Case Number 1300540/2016

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **AND** | **Respondent** |
|---|---|---|
| **Mr G Bellavia** | | **The University of Birmingham** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT** Birmingham **ON** 27 & 28 February 2017
1, 2, 6 – 9 & 13 – 17 March 2017

**EMPLOYMENT JUDGE GASKELL** **MEMBERS:** Mrs N Gill
Mr S Woodall

**Representation**
**For the Claimant:** **In Person**
**For Respondent:** **Ms N Motraghi (Counsel)**

**JUDGMENT**

**The judgment of the tribunal is that:**

1 The claimant's claim to have been unfairly dismissed by reason of having made protected disclosures is dismissed upon being withdrawn by the claimant.

2 The claimant was fairly dismissed by the respondent by reason of redundancy; his claim for unfair dismissal is not well-founded and is dismissed.

3 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaint of direct disability discrimination, pursuant to Section 120 of that Act, is dismissed.

4 Pursuant to Rules 74 – 78 & 84 of the Employment Tribunals Rules of Procedure 2013, the claimant is ordered to pay to the respondent the sum of £20000 as a contribution towards the respondent's costs.

## REASONS

### Introduction

1 The claimant in this case is Mr Gerlando (Gina) Bellavia; who was employed by the respondent, the University of Birmingham, in various roles from 5 April 2004 until 30 November 2015 when he was dismissed. The post held by the claimant at the time of his dismissal was *Project Director for Smartculture*; a Grade 9, non-academic, post. The contemporaneous reason given for the claimant's dismissal was redundancy; the claimant does not accept that this was the principal reason.

2 By a claim form presented on 30 March 2016, the claimant brought the following claims: -

(a) Unfair dismissal; including automatic unfair dismissal by reason of having made protected disclosures.
(b) Disability discrimination, including direct discrimination; indirect discrimination; harassment; and failure to make reasonable adjustments.

3 When the claimant was ordered to provide further particulars of his claims, he included claims for protected disclosure detriment and age discrimination; sex discrimination; victimisation; and claims brought under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000; and the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

4 At a Closed Preliminary Hearing on 19 May 2016, Employment Judge Camp directed that there should be an Open Preliminary Hearing (OPH) to determine several preliminary issues namely: -

(a) Whether the claimant should be permitted to amend his claim to include the claims which he purported to add by the further particulars.
(b) Whether, at the material time, the claimant was a disabled person as defined in Section 6 and Schedule 1 of the Equality Act 2010.
(c) Whether any part of the claims should be struck out as having no reasonable prospect of success.
(d) Whether he claimant should be ordered to pay a deposit.

5 The OPH was conducted by Employment Judge Dimbylow on 13 &14 October 2016. Judge Dimbylow determined that the claimant was a disabled person at all material times after 11 March 2014; he was not a disabled person before that date. At or before the OPH the claimant withdrew some of his claims; Judge Dimbylow refused permission to include some of the claims by way of amendment; he struck out some of the claims as having no reasonable prospect of success; and he ordered deposits to be paid in respect of some others. The

deposits were not paid; and so, those claims were struck out by operation of the Rules.

6 The following claims survived for determination by this panel: -

(a) Unfair dismissal.
(b) Automatic unfair dismissal by reason of having made protected disclosures.
(c) Direct disability discrimination limited to the dismissal only.

7 Part-way through this trial the claimant withdrew the allegation that he had been dismissed by reason of having made protected disclosures. It has only therefore been necessary for us to determine the "ordinary" unfair dismissal claim; and the claim for direct disability discrimination.

**The Evidence**

8 We received and considered evidence from a total of seven witnesses: six of these gave oral evidence before us and were cross-examined; the seventh was Professor Martin Stringer; a witness called by the claimant. Miss Motraghi indicated at the outset of the trial that she had no questions for Professor Stringer; accordingly, his evidence was taken as read; it was unchallenged; and there was no need for him to attend.

9 As the issues in the case all centred on the claimant's dismissal, at the suggestion of the panel, and with the agreement of the parties, the respondent presented its case first. Ordinarily this would have entitled the respondent to close the case; and address the tribunal last. However, with her agreement, Miss Motraghi made her closing submissions before the claimant; allowing him to make the final address.

10 The respondent called a total of five witnesses; the details provided include the witness' designated role at the time of the claimant's dismissal: -

Professor Michael Whitby - Head of College of Arts and Law (CAL)
Professor Susan Hunston - Director of Research CAL
Ms Charlotte Wellington - Director of Operations: College of Social Sciences
Mrs Zoe Oakes - HR Manager CAL
Ms Daljit Dhillon - HR Adviser CAL

11 The claimant gave evidence on his own account; and relied on the unchallenged written evidence of Professor Stringer – Deputy Pro-Vice Chancellor (Staffing).

