Case Number: 2301195/2014

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THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE C HYDE**

MEMBERS: **Ms S McDonald**
Ms S Murray

BETWEEN:

Ms Kiran Kalia **Claimant**

AND

Atkins Ltd **Respondent**

ON: **11 October 2016**

APPEARANCES:

For the Claimant: **In person**
For the Respondent: **Mr C Graham, Solicitor**

RESERVED COSTS JUDGMENT

The unanimous judgment of the Tribunal is that: -

1. The Claimant was ordered to pay the sum of £17,500 in relation to the costs incurred by the Respondent.

REASONS

Preliminaries

1. These reasons are set out only to the extent that the Tribunal considers it necessary to do so in order for the parties to understand why it

reached the Judgment set out above. Further the reasons are set out only to the extent that it is proportionate to do so.

2. In a reserved judgment which was sent to the parties on 21 January 2016, the Tribunal dismissed the complaints of unfair dismissal by reason of having made a protected disclosure (whistleblowing) under the Employment Rights Act 1996 ("the 1996 Act"); and of direct disability discrimination, discrimination arising from disability, indirect disability discrimination and failure to make reasonable adjustments under the Equality Act 2010 ("the 2010 Act").

3. Following an application on behalf of the Respondent for the Tribunal to consider making an order for costs against the Claimant, the parties were given notice by a letter dated 8 September 2016 that the hearing would take place on 11 October 2016. The application for costs was made on behalf of the Respondent on 18 February 2016.

4. The Respondent set out in writing outline submissions in support of their application for the costs order. This document was dated 3 August 2016 and ran to some 68 paragraphs and some 17 pages. In addition, in support of their application the Respondent presented a schedule of costs (five pages) and a case management chronology which ran to three pages, which together formed a bundle marked [R3] at the hearing. The Respondent's submissions were supplemented by a further document marked [R4] and dated 8 August 2016, which addressed various issues which arose from a witness statement lodged by the Claimant with the Tribunal some time earlier. The Respondent had been unaware of the existence of the witness statement as the Claimant had not served a copy on it, until a copy was sent by the Tribunal to the Respondent on about 5 August 2016.

5. A further updated schedule of costs was presented by the Respondent at the hearing to support the application for costs covering the period 17 March to 11 October 2016. This document was marked [R5].

6. The main documents relied upon by the Respondent in support of the costs application were contained in a bundle of documents which ran to some 400 pages and which the Tribunal marked [R1]. Further the Respondent had prepared a full bundle of authorities which was marked [R2].

7. The authorities relied upon by the Respondent were as follows:

A Q Limited-v-Holden *[2012] IRLR 648*

ET Marler-v-Robertson *[1974] ICR 72 (NIRC)*

Scott-v-Russell *[2013] EWCA Civ 1432*

McPherson-v-B N P Paribas *[2004] ICR 1398 (CA)*

Yerrakalva-v-Balmsley Metropolitan Borough Council *[2012] ICR 420 (CA)*

Daleside Nursing Home Limited-v-Mathew *EAT 519/08*

HCA International Limited-v-May-Bheemul *EAT 477/10*

Ghosh-v-Nokia Siemens Networks UK Limited *EAT 125/12*

Hamilton-Jones-v-Black *EAT 47/04*

Salinas-v-Bear Stearns International Holdings Inc *[2005] ICR 1117*

Vaughan-v-London Borough of Lewisham (No. 2) *[2013] IRLR 713*

Doyle-v-North West London Hospital NHS Trust *[2012] ICR D21*

Sharma-v-London Borough of Ealing UK *EAT/0399/05*

Sahota-v-Dudley Metropolitan Borough Council *UKEAT/0821/03*

Shields Automotive Limited-v-Mr Ronald Grieg *UKEATS/0024/10*

Jilley-v-Birmingham and Solihull Mental Health NHS Trust *UKEAT/0584/06*

SUD-v-London Borough of Ealing *UKEAT/0482/11*

Arrowsmith-v-Nottingham Trent University *[2012] ICR 159 (CA).*

8. In support of her submissions resisting the costs application, the Claimant produced a witness statement dated and signed by the Claimant on 10 October 2016 which ran to some 20 pages. It was a copy of the statement which had earlier been sent to the Tribunal. The Claimant also produced an additional authority, namely the case of ***Gallop-v-Newport City Council*** [2013] EWCA Civ 1583.

