statement Mr Carolan referred to reviewing documentation and information which suggested that the claimant had been on a list of employees with under 24 months' service which had been compiled at the height of the pandemic when the business was seeking to reduce its cost burden. The Tribunal was shown evidence (MB p233) which indicated that on 18 June 2020 the business was considering redundancies and seeking volunteers although by 17 July 2020 (MB p257) furloughed staff were advised that there had been an increase in business throughput. Mr Carolan also stated that he had thought the claimant disingenuous because he had been working nights for a company called Truck & Trailer in Telford whilst on sick leave from the respondent.

30. Mr Hunt said in his statement that he had reviewed the claimant's dismissal further on 28 August 2020 in the absence of the claimant and decided to uphold the dismissal because of ongoing concern about the financial performance on the business, referring to a reduction in headcount from 309 to 278 in August 2020, in the face of a revenue stream reduction from £130M to £118M per annum.

31. The claimant argued that the contemporaneous documentary evidence alone should lead the Tribunal to conclude that the respondent had deliberately put forward a sham reason for dismissal. The Tribunal was referred to and considered pages MB 245-248, 262, 266 and 270-275. These documents comprised a series of emails which began with one from the claimant on 28 June 2020 in which he notified the third respondent that he has been signed off for 4 weeks due to struggling with his mental health recently, not sleeping and finding it difficult to concentrate. He added that given the safety aspect of the job he was doing he felt this made him a liability to the people he was working with and to the respondent, which was not a risk he was willing to take.

32. From the emails it appeared that the claimant then attended a meeting with the third respondent on 24 July 2020 at which he filled in a health questionnaire about his fitness to work nights (MB p267). In it, he highlighted that he had a condition that caused him difficulty sleeping and was taking Mirtozapine. The same day Mr Carolan emailed Mr Hunt asking for his view, describing the claimant as "employed for less than 12 months – misled us on his original health care questionnaire. Are you happy for us to release as unable to accommodate his request for nightshift working?" Mr Hunt replied "yes" (MB p265). This was followed by an email from the third respondent to Mr Carolan dated the following Monday (27 July 2020) in which he stated that he had told the claimant that the return to nights was not a good option from a safety and risk point of view taking account of the claimant's doctor's advice that he change to day shifts. He said that the situation on the day shift had been reviewed and there were no positions currently available and noted that the claimant had said that a change to days would not suit the claimant because of his anxiety level because it was too busy (MBp270).

The Law

33. The Tribunal considered the law relating to rule 76 applications and in particular rule 76 itself which states:

> "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 bringing the proceedings in part, or the way the proceedings have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success."

This gives rise to a 2-stage test. First, an applicant for costs needs to persuade the Tribunal that the threshold test is passed, in other words that the circumstances are such that a Costs Order may be made in principle. These circumstances are either (to summarise, not replace, the statute) that one of the parties or their representative has acted vexatiously, abusively, disruptively or otherwise unreasonably or that the claim or response had no reasonable prospect of success. If and only if that threshold test is crossed, the Tribunal should go on to look at the matter in the round and at all the factors present in a particular case so as to be able to decide in its discretion whether or not it would be appropriate to make an Order for costs. There is then a third element to the process, which is that if the matter reaches this stage the Tribunal will go on to look at how much that Order should be for.

34. The Tribunal also considered the cases that counsel referred to, which can be summarised as follows. **McPherson -v- BNP Paribas** [2004] ICR 1398, which the claimant cited, was a decision of the Court of Appeal dealing with costs in a case where a claimant had withdrawn his claim. Regarding the exercise of discretion, and in relation to the predecessor to rule 76, Lord Justice Mummery said as follows:

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

The Tribunal accordingly bore in mind that it was not necessary for the claimant to show that a particular element of the costs he incurred was attributed to a particular element of the alleged unreasonable conduct.