12 In addition, we were provided with an agreed bundle of documents running to more than 700 pages; and an additional bundle provided by the claimant running to a further 891 pages. In reaching our decision, we have taken account of those documents from within the bundle is to which we were referred by the parties during the hearing.

13 The claimant was a most unsatisfactory witness: his evidence, and his entire case, was riddled with inconsistency; examples of which are as follows: -

(a) The claimant's evidence before us was that Ms Dhillon provided him with a perfunctory service in assisting him in seeking redeployment opportunities. But during meetings with her at the time the claimant is recorded as being effusive in his gratitude to her for the efforts she was making on his behalf. The claimant could not explain this discrepancy save to say that he was not being dishonest in his evidence; but could not now recall how he felt at the time.

(b) The claimant's case before us was that because of his disability he was unable to fully participate in the consultation and redeployment process. This assertion is contradicted by the documentary evidence: for example, at the outset of the consultation process he could write a searching letter of enquiry addressed to Mrs Oakes as to the procedure and how it would be followed. Much later in the process, whilst the claimant was off sick, he wrote a similarly searching letter of enquiry regarding a possible alternative role - that of Senior Research Facilitator + Operations (SRF+Ops). Also, during this process, he could construct a detailed letter addressed to the University Registrar regarding alleged financial irregularities; this letter was later to form a central plank in his protected disclosure claims.

(c) The claimant based his claim in part on the suggestion that he should have been offered the SRF+Ops job without the necessity of an application or a selection process; and that, in failing to make such an offer, the respondent had failed to offer reasonable alternative employment. However, at the time, the claimant himself stated in writing that he did not regard that post is suitable for him.

(d) When the claimant purported to present a claim for age discrimination it was based on a conversation with Professor Kai Bongs about a possible post. Professor Bongs had stated something to the effect that he was looking for someone more "junior" than the claimant. The claimant purported to interpret this as a reference to his age. However, the claimant made no reference to suggested age discrimination in contemporaneous documents or discussions with Ms Dhillon or Mrs Oakes. Indeed, it was clear from those discussions that he fully understood that Professor Bongs was referring to the grade status of the role and not to the age of any applicant. The claimant subsequently withdrew the claim for age discrimination.

(e) In part, the claimant's claim for unfair dismissal relied on the proposition that he could have been "bumped" into a role occupied by Ms Lara Ratnaraja; but Ms Ratnaraja's role was at a lower grade than the claimant's; and he made clear throughout the consultation/redeployment process that he did not think a lower graded post was a suitable alternative. In any event, the evidence was clear and yet the claimant seemed unwilling to grasp it, That Ms Ratnaraja's is post was coming to an end at the same time as the claimant's post. The proposed "bumping" could not have extended the claimant's employment.

(f) In his closing submissions, the claimant articulated a conspiracy theory involving Professor Whitby; Mrs Oakes and others - to deliberately establish him in a position following his 2014 appeal which itself would fall for redundancy within 12 months. The claimant had not earlier articulated this theory; and did not put that case either to Professor Whitby or to Mrs Oakes. Furthermore, detailed reference to the transcript of the 2014 appeal demonstrate that the very basis of the appeal was that a limited term role should be made available to extend the claimant's employment.

(g) The claimant was adamant that during the redeployment process Ms Dhillon had not hit informed him of salary protection if he was assigned to a lower grade post. Ms Dhillon was always confident that she had given him the information; and her personal notes reflected this. A covert recording of their discussions produced by the claimant only shortly before the trial confirmed that Ms Dhillon was correct and the claimant was incorrect in this regard.

(h) The claimant pursued an allegation of unfairness on the basis that Dr Henry Chapman may have been involved in the consideration of his application for the post of Lecturer in Archaeology; and that Dr Chapman was biased against him because of one of his purported protected disclosures. However, in cross examination the claimant was obliged to concede that he was simply not appointable to the post as he did not meet the essential criteria. He had, in any event, been informed that Dr Chapman had not been involved in the process but it could not possibly have made any difference.