9. Also in the bundle from the Claimant marked [C1] were approximately 100 pages including correspondence and a further copy of the Tribunal's judgment. In particular, for the purposes of the costs application the Claimant produced various documents relating to her financial circumstances.

10. At the outset of the costs hearing it was agreed that each of the parties would have a maximum of one hour to make their submissions.

11. Before listening to the submissions, the Tribunal adjourned for just over an hour in order to read the various documents and to allow each party to read the other's documents.

The Application

12. The Respondent applied on two bases. The first was that the Claimant had had no reasonable prospect of success, and the alternative basis was that the Claimant's conduct of the proceedings and the bringing of the proceedings by her was vexatious or otherwise unreasonable conduct. The Respondent relied largely on the findings in the Tribunal's Judgment on liability.

13. As the Respondent set out the detail of their submissions in writing it is not proportionate to repeat them in these reasons.

14. The Tribunal had regard to the fact that this costs application followed a difficult and lengthy case which dealt with a specialist area of employment. The Tribunal accepted that it was more difficult than in the usual case for the Respondent and its representatives to prepare and conduct its case in those circumstances. This situation was compounded by the fact that a substantial number of the Claimant's allegations kept changing. For example, following the decision by a Tribunal prior to the liability hearing about the basis on which the Claimant could pursue her disability claim, she sought to alter the basis of her claim in an attempt to circumvent that ruling. This was also reflected by the size of the bundle and the need for the Respondent to produce evidence in rebuttal.

15. The Claimant contended that the Respondent could have applied for her claim to be struck out but the Tribunal accepted that this would not have been appropriate as this was a case in which the facts were in dispute. The merits of the claim therefore could only be resolved at a full hearing.

16. The Tribunal also took into account that the complaints alleged whistleblowing and various types of disability discrimination. These were complex types of claims. The Claimant relied on 10 protected disclosures.

17. In determining whether the Respondent had established that the Claimant met the threshold for the making of a costs order, the Tribunal had to take into account all the relevant circumstances. In relation to whether the Claimant's conduct and or the bringing of the proceedings was vexatious the Tribunal had regard to the law set out in the case of ***Marler –v-Robertson*** (above).

18. The Tribunal considered the submission that it was unreasonable of the Claimant to have conducted the proceedings in several respects. The first was in relation to the giving of evidence which was untrue. Whilst this was not a matter which necessarily could lead to an award of costs the Tribunal accepted the Respondent's submissions that it was capable of amounting to vexatious or otherwise unreasonable conduct of the proceedings. In this respect the Tribunal relied on the two cases cited by

the Respondent in paragraph 9 of the written submission namely ***May-Bhemul*** and ***Ghosh.***

19. In relation to whether the bringing of the proceedings was vexatious or unreasonable, the Tribunal had to be satisfied that there were no reasonable prospects of success at any point. This is a high hurdle for the Respondent to surmount in relation to costs. The case of ***Sahota-v-Dudley Metropolitan Borough Council*** was relevant in this regard.

20. The Tribunal was satisfied that there was never any proper basis for bringing the whistleblowing complaint. The Tribunal had found that it was the Claimant's contractual responsibility and part of her duties to raise the compliance issues. She could therefore not have had a reasonable belief in the contention that she later relied on (as to the Respondent's intentions). The Tribunal's findings as to the ten different disclosures relied upon and the examination of events at the time did not support the Claimant's bringing of the claim.

21. A further element was the report prepared by Dr Treleaven. This report which was generated during the course of the proceedings was entirely consistent with the Respondent's position and with the Claimant's medical records. There was no evidence other than that of the Claimant during the course of the hearing that she had the symptoms which she described in her pleaded case. The Claimant effectively sought to circumvent the contents of Dr Treleaven's report, the relevant expert, by seeking to pursue other types of complaints in relation to her medical condition. However, the evidence which had been obtained in relation to the Claimant's medical condition from Dr Treleaven made it absolutely clear that any other symptoms which the Claimant sought to rely on had no relevant effects.