35. Mr McNerney for the claimant also referred to the case of **Highlandwear v Nicolson** [2010] IRLR 589, a Scottish Employment Appeal Tribunal decision in which Lady Smith made the point, which the Tribunal agreed could not be contentious, that if a Tribunal finds that a party has been dishonest in relation to his or her claim, (or response) then the Tribunal could be expected to conclude that this was evidence of unreasonableness when applying the costs provisions of the Tribunal rules.

36. The respondents drew the Tribunal's attention to **Sheikholeslami v The University of Edinburgh** (UKEAT/0014/17/JW) in which section 15 Equality Act claims are discussed. The respondents relied on the fact that the EAT held that with such claims there are 2 distinct causation tests. First, a Tribunal has to look at whether or not the unfavourable treatment arose because of the identified "something" and secondly has to decide whether that something arose as a consequence of the claimant's disability. Mrs Justice Simler DBE (as she then was) said at paragraph 65 that there may be several links in the causal connection between the something that causes the unfavourable treatment, and the disability. The respondents argued that this principle was relevant in the present case because the admission that it had made in the proceedings was of the disability-related discrimination under section 15. Counsel drew the distinction between that and an admission that the claimant had been directly discriminated against when he was dismissed.

37. The Tribunal also reminded itself, in accordance with **Scott v Inland Review Commissioners Development Agency** [2004] ICR 1410,CA**,** and also the Presidential Guidance on Case Management that costs are the exception or, to put it another way, "not the norm" in the Employment Tribunal. Further, decisions on costs are fact specific. In line with **Mr M Radia -v- Jefferies International Ltd** [2020] IRLR 431, EAT**,** a Tribunal should be cautious to attribute hindsight to the parties when conducting an analysis of a case after the event.

38. Last but not least, the Tribunal was assisted by the decision of the Employment Appeal Tribunal (His Honour Judge James Tayler) on costs in **Opalkova -v- Acquire Card Limited** (UKEAT/2020/000345/RN). Judge Tayler said in that case that assessment must be of the prospects of success in each claim and defence. That was a case in which there had been an overarching decision on costs where the claimant had made 6 separate claims. Its particular relevance to the present case, however, lies in the consideration of the merits of a

particular argument and its impact on the question of costs. Paragraph 24 of the Judgment reads as follows:

> "Accordingly, there are three key questions. First, objectively analysed when the response was submitted did it have no reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospect of success?

The Tribunal applied this analysis when considering the claimant's "merits" argument on alleged unreasonableness in this case.

Conclusions

39. When the response was submitted, objectively analysed, did it have no reasonable prospect of success (or was there a stage reached when that became the case)? The respondent disputed disability at the time that the response was submitted which had the potential to provide it with a complete defence to the claims. On this basis, the response could not therefore be said to have had no reasonable prospect of success when submitted.

40. The Tribunal unanimously concluded that it was not unreasonable for the respondent to keep the issue of disability live in its response, or thereafter. Initially, it did so simply saying "we don't know, we want more evidence". The Tribunal looked at what happened when the claimant submitted his impact statement and his medical evidence and asked whether this became the stage at which the response became one which had no reasonable prospect of success. The Tribunal did not consider that to be so. The medical evidence submitted at that stage included an entry in the GP records shortly before the claimant commenced employment that he was essentially well (see paragraph 16 above) and it was not unreasonable for the respondents to want to examine the position further. In addition, the impact statement submitted by the claimant was not a signed statement describing the day-to-day impact on the claimant of his symptoms and was lacking in detail.

41. Further, the state of the evidence on disability was the subject of argument before Employment Judge Meichen on 28 March 2022 and he concluded, in a decision that was not challenged by the claimant, that, notwithstanding the disclosure from the claimant to date, it was reasonable for the respondent to seek expert evidence on the issue of disability. It is unfortunate that there was then late disclosure of the report following Dr Mangan's examination of the claimant on the 24 August 2022. When the report was received, however, Dr.Mangan did not support the claimant's position on disability. It is right that the question of disability was a question for the Tribunal to decide, but this Tribunal concluded that it was not unreasonable for the respondent not to concede disability when an appropriately qualified and joint expert witness, having carried out an examination of the claimant and his medical notes, had expressed the

opinion that the definition in section 6 of the Equality Act was not satisfied at the material time.