14 In addition to these inconsistencies, there were other aspects of the claimant's conduct which severely undermine his credibility; and our ability to rely on the truth and accuracy of his evidence: -

(a) From 2013 onwards, the claimant routinely made covert recordings of meetings with colleagues. He did not inform his colleagues of what he was doing; or seek their agreement. In our judgement, this conduct falls far below the standards of professional courtesy; openness; and transparency; that we would expect between colleagues in an academic institution. The fact that the claimant chose to behave in this way, in our judgement, is seriously damaging to his credibility. The claimant explained

to us that his reasons for recording the meetings was linked to his disability; his inability to accurately recall conversations; and his inability to maintain an accurate note. This is a complete explanation for the desire to make an audio recording; it does not explain the necessity to do so covertly. Furthermore, having made the recordings the claimant appears not to have paid any attention to them before making serious allegations against Ms Dhillon and Professor Whitby.

(b) Repeatedly: in an email to Ms Dhillon; in his claim form; and even in his witness statement; the respondent asserted the Professor Whitby had told him in a meeting "*you will never be an academic here*". This is a total misrepresentation of what Professor Whitby had said; again, as disclosed by the claimant's own covert recording of the meeting. Frankly, bearing in mind that the audio recording was always available to the claimant, this allegation was at least reckless if not dishonest.

(c) The claimant attempted to advance a bizarre case with regard to his posting as *Project Director of Smartculture*: he well knew that this post had been created for him following his successful 2014 redundancy appeal; but it had not proved possible to agree a job description for the role; (*as an aside, we observe that, if anything, the respondent was over-indulgent in seeking the claimant's agreement to a job description; in our judgement, it is a matter for the employer to determine what the job description should be*). However, absent a job description, the claimant attempted to argue that the respondent could not establish that it was his role which was in fact redundant. This notwithstanding that he knew he had been appointed to the role; and he had taken the salary for it since 1 September 2014. We find that this conduct was simply manipulative; the claimant never seriously entertained the belief that he was not the holder of that role.

(d) The claimant damaged his own credibility by the readiness with which he made serious allegations against colleagues and former colleagues. Allegations of discrimination; detriment; victimisation; conspiracy; and flagrant dishonesty. Allegations which, in our judgement, were entirely without justification; and which, to a large extent, the claimant was compelled to resile from before the case was completed.

15 After detailed consideration, this panel concluded that the claimant was not a dishonest witness: but he was an individual who was so narrowly focused on the injustices which he perceives have been visited upon him that he was quite unable to see the full picture. He extracted words or phrases which were convenient to him and attempted to use them to his advantage entirely out of context (e.g. Professor Whitby). The most recent example of this is his misplaced reliance on the case of ***Bandara -v- British Broadcasting Corporation*** **UKEAT/0335/15 (EAT)** – also at **London Central ET 2202336/2016**. Here the claimant has latched onto references to earlier acts which were found to be "manifestly inappropriate" - this was relevant to the ***Bandara*** case; but, for reasons which we will explain, is wholly irrelevant to this case.

16 Professor Stringer's evidence was unchallenged: we accept it as truthful and reliable; but we find that it has no relevance to the issues which we must decide. Professor Stringer deals only with events up to the claimant's successful appeal against redundancy in June/July 2014.

17 By contrast to the claimant, we found the respondent's witnesses were, without exception, truthful; and compelling. In each case, their evidence remained consistent throughout; the witnesses were consistent with each other; their evidence was consistent with their earlier witness statements; and consistent with contemporaneous documents. The respondent's witnesses were unaware that their meetings with the claimant were being recorded; they did not become aware of this or have access to the recordings until shortly before the trial commenced; and sometime after their witness statements were prepared. And yet, by reference to the recordings, their evidence was unerringly accurate. This feature of the case enhanced our confidence in the truth and accuracy of their evidence. We found Mrs Oakes and Ms Dhillon to be particularly impressive witnesses.

18 In the light of the above findings, where there are contentious factual issues, we prefer the evidence given by the respondent's witnesses over that given by the claimant. On this basis, we have made our findings of fact.

## The Facts

19 On 5 April 2004, the claimant commenced employment with the respondent. He fulfilled several different roles; and held several different posts. Not unusually in academic institutions, some of the posts held by the claimant were underpinned by specific limited-term funding; and the post could only continue so long as the funding endured or was replaced.

20 On 1 September 2011, the claimant commenced his role of Digital Heritage Project Director. This was not a fixed-term contract; but the role was underpinned by grants from the European Regional Development Fund (ERDF). From the outset, the claimant was aware that the role could only continue to exist so long as the funding remained available. Part of the claimant's role (funded from outside ERDF), was to try and secure continuing funding. The role was located in CAL and the claimant's line manager was Charlotte Jarvis – Director of Operations CAL. The post was at Grade 9 and the claimant worked at 60% of full-time equivalent hours.