22. In short there were various way in which the Claimant sought to change her case in relation to her medical condition and medical diagnosis added considerably to the time taken but also to the difficulty for the Respondent in seeking to cross examine and address the issues. This was highlighted by the Claimant's contention initially that she had pernicious anaemia based on a comment by Dr Treleaven. Then during the hearing, she sought to rely on the evidence of Martin Hooper who was not a medical expert despite the fact that there had been specific directions given by the Tribunal prior to the hearing about the obtaining and adducing of such evidence. The Claimant did not attempt to amend her claim form or the basis of her complaints and it was left to the Respondent to apply to exclude evidence.

23. The Tribunal also accepted the Respondent's contentions about the way in which the Claimant ran her whistleblowing case. For example, she had declared that she did not regard herself as disabled when she started working with the Respondent, but when reference was made to the document in which the Claimant had ticked the box to say that she

was not disabled, she maintained that there was another document in which she had said that she was indeed disabled. That document however was never produced in evidence by the Claimant. In apparent furtherance of this changed position about being a disabled person, in correspondence with the Respondent the Claimant through her Solicitors indicated an intention to exclude her medical records. In the event she did not make such an application. The position was that the medical records of the Claimant showed that the Claimant's witness statement was inaccurate and misleading in relation to the nature of her disability and the pernicious anaemia in particular.

24. The Tribunal took into account the fact that although the Claimant was a litigant in person during the costs hearing, at all material times she had been represented by an experienced Solicitor and specialist Counsel.

25. The Tribunal accepted the statement of the law in relation to what constitutes "vexatious" conduct as set out in paragraph 7 of the Respondent's outline submission [R3] as follows:

> "The hallmark of a vexatious proceeding is …….that it has little or no basis in law (or at least no discernable basis); that whatever the intention of the proceedings may be, its effect is to subject the defendants to inconvenience, harassment and expense out of all proportion to the gain likely to accrue to the Claimant and it involves an abuse of the process of the Court, meaning by that, a use of the Court process for a purpose or in a way which is significantly different from the ordinary and proper use of the Court process."

26. Conduct which is "unreasonable" includes vexatious conduct but has no specific, legal meaning and is a matter of commonsense. When considering the exercise of the Employment Tribunal's discretion, it has been held that the Tribunal should take into account the nature, gravity and effects of the conduct regarded as unreasonable: ***McPherson*** (above) and also should look at the whole picture, identifying the conduct, what was unreasonable about it and what effect it had: ***Yerra Kalva*** (above).

27. Also in relation to the relevant law, the Tribunal noted that the purpose of a costs order is compensatory and the Employment Tribunal should look at the effects of the conduct. It is not necessary to identify a precise cause or link between the specific costs claimed (on the one hand) and the conduct relied upon (on the other): ***Yerra Kalva*** (above). It has been held that Tribunals should avoid over-analysis and simply consider the effect as well as the nature and gravity of the conduct relied upon.

28. Turning to ability to pay, the Employment Tribunal is not obliged to, but properly ought to, take into account a party's means, particularly when the costs claimed are substantial: ***Doyle*** (above). The ability to do so is however dependent upon evidence of means.

29. The Respondent in this case did not provide a bill of costs but relied on the schedule produced in the hearing to give the Tribunal an indication of the scale of the costs incurred.

30. Although whether a Claimant has brought proceedings which are misconceived must be considered separately, it is open to the Employment Tribunal to consider a course of conduct and conclude that taken as a whole, such conduct is unreasonable: see for example the matters set out in the case of ***Sahota*** (above).

31. The Tribunal adopted the principles of law set out in paragraphs 5 to 16 inclusive of the Respondent's outline submissions [R3] in relation to the consideration of a costs order. The Tribunal has merely set out above extracts from that submission on grounds of proportionality.

32. The Tribunal accepted the following specific submissions made on behalf of the Respondent.

    i. At paragraph 60 of the Reasons for the Reserved Judgment, the Tribunal found that all of the matters relied upon by the Claimant by way of qualifying disclosures involved the Claimant referring to matters which had arisen as part of her day to day working duties and that she had relabelled advice and recommendations as protected qualifying disclosures. Further, as set out above the Claimant could not therefore have had, and did not have, a reasonable belief that any information provided tended to show that the Respondent had failed to comply with the stated legal obligation.

    ii. Further in each case in which the Claimant had pursued a claim that the reason or, if more than one, the principal reason for her dismissal was the fact that she had made a protected disclosure, the Tribunal had concluded that there was no substantiated basis for her suggested belief, based upon the contemporaneous documents or (in most cases) the Claimant's own evidence. The Claimant herself accepted this in relation to those disclosures which were no longer pursued by the end of the hearing (disclosures 3, 7, 9 and 10).

    iii. Further the Tribunal concluded that the Claimant was an expert in employment taxes, having accepted the details provided in her CV and that she also could not subjectively have held the view that any information provided tended to show that the Respondent had failed to comply with the stated legal obligation.