42. The respondent chose to make a concession at the preliminary hearing on 20 September 2020 in light of Employment Judge Perry's requests for clarification at that hearing, the nature of which were not before this Tribunal. Employment Judge Perry's order records (at paragraph 1.9) simply that he "queried how its position was maintained on several occasions (albeit the respondent had sought to clarify how that was argued on those occasions)". The Tribunal did not consider that the making of the concession on disability at this hearing necessarily meant that the respondent knew or ought to have known that its response on this issue had no prospect of success. The respondent took a view in light of EJ Perry's indications, that it would not be fruitful to pursue the argument and that it should not subject the claimant to cross-examination on the subject in light of those indications.

43. Thereafter the case moved on apace and it was a very short time after the Perry preliminary hearing (and dispute resolution appointment) before the respondents were making a substantial offer to the claimant to settle his claims. The Tribunal inferred that the dispute resolution appointment may have helped to focus the parties' minds on the issues in the case and the risks involved in pursuing arguments to a full hearing. That of course was in part its function. The Tribunal did not find that the respondents' limited admissions on liability on behalf of the first and second respondent, as set out in its open letter of 5 October 2022 (CB, p600) were an indication that it had been unreasonable to defend the claim at all or up to that point. It noted that the claimant had specifically drawn attention to the respondents' failure to admit liability or apologise in its rejection of the without prejudice offer of 30 September 2022.

44. Turning to the "reason for dismissal" argument, the Tribunal concluded that, whilst there were contemporaneous documents that would certainly have been relevant to the Tribunal's determination of this case, it was not able to conclude on the basis of the documentation presented alone that the respondents had set out to deliberately mislead the Tribunal as to the reason for dismissal, as alleged. The Tribunal noted that, in paragraph 15 of the grounds of resistance (see paragraph 7 above), the respondent paraphrased the third respondent's contemporaneous email correspondence and did not seek to conceal the reference he made to the claimant's request to work on fixed nightshifts. The witness statements and contemporaneous documents outlined a series of factual matters some or all of which had the potential to have had a bearing on the decision to dismiss the claimant. In order to have decided the reason for dismissal, the Tribunal concluded that it would have needed to consider all the evidence and in particular the oral evidence of all the witnesses, tested under cross-examination. The Tribunal was accordingly not satisfied that the respondent had behaved unreasonably by setting out to deliberately mislead the Tribunal as to the reason for dismissal.

45. The third reason put forward by the claimant as to why the respondents had conducted this litigation unreasonably was their failure to disclose witness statements until an unless order was made. The Tribunal concluded that this was

unreasonable conduct by the respondents. There had been no application made for an extension of time in which to exchange witness statements and it appeared that the respondents had ignored more than one Tribunal order.

46. In summary, therefore in relation to the threshold test in rule 76, the Tribunal concluded that it had been passed on one of the three grounds alleged by the claimant only – namely, that the respondent had acted unreasonably in failing to serve its witness statements in the proceedings in breach of Tribunal orders.

47. The Tribunal then went on to consider whether, in the exercise of its discretion, to order the respondents to pay the claimant's costs. The Tribunal concluded on the basis of all the circumstances of the case, including the nature, gravity and effect of the unreasonable conduct found, that it would not be appropriate to order costs on this basis alone. That is not to say that adherence to Tribunal orders is not essential and that ignoring them is not unreasonable. However, the principal bases for the claimant's application – that the response had been dishonest and the disability issue not conceded at an earlier stage were not made out. The respondents made a very substantial offer to settle the case shortly after a dispute resolution appointment. The claimant rejected it only to accept a lower amount later on when faced with an open admission of liability. The Tribunal noted with some disappointment that substantial costs had been incurred in a relatively straightforward case and had thus become the stumbling block to a full resolution of the matter without the need for a substantive hearing.

Employment Judge J Jones
19 July 2023