21 On 2 January 2014, the claimant was notified that the funding underpinning his role was due to cease on 31 August 2014; and that, accordingly, he was at risk of redundancy. There followed a consultation process which continued until 5 March 2014; the respondent's case is that during this

period all reasonable efforts were made to redeploy the claimant. On 7 March 2014, Mrs Oakes wrote to the claimant giving him notice of dismissal effective on 4 September 2014. The claimant was advised of his right of appeal.

22 In the meantime, the claimant was suffering with ill-health - anxiety and depression; he had attended an occupational health consultation; and, on 26 February 2014, in accordance with the respondent's procedures, he declared himself disabled. The following day the respondent's Employee Disability Adviser, Angela Breen, requested that he be added to the disability register. As previously indicated, Employment Judge Dimbylow identified the onset of the claimant's disability as 11 March 2014 – nothing turns on these dates. The claimant attended regular occupational health consultations until the end of his employment.

23 The claimant appealed against the redundancy dismissal; his redundancy appeal hearing commenced on 19 May 2014; the hearing was adjourned and reconvened on 25 June 2014. The appeal panel comprised Professor Joe Biddlestone; Dr David Bailey; and Erica Conway. Mrs Sam Bateman - Employee Relations Specialist, attended to provide HR advice and support to the panel. The claimant was accompanied the that the hearing by his Trade Union Representative - Mr Greg Howard.

24 Principal among the arguments presented by the claimant at the appeal hearing, was that funding was available; and there was a business need for the creation of a post as Director for the Smartculture Project. The claimant made specific reference to the funding for such a post being available until December 2015. The outcome of the appeal was that the panel was satisfied that the claimant's existing post - Digital Heritage Project Director, was genuinely redundant; and that the University had followed all appropriate procedures; and met all necessary requirements of consultation; and efforts at redeployment. Nevertheless, the panel accepted the claimant's representations that effectively there was an alternative post available (albeit that the new post had to be created); and accordingly, the claimant's appeal against dismissal was upheld; CAL was directed to create an alternative post within the Smartculture Project. The outcome of the appeal was communicated to the claimant by a letter from Mrs Bateman dated 2 July 2014.

25 The claimant remains passionately of the view that the 2014 redundancy process was a complete and dishonest sham. He does not accept that his post was genuinely redundant; he does not accept that either consultation or redeployment efforts were conducted in good faith; and he believes that, although his employment was preserved by the successful appeal, he was placed in a position of considerable disadvantage.

26 CAL, headed by Professor Whitby and Mrs Oakes, went on to create the new post. On 28 August 2014, Mrs Oakes wrote to the claimant confirming that he would transfer to the new post with effect from 1 September 2014. The new post was located within CAL; it was at Grade 9; and the 60% fte was to continue. In the ordinary course of events the claimant's line manager in his new role should have been Ms Jarvis who had previously line managed him. But, it appears that the claimant had become Profoundly distrustful of Ms Jarvis because of the redundancy process; he requested that alternative line management arrangements were made; to accommodate the claimant's request arrangements were made for him to be line managed by Ms Wellington. This was a highly unusual situation - a Grade 9 non-academic employee located in CAL was to be line managed by the Operations Director from another college.

27 After a period of sickness absence, the claimant physically commenced his new role on 5 November 2014. From the outset, there were difficulties because of his relationship with the senior academic working on the project - Dr Lisa Di Propris. It is clear, and the claimant accepts, that Ms Wellington was highly supportive of the claimant in attempts to resolve these difficulties; further, Ms Wellington enlisted help from Ms Jarvis; and her view is that Ms Jarvis' intervention was positive and constructive.

28 From the commencement of his new role, the claimant was aware, and had been informed in writing, that he had an open-ended contract which was funded wholly through external funds for the Framework-7 Smartculture Project; the funding was in place until 30 November 2015; and that, if the funding ceased to be available, the University would need to review his continued employment.

29 On 16 March 2015, Mrs Oakes wrote to the claimant confirming that the external funding for his role was due to end on 30 November 2015; and that accordingly, he was at risk of redundancy. There followed a consultation process which involved two consultation meetings with Ms Wellington and Mrs Oakes, on the 18 March 2015; and again, on 18 May 2015. The respondent's policies require consultation with an individual facing redundancy to extend over 45 days; in fact, this process extended over 70 days. We are satisfied that the claimant fully understood the position; and could engage with this process. Following the first consultation meeting, the claimant submitted a typed memo of 11 detailed questions for clarification; he received point-by-point responses expeditiously. The claimant has accepted throughout that his role as Project Director of Smartculture was redundant.