33. These findings were relevant to the consideration of whether the claim was misconceived in the sense of having no reasonable prospect of success; alternatively, whether the Claimant acted vexatiously or

otherwise unreasonably in bringing such a complaint.

34. In relation to the disability discrimination allegations, the Respondent had conceded that the Claimant was suffering from a Vitamin B12 deficiency but according to the jointly instructed expert (Dr Treleaven) the symptoms described by the Claimant were unrelated to the condition upon which she originally relied. According to the Claimant's own GP notes as well as the evidence of the Respondent, there were no symptoms causing difficulties in the work place. In essence there was no objective evidence supporting the Claimant's alleged symptoms. Indeed, the Claimant must have been aware of her own capabilities at the time which is why as the Tribunal found (paras 124 -136) the Claimant had not made the Respondent aware of the symptoms described in her disability impact statement. The effect of this therefore was that the Claimant was unable to demonstrate

    i. For the purposes of the direct discrimination allegations, a proper comparison and connection between her dismissal on the one hand and her protected characteristic on the other;

    ii. For the purposes of the reasonable adjustments claim that there were provisions, criteria and practices ("PCPs") which placed her at a substantial disadvantage when compared with others who were not so disabled;

    iii. For the purposes of the indirect discrimination complaint that there was any PCP which placed her at a substantial disadvantage when compared with others who were not so disabled; and

    iv. For the purposes of the discrimination arising from disability complaint that there was a factual basis for a causal link between the treatment complained of and her disability.

35. The point made above about Dr Treleaven's report is that although it was obtained during the course of proceedings jointly, the unequivocal conclusions that she reached were entirely consistent with both the Respondent's version of events and the Claimant's own general practice notes. Thus no objective evidence was or could be adduced supporting the symptoms relied upon by the Claimant in the context of her un-amended, pleaded case.

36. Given the diagnosis of the Claimant that she had a vitamin B12 deficiency, and the symptoms attributed to it, claims of direct discrimination, and an alleged failure to make reasonable adjustments, indirect disability discrimination and discrimination arising from disability were misconceived in the sense of having no reasonable prospect of success; or alternatively by bringing such complaints, the Claimant acted vexatiously or otherwise unreasonably.

37. The next argument was that the Claimant acted unreasonably in bringing proceedings. It was not in dispute that she did not have sufficient continuous service to pursue a claim of unfair dismissal. She pursued instead complaints which she must have been aware could not succeed. Further to the points already made in this context above, in relation to the disability discrimination claims, the Claimant accepted in her witness statement that disability only "may have been a contributory factor in my dismissal…..". The Claimant therefore was not even asserting a case which was sufficient to constitute grounds for liability against the Respondent.

38. The Tribunal did not make any specific findings about what actually motivated the Claimant to pursue this litigation. The Tribunal did not consider that was necessary in order to find that the grounds for making a cost order had been made out. Specifically, this related to the Respondent's submission at paragraph 28 of [R3]. The Tribunal in essence accepted that the Claimant's conduct of and bringing of the proceedings had the effect of subjecting the Respondent to inconvenience and expense out of all proportion to any gain likely to accrue to her. In bringing this litigation she went beyond the exercise of her legitimate legal rights. Further as set out above the Claimant's conduct in bringing the proceedings was unreasonable based upon the factual position relating to her working duties and responsibilities and to her own medical condition which she must have been aware of

39. In relation to the conduct of the proceedings, the case argued by the Respondent which the Tribunal accepted was that whenever the Claimant was challenged with regard to the factual basis for her complaints, including during case management, she conducted the proceedings by:

    i. Introducing a version of events which was different to that originally relied upon;

    ii. Attempting to introduce evidence relating to a case which was different from her original complaints;

    iii. Giving testimony which included extravagant statements of facts in an attempt to support her original case; (such as her alleged diagnosis of pernicious anaemia).

    iv. Making concessions only upon cross examination by the Respondent's representative; and

    v. Ultimately giving testimony to the Employment Tribunal which was misleading and false.