30 In addition to the two consultation meetings, the appellant had a meeting with Ms Dhillon on 23 April 2015 to discuss redeployment opportunities. At that meeting, Ms Dhillon ensured that the claimant was aware of assistance available to him: he was aware of the redeployment section of the respondent's intranet where available posts were advertised in advance of being made generally

available; he was aware that a redeployee meeting the essential criteria for a post would be guaranteed an interview; and he was aware of salary protection extending for a period of four years if he secured a post - up to one grade lower than his current position.

31 On 25 May 2015, Mrs Oakes wrote to the claimant confirming the end of the formal consultation period; and giving him formal notice of dismissal by reason of redundancy effective on 30 November 2015. She advised the claimant of his right of appeal. Although Mrs Oakes and Ms Wellington worked closely together throughout this process the decision that the claimant should be dismissed was taken by Ms Wellington.

32 Contrary to what is now asserted by the claimant, we are satisfied that Mrs Oakes; Ms Wellington; and Ms Dhillon; were all sincere and conscientious in their efforts to find alternatives and/or solutions which would preserve the claimant's employment. Exceptionally, because the claimant was a Grade-9 employee, Mrs Oakes emailed the heads of all other colleges in the University enquiring as to posts which may be vacant; or may be coming vacant; or may be in the process of creation. Ms Dhillon assisted the claimant in making a late application for a vacant post as Lecturer in Archaeology; and she provided him with all the assistance and information that he asked for in relation to 4 other potential vacancies. The claimant acknowledges that he was not qualified for the lecturer post; and, on due consideration, he ruled himself out of the other 4 posts; deciding that they were unsuitable for him. This included the post of Project Manager for the Quantum Hub in respect of which he had taken the opportunity of an informal meeting with Professor Kai Bongs.

33 Attention to the claimant's welfare did not cease with the consultation period. On 3 September 2015, Mrs Oakes wrote to the claimant giving him early notice of a forthcoming vacancy SRF+Ops – it was not even on the redeployment jobs website at that stage. On 7 September 2015, the claimant wrote to Mrs Oakes requesting detailed information about the role; he received an expeditious reply; and he concluded that the role was not suitable for him. Perversely, the claimant has since suggested that his dismissal was unfair in part because the respondent failed to offer him this position.

34 From 26 May 2015, until the end of his employment, the claimant was off sick. But we find that he was still able to fully participate in the quest for alternative roles; he had access to the respondent's intranet; which included the redeployment website; and the general vacancies website; he also had full access to the Internet. During his period of sickness, he could produce lengthy and complex documentation in support of his appeal against dismissal; and he wrote letters to the University Registrar; and to the Department of Communities and Local Government regarding his concerns about financial irregularities in the ERDF Project.

35 The redundancy appeal hearing commenced on 21 September 2015; the panel comprised Professor Hunston; Mr Stuart Richards; and Dr Roland Brandstaetter. The claimant was accompanied by his Trade Union Representative Mr Howard. The meeting had to be adjourned almost immediately because the claimant believed that he had not received all the necessary papers; this later transpired to be a mistake on the claimant's part. The meeting was reconvened on 19 January 2016; the panel were unanimous that the claimant's role was genuinely redundant; and that the University's managers (Ms Wellington; Mrs Oakes; and Ms Dhillon) had undertaken a thorough consultation and redeployment exercise; and there were no suitable alternative posts. The panel considered whether, in all the circumstances, it would be reasonable for a post to be specially created to accommodate the claimant. By a majority (Professor Hunston and Mr Richards) they concluded that it would not be reasonable; accordingly, the appeal was dismissed. This was confirmed in a letter from Professor Hunston dated 9 February 2016.

36 In the meantime the claimant's employment had terminated on 30 November 2015. But he had received written confirmation that, in the event of a successful appeal, he would be reinstated with continuous employment.

37 On 25 November 2015, the claimant raised a formal grievance regarding matters which are of no relevance to the issues which we must decide now that the claimant has withdrawn his protected disclosure claim. There was a grievance meeting on 3 March 2016; the grievance was not upheld.

38 Four individuals were employed on the Smartculture Project; three of them, including the claimant, were dismissed when the funding ended. Dr Di Propris had a substantive academic role within the University which she was continuing to perform whilst working on the Project. When the funding ended she simply reverted to her substantive role.