40. The whistleblowing part of the case once again centred on the Claimant's reliance upon 10 separate disclosures. Details of these were provided by her in the additional information and in her claim. As despite

that, insufficient detail had been provided by her in advance of the liability hearing, the Respondent had no option but to challenge this in cross examination. Further the evidence in the Claimant's witness statement about the disclosures was inconsistent with her claim form and the additional information provided.

41. Further in this context in relation to disclosure one (see para 10 of the reasons for the reserved judgment) on the second day of the liability hearing the Claimant produced a further schedule purporting to be merely an annotation of the earlier list of disclosures, but this document also re-worded and re-cast some aspect of her complaints.

42. In cross examination the Claimant then made a series of concessions which wholly undermined her whistleblowing complaint.

43. In this context the Tribunal accepted that the Respondent and its advisors had found it necessary to take independent specialist advice from the Respondent's external tax advisors in order to assess the Claimant's case and properly prepare their responses.

44. Further, the Tribunal accepted paragraph 34 of the Respondent's main costs submission [R3] in relation to the Tribunal's various findings at paragraph 62 of the reserved judgement about each of the disclosures alleged, which undermined the Claimant's case.

45. The concessions identified in paragraph 34 of [R3] applied to all the disclosures, apart from disclosure 8, allegedly made by the Claimant during the course of her employment. The Tribunal dismissed disclosure 8 partly because no evidence was given at all in relation to Denmark and because the Claimant offered no evidence that the Respondent had failed to either pay taxes in France or to make all necessary disclosures.

46. The Tribunal also accepted the submission that the Claimant gave false and misleading evidence in a number of material respects. One example was in relation to her case about a global tax policy that she had been warned not to upset matters and that her actions "may most likely lead to the termination of [her] employment". The Tribunal had found that the documents at pp332 to 334 of [R1] did not constitute a disclosure qualifying for protection and had accepted the rebuttal evidence of Mrs Cox in support of the Respondent's case on this issue. Further, when questioned by the Employment Tribunal, the Claimant attempted to justify failing to disclose to HMRC the absence of a modified PAYE agreement by relying upon her responsibilities towards the Respondent, stating that she effectively attempted to mislead the HMRC.

47. The Tribunal also took into account that although the Claimant withdrew certain disclosures (3, 7, 9 and 10) this was only done after the close of the evidence. This meant that the Respondent still had to address these

disclosures during the evidence and also had prepared submissions in relation to these matters as the Respondent was only notified on 26 May 2015 of the withdrawal.

48. Further the withdrawal of those disclosures was consistent with the Respondent's submission, which the Tribunal accepted that the Claimant's evidence in support of those disclosures was false and misleading. A further example of this was the Claimant's case in relation to causation of detriment/dismissal by reason of the whistleblowing. She alleged at paragraph 44 of her witness statement that the matters she was drawing attention to were increasingly causing her to be isolated by those who wanted to protect their positions, before going on to describe a deteriorating relationship with her line manager. The Tribunal found (para 118 of the reasons for the reserved judgment) that this evidence was inconsistent with the contemporaneous evidence. The Tribunal reiterated that it did not consider that the chronology in relation to the Claimant's probation and the provision to her of information about the promotion process by Mrs Flowerdew was consistent with her contention that the dismissal was as a result of having made disclosures.

49. The Tribunal considered the position in relation to the conduct of the disability discrimination case. As set out above in the event the Claimant's case at the hearing consisted of attempts by her to get around the clear conclusions of the jointly instructed expert. Prior to the commencement of the hearing the Claimant produced further medical evidence which, albeit it was of limited probative value, required the Respondent to submit supplemental questions to the jointly instructed expert. Further the Claimant relied on the tentative suggestion of pernicious anaemia in Dr Treleaven's report to contend that this was a diagnosis of her and this required the Respondent in turn to adduce evidence from her general practitioner's records and medical history to rebut this. Finally, the Claimant attempted to introduce non-expert opinion evidence in her witness statement and hearsay evidence of an individual tendered as an expert but without relevant qualifications.

50. It was also relevant that the Claimant eventually accepted in cross examination that there was no such diagnosis of pernicious anaemia of her. Before this however she had among other things identified Dr Sharma as having made this diagnosis when in fact she had been informed that her test results had been negative and there was no evidence whatsoever to support such a diagnosis by him.

51. The effect of the way in which the Claimant ran the case was that considerable time was taken up addressing the Claimant's attempts to justify the symptoms relied upon in her disability impact statement (chronic fatigue, chest pains, slow speech, memory loss and headaches). In effect she attempted to base a case on these symptoms and not those which had initially been put forward. She also relied upon further undiagnosed medical conditions. In an unsuccessful attempt to

establish that the Respondent had knowledge of such symptoms the Claimant

i. Contradicted herself with regard to when and how she informed Mrs Flowerdew of such symptoms;

ii. Could not identify the context of the discussions alleged or even when and where they had taken place; and

iii. Gave a version of events which was inconsistent with her own claim and with the contemporaneous evidence in the notes of her second interview on 4 March 2013, with her own health declaration and with the application for a parking permit as well as with her own general practitioner's records.

52. Another respect in which the Tribunal rejected the Claimant's case as untrue was her assertion that Mrs Flowerdew would not allocate more resources and procrastinated in any decision to recruit additional staff, alleging that help had not been forthcoming: see paras 38 and 41 of the reasons for the reserved judgment. The Tribunal accepted the Respondent's submissions on these issues as set out at paragraphs 50 to 53 of [R3]. Thus the factual basis for the Claimant's claims for indirect disability discrimination, reasonable adjustments and also discrimination arising from disability were all based upon evidence which was false.

53. Thereafter even after the conclusion of the evidence but before the presentation of written submissions, the Claimant conducted her case unreasonably.

54. After the close of the evidence the parties were directed to exchange written submissions. The submissions put forward by the Claimant were legally incorrect in certain respects; put forward a case which was not reflected in the evidence; and relied on arguments which misconstrued the evidence and were or could be misleading.

55. In relation to the whistleblowing complaint as the Tribunal concluded at paragraph 54 of the reasons the Claimant's analysis with regard to the burden of proof was legally incorrect. A similar situation pertained in relation to the requirement that the Respondent must have actual or imputed knowledge of the Claimant's disability and also the requirement for expert evidence of diagnosis and complex cases with a wide range of symptoms (para 133 of the Reserved Reasons).

56. The Claimant then also advanced a different case specifically by changing the case which the Respondent was expected to meet in relation to five out of the remaining six disclosures relied on, basing her case in closing upon evidence which differed from and was in many respects inconsistent with her claim form, additional information, schedules of disclosures and even her statement. All these matters were addressed by the Respondent in their reply to closing submissions

providing all the relevant particulars. The Tribunal had directed that such replies should be made.

57. The Respondent also relied upon the fact that they had warned the Claimant that a costs application was likely if she persisted with a claim for disability discrimination which was contradicted by the conclusions in the report of the jointly instructed expert. There was documentary evidence of this (pp277, 282 and 364). The Respondent did not rely on this correspondence as evidence of unreasonable conduct in relation to the Claimant's non-acceptance of an offer made on 26 February 2015, but upon the representations made by way of warning the Claimant with regard to the merits of her whistleblowing complaint.

58. In relation to the Claimant's means, the Respondent had explained the position in law to the Claimant. Further, they sent to the Claimant the standard form used in the County Court for the declaration of means and invited her to fill it in if she wanted the Tribunal to take those means into account in the costs application. This is in accordance with a practice encouraged by the Employment Appeal Tribunal.

59. By the end of April 2016 the Respondent had received no response to that invitation. The Employment Tribunal was written to on 17 June (p.399). That was the background against which the Claimant then lodged with the Tribunal the witness statement which addressed her ability to pay but this was not supplied at the same time to the Respondent as described above in these reasons. Indeed, the Claimant provided a further witness statement to the Respondent and the Tribunal on the morning of the costs hearing. The Respondent having only found out about the Claimant's first statement because it was referred to in correspondence from the Tribunal, prepared the documents at R4 with further submissions. The second witness statement that was produced on the morning of the hearing was given to the Respondent without any advance notification that it would be prepared.