39 The claimant is very preoccupied by the position of Ms Ratnaraja. He has persistently requested disclosure of documents relating to her employment. These requests have been resisted by the respondent on the basis of relevance to the issues in this case. At the tribunal's request, during the hearing, the respondent searched for, and provided, the following information regarding Ms Ratnaraja. Bearing in mind the confidential nature of some of the documentation, and mindful of the need for proportionality, we did not order production of all relevant documents. The claimant does not necessarily accept the accuracy of the following information; but he has no basis to dispute it: -

(a) Ms Ratnaraja was employed from 6 January 2014 until 29 August 2014 working 80% FTE hours - being 20% as a Senior Research Facilitator and 60% as a CATH worker funded by AHRC.

(b) From 29 August 2014 until December 2014 she was employed as a SRF at 60% FTE hours using funding from AHRC and other external sources. This was increased to 80% FTE hours from 1 November 2014 until August 2015.
(c) Because of the availability of external funding, her employment was then extended until 30 October 2015.
(d) Miss Ratnaraja successfully applied for the SRF+Ops role on a fixed term contract from November 2015 until July 2016; this was funded from college vacancy savings. In July 2016, her employment terminated.
(e) As we understand it, at all material times, Ms Ratnaraja was employed at Grade 8.

**The Law**

*Disability Discrimination*

40 **The Equality Act 2010**

**Section 13: Direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

**Section 23: Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;
(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.

**Section 136: Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

41 **Decided Cases – Discrimination**

***Ladele –v- London Borough of Islington*** **[2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

***Nagarajan v London Regional Transport*** **[1999] IRLR 572 (HL)**
***Villalba v Merrill Lynch & Co*** **[2006] IRLR 437 (EAT)**

If the protected characteristic had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

***Igen Limited –v- Wong*** **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails, then the complaint of discrimination must be upheld.

***Madarassy v Nomura International Plc*** **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis, it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

*Unfair Dismissal*

42 **The Employment Rights Act 1996 (ERA)**

**Section 94: The right not to be unfairly dismissed**

(1) An employee has the right not to be unfairly dismissed by his employer.

**Section 98: General fairness**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

**Section 139: Redundancy**

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

43 **Decided cases relating to the creation of a pool for selection**;

***Taymech Limited –v- Ryan*** **EAT 633/94**
***Thomas and Betts Limited –v- Harding*** **[1980] IRLR 255 (CA)**
***Hendy Banks City Print Limited –v- Fairbrother*** **EAT 0691/04**

In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from whom those who are to be made redundant will be drawn. In assessing the fairness of a dismissal, a tribunal must look to the pool from which the selection was made since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. If an employer simply dismisses an employee without first considering the question of a pool the dismissal is likely to be unfair.

Employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. They need only show that they have applied their minds to the problem and acted from genuine motives. However, tribunals must be satisfied that an employer acted reasonably. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances.

44 **Decided Cases relating to consultation and procedure**;

***Williams and Others –v- Compair Maxam Limited*** **[1982] IRLR 83 (EAT)**
***Polkey –v- AE Dayton Services Limited*** **[1987] IRLR 503 (HL)**
***R –v- British Coal Corporation and anr ex parte Price*** **[1994] IRLR 72**
***King and Others –v- Eaton Limited*** **[1996] IRLR 199 (CS)**
***Graham –v- ABF Limited*** **[1986] IRLR 90 (EAT)**
***Rolls-Royce Motor Cars Limited –v- Price*** **[1993] IRLR 203 (EAT)**

In a case of redundancy in the employer will not normally act reasonably, unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment.
The employment tribunal must be satisfied that it was reasonable to dismiss the individual claimants on grounds of redundancy. It is not enough to show that it was reasonable for the employer to dismiss *an* employee. It is still necessary to consider the means whereby the claimant was selected to be the employee to be dismissed.

Fair consultation means (a) consultation when the proposal is still at a formative stage, (b) adequate information on which to respond, (c) adequate time in which to respond, (d) conscientious consideration by the employer of any response.
If vague and subjective criteria are adopted for the redundancy selection, there is a powerful need for the employee to be given an opportunity of personal consultation before he is judged by it.

45 **Decided Cases – General test of fairness**

***Iceland Frozen Foods Limited –v- Jones*** **[1982] IRLR 439 (EAT)**
***Sainsbury's Supermarkets Ltd. –v- Hitt*** **[2003] IRLR 23 (CA)**

In applying the provisions of Section 98 (4) ERA the employment tribunal must consider the reasonableness of the employer's conduct, and not whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases, there is a band of reasonable responses to a given situation within which one employer might reasonably take one view, another quite reasonably take another. The function of the employment tribunal is to determine whether, in the circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, then the dismissal is fair. If the dismissal falls outside the band it is unfair.

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee is fairly and reasonably dismissed.

**The Claimant's Case**

*Disability Discrimination*

46 It has not been easy to fully understand how the claimant puts his case on disability discrimination. We remind ourselves that the only claim which we are seized of is a claim for direct discrimination relating to the dismissal of the claimant on 30 November 2015. Quite frankly, the claimant has not articulated any such case. Indeed, it is his case that the relevant decision makers in the 2015 dismissal (Ms Wellington and Professor Hunston) were not aware of his disability. If they were unaware of his disability it is difficult to see how this could have been an operative reason for their decision to dismiss.

47 The closest that the claimant has come to articulating a direct discrimination claim emerges in his references to the 2014 redundancy process. The claimant makes the point that his first prolonged absence from work related to his disability came in 2013; and the 2014 redundancy process commenced almost immediately upon his return.

48 So far as the 2015 process is concerned, such criticisms as the claimant makes regarding his disability and its impact on the process, is that allowances were not made for the fact of his disability. Potentially, this could amount to a Section15 claim or a claim for a failure to make reasonable adjustments.

49 It appears to be the claimant's case that, regardless of the specific impact of the disability, the respondent had an obligation to treat disabled employees differently from non-disabled; and to make some additional provision for them in the consultation/redeployment process.

*Unfair Dismissal*

50 The claimant's fundamental preoccupation is that the 2014 process was unfair; he advances the case that this necessarily imperils the fairness of the 2015 dismissal. Put simply, his case is that, "*but for*" what happened in 2014, he would not have been in a position to be dismissed by reason of redundancy in 2015. In this regard, the claimant relies heavily on the case of ***Bandara*** referred to above.

51 The claimant is also preoccupied by the circumstances of Mr Ratnaraja; he is convinced that roles were created simply to accommodate her. It is unclear whether he claims that these roles should have been offered to him; or whether

his case is more basic – that, if roles could be created for her, than other suitable roles could have been created for him.

52 The claimant's case is that there was inadequate consultation; and a perfunctory attempt to redeployment. Regardless of disability as such, he also claims that insufficient care was taken having regard to his illness; and his prolonged absence from work after 26 May 2015.

53 Finally, the claimant attempts to impugn the independence and impartiality of Professor Hunston.

## The Respondent's Case

54 Simply put, the respondent's case is that what happened in 2014 is wholly irrelevant to the claimant's dismissal in 2015. The fact of the 2014 dismissal and reinstatement may have put the claimant in a position where he occupied a role which became redundant in 2015; but the fact of the 2014 redundancy did not operate on the minds of the 2015 decision makers. The respondent's case is, and the claimant accepts, that in 2015 the claimant's role was redundant. The respondent followed a fair; open; and transparent consultation and redeployment process. Several possible roles were considered all of which were discounted by the claimant; save for one for which he accepts that he was not qualified. Accordingly, no alternative posts were available in the claimant was fairly dismissed by reason of redundancy. The respondent does not accept that the claimant's disability in any way impacted upon the process; and submits that Ms Ratnaraja's position is wholly irrelevant.

## Discussion & Conclusions

*Disability Discrimination*

55 There is no evidence whatsoever that the fact of the claimant's disability in any way impacted on the decision to dismiss him in 2015. Indeed, it is the claimant's own case that the relevant decision makers were unaware of his disability. Arguably they should have been aware - but the point is that their lack of awareness essentially rules out the possibility of direct discrimination.

56 We have considered who the possible comparator(s) might be: Dr Di Propris is not a true comparator as she was the holder of a substantive academic post; the two others who worked on the Smartculture Project were dismissed when the claimant was dismissed; and as they were graded lower than the claimant they too might not be appropriate comparators. The hypothetical comparator must be essentially the claimant - but absent his disability. Would he have been treated any differently? We find the answer is a resounding no.

57 For reasons which I will explain, we find that the 2014 process is wholly irrelevant to the issues which we must decide. Accordingly, even if that process was tainted by direct discrimination (there is no evidence that it was), that would not contaminate the 2015 dismissal.

58 Even if we were considering a case brought under Section 15 or a case under Sections 20/21 relating to a failure to make reasonable adjustments, the claimant is wrong in his belief that the fact of disability necessarily imposes additional duties on the respondent. For a reasonable adjustment claim the claimant would have to establish that the respondent had applied a PCP which placed the claimant at a disadvantage because of his disability. We heard no evidence to suggest that such a PCP was applied in this case.