60. The Respondent complained about these circumstances. They urged the Tribunal either not to take into account the Claimant's ability to pay in those circumstances or if the Tribunal did so, to make a substantial award of costs in any event.

61. The reason why the Respondent now submitted that the Tribunal should disregard the Claimant's means was because the Claimant had failed to give full evidence of her means and her ability to pay but had given incomplete evidence about her inability to pay. It was in order to try to obtain all relevant evidence that the Respondent had sought to obtain that evidence and to provide the Claimant with the means of providing it to the Tribunal in advance of the hearing. The Claimant had not despite those efforts provided such information.

62. Despite that however the Respondent submitted that the Tribunal had

considerable information about the Claimant having access to substantial funds. This could justify the order for costs that was being sought. The Respondent referred to the fact that the Claimant owned a property at 18 Tobermory Close and that on the basis of the Claimant's estimation of value it was worth approximately £469,000. This yielded £247,000 of available equity.

63. Among other points the Respondent referred the Tribunal to the fact that in her costs witness statement [C1] the Claimant continued to make a myriad of submissions about the whistleblowing claim, arguing her case in new ways.

64. Mr Graham outlined the range of options available to the Tribunal if the Tribunal sought to make a costs order. This included a cost capping order in which the Tribunal limited the costs to a particular figure or percentage of the costs claimed. He asked for the assessment of costs to be referred to the County Court.

65. For the avoidance of doubt, the schedule of costs in bundle [R3] amounted to £122,881.60. The further costs subsequently incurred were estimated in [R5] for the period March to 11 October 2016 at £19,595.70.

66. In opposition to the application, Ms Kalia addressed a number of points. She challenged the contentions made by Mr Graham as to her motives. In particular, she contended that she was not concerned with being vindictive against the Respondent.

67. In relation to the Respondent's point that she had made no specific request for disclosure, the Tribunal considered that her point that if the Respondent had provided certain documents that had been asked for a lot of inconsistencies would have been clarified, was not well made. The Tribunal reminded itself that the Claimant had been legally represented throughout both by Solicitors and Counsel. The process of disclosure and requests for specific disclosure of certain documents which were deemed to be relevant or not provided was available and had not been used.

68. In her oral submissions she then addressed various aspects of the Respondent's arguments about her attempt to circumvent the conclusions of Dr Treleaven and to rely on symptoms which had not been put forward originally. She did not however during her submissions accept the Tribunal's findings that the case being put by her was inconsistent with the medical records and with the conclusions of the expert. She effectively sought to re-argue a number of the substantive liability points in her response to the costs application submissions. Indeed, she indicated that she was now seeking to obtain various documents under the Data Protection Act which the Respondent should have provided for this litigation.

69. During her submissions in support of the costs application she once again sought to argue that her disability was the reason for the dismissal despite the fact that the Tribunal had ruled already on this liability issue. Further she failed to address even within that context the findings that the Tribunal had made as to the other difficulties in her employment which had in the event led to its termination.

70. Further she asserted that after the evidence was concluded she did not know that closing submissions had been sent in. The Tribunal had made directions about this at the end of the hearing in her presence and indeed closing submissions were received by those instructed by the Claimant as directed.

71. The Tribunal did not consider that it was appropriate or necessary to set out the numerous submissions made by the Claimant in answer to the costs application in which she sought to persuade the Tribunal to reach findings which were different from the findings which had been set out in the liability judgment about factual matters or matters relating to her reasons for acting in the way that she had during her employment. One such example was in relation to the criticism by the Respondent that she had failed to sign off on a document (a 'fit and proper person' statement) in accordance with her job role and despite the fact that she had been party to the discussion about the issues she was being asked to sign off. The Tribunal had reached findings about this as part of the liability judgment and submissions at this stage seeking to persuade the Tribunal to reach a different outcome were not relevant. Indeed, during her submissions Ms Kalia referred to the fact that she had sought to persuade the Tribunal to reconsider its original judgment. This application had been rejected. Her contention however was that if the ground for rejection of her application for reconsideration was that she was not raising any new points then she submitted that all the points in her submission for reconsideration must now be taken into account. She also referred in passing to the possibility of launching an appeal.

72. Although she addressed the question of her ability to pay and the specific costs that were being sought against her, she applied the wrong test in that she referred to the question whether a reasonable employer would have behaved as the Respondent did. This was a test that was relevant in the context of an ordinary unfair dismissal and to a certain extent supported the Respondent's contention that she primarily would have wanted to bring an unfair dismissal claim but she did not have sufficient length of service to do so. This in turn pointed to the greater likelihood of the Claimant's whistleblowing and Disability Discrimination complaints being misconceived.

73. The Claimant also asserted that she had a genuine belief in the rightness of her case. She contended that matters had not come to an end. The Tribunal considered that this was inconsistent with the way in which she opened her submissions by saying that although she had

been concerned to ensure that she got justice out of what happened, she had since moved on and had done the best that she could in this investigation.

74. The Claimant relied upon the information that she had provided about her ability to pay. She lived in her property with her mother who was aged approximately 79 years and with a daughter who was 29 years old. She indicated that she could not afford to borrow any more money. Her salary was right at the top of the scale so that was unlikely to increase. Her outgoings however had increased she contended and she had to pay charges such as parking and congestion charge. She had received a pay rise of £1500 this year. Other managers had received lower pay rises. She did not anticipate that the Respondent would be able to recover the sums they sought for at least 10 to 15 years.

75. In reply the Respondent among other matters referred to the fact that the Claimant's position to the effect that she had a Tribunal Judgment against her therefore she could not work was not incomprehensible. Mr Graham submitted that the Tribunal should regard the Claimant as a senior manager with earning capacity.

76. The Claimant sought to explain that her condition prohibited her from getting a more highly paid job.

77. As set out above the Tribunal accepted the submissions made by the Respondent. The point made by the Claimant did not defeat the substance of those points. The Tribunal was satisfied that the Claimant had brought and conducted the proceedings unreasonably in relation to both the whistleblowing claims and the disability discrimination allegations. In particular, in relation to the whistleblowing she did not have reasonable grounds for believing that she had made protected disclosures, by reason of her job and her knowledge of the area as the Tribunal's earlier findings established; and also she was fully aware of the factual matters which had led to the termination of her employment and the suggestion that she was being disadvantaged because of the disclosures was not credible as the chronology demonstrated. The time line of the employment was far more consistent with the performance concerns being the reason for the dismissal rather than the protected disclosures. The Tribunal has also noted above the Claimant's own comments during her closing submissions about unfair dismissal and the Tribunal considered that these tended to undermine the case that she had good grounds for believing in her claim of whistleblowing and disability discrimination.

78. In relation to the disability discrimination the fact that the ground shifted constantly in relation to the symptoms that the Claimant wished to rely on and then that she failed to take on board the effect of the expert evidence about her symptoms also undermined her case that she had reasonable prospects of success in relation to causation between the

disability and the detriments and dismissal that she complained about. The Tribunal considered it was very likely that she was aware of this weakness otherwise she would not have taken the steps that she took to try to bolster her case and to seek to elicit other evidence to circumvent the effects of the expert's report.

79. In all those circumstances therefore the Tribunal considered that as set out above the grounds for making the costs order were established; and second, that it was appropriate to make an order for costs.

80. The Tribunal did not follow the course proposed by the Respondent of disregarding the Claimant's means. However, the evidence that was agreed as to the Claimant's means was evidence which the Tribunal could take into account. We also had regard in general terms to the fact that the Claimant continued to have an earning capacity and the fact that she was able to work for the Respondent without her disability having an effect on her attendance. The Claimant was also in possession of particular specialist skills. The Tribunal considered therefore that she had a considerable earning capacity and could repay costs. We also took into account that she had instructed lawyers in order to pursue this claim through to the end of the liability determination.

81. In all those circumstances we considered that for the reasons outlined in considerable detail in Mr Graham's submissions it was appropriate to make an order for costs against the Claimant.

82. We did not accept that it was appropriate to refer this case to the County Court for assessment of costs. The Tribunal considered that the proportionate approach was to have regard to the length of the hearing and our findings that the case had no reasonable prospects of success. We also took into account the amount of documentation and the nature of the allegations and the fact that numerous disclosures were abandoned by the Claimant at the end of the evidence. In addition, we took into account our own findings about the remaining allegations.

83. In all those circumstances we considered that it was appropriate that the Claimant should pay the sum of **£17,500** to the Respondent for costs incurred by the Respondent in defending this claim.

Employment Judge C Hyde
Date: 15 February 2017