59 The claimant has not established before us any facts from which we could infer that he had been discriminated against on grounds of disability.

60 Accordingly, and for these reasons, we find that the claim for disability discrimination is totally without merit and is dismissed.

*Unfair Dismissal*

61 Before considering the fairness of the dismissal more generally, we have carefully considered 3 matters upon which the claimant places considerable reliance: -

(a) **Firstly, the impact of his health on the fairness of the dismissal**: even though we have dismissed the claim for disability discrimination, a reasonable employer would be expected to have due regard for, and take steps to accommodate, any disadvantages which a sick/disabled employee might experience during a redundancy consultation process. However, in this case there was no evidence apparent to the respondent that any such disadvantage arose. The evidence demonstrates that the claimant was fully able to participate in the process albeit that he was at home and not at work. We have already observed that he wrote detailed letters expressing concern about financial irregularities; and he could raise searching and relevant questions regarding the SRF+Ops job in September 2015; he also prepared lengthy and complex documentation for the redundancy appeal process.

(b) **Secondly, the position of Ms Ratnaraja**: taken at its height, the claimant's case is that from 2014 onwards positions were found for Miss Ratnaraja which were not open to competition and which were specifically designed to accommodate her. The respondent does not accept this; and we make no finding; but, even if the claimant is right, this simply does not impact on his position in any way at all. We are concerned with the 2015 process: at the beginning of that process, the claimant was in a post at Grade 9 the funding for

which was due to cease on 30 November 2015; Miss Ratnaraja was posted Grade 8 - the funding for which expired at the same time. We can see no logical basis whereby Miss Ratnaraja's post adversely impacted upon the claimant; and to have "bumped" him into that post would derive no advantage. When the position eventually came that only one post was available, for which both the claimant and Miss Ratnaraja may have been suitable – SRF+Ops; the claimant was given advance notice of the post; he could have applied for it; Mrs Oakes' opinion is that he was likely to have been successful if he had done. But the claimant discounted it as not suitable.

(c) **Thirdly the 2014 redundancy process**: the claimant's reliance on the case of ***Bandara*** is wholly misplaced. Mr Bandara was dismissed from his employment in August 2014; previously, in November 2013, he had received a final written warning (FWW). Both cases related to allegations of misconduct. The ET, as it was entitled to do, found that the 2013 FWW was "manifestly inappropriate" and should not have been issued. The ET later (after a reference back from the EAT) determined that the fact of the FWW had been a material factor in the mind of the decision-maker when Mr Bandara was dismissed in 2014. Because the FWW was manifestly inappropriate, the decision-maker had acted outside the range of reasonable responses in taking account of it. The case has no direct application to the claimant's case: the 2014 process was not a factor in the mind of the 2015 decision-makers; they correctly concerned themselves only with the 2015 position. If anything, the EAT decision in ***Bandara*** operates against the claimant in this case; it makes clear that the ET cannot do the very thing he wishes us to do; a reimagining the situation if the 2014 "injustice", as he would have it, had not occurred.

62 The respondent has established to our satisfaction that the reason, and the sole reason, for the claimant's dismissal was redundancy. Specifically, that the funding underpinning his post came to an end in November 2015; and so, the post was discontinued. Redundancy is a potentially fair reason for dismissal under the provisions of Section 98(1) and (2) ERA.

63 The respondent properly applied its mind to the question of pooling: all posts within the Smartculture project were terminated at the same time; all employees were dismissed by reason of redundancy; the claimant was the most senior employee and the only Grade 9. The respondent was entitled to conclude that a "pool of one" was appropriate; and that, accordingly, no selection criteria were required.

64 The respondent commenced a consultation process in a timely manner; and, in our judgement, it was conducted diligently in the hope of avoiding dismissal. Redeployment opportunities were explored; but the claimant ruled them out as unsuitable. The only application he made was for a post for which he knew he was not qualified. The claimant has not suggested that there were any

suitable posts which were not drawn to his attention or for which he was discouraged from applying.

65 The claimant's only effective criticism of the process is that Mrs Oakes and Ms Dhillon did not take away his CV and use it to scour for potential alternatives. Mrs Oakes response to this criticism was that such a task would be too onerous within the University because so many staff occupy posts which are either fixed-term or subject to fixed-term funding. The claimant provided an extract from the redeployment process in Oxford University; this appears to involve HR staff using a redeployment candidate's CV in the search for posts. Oxford University may demonstrate the gold standard of best practice; but that is not the test which we must apply; we must consider whether this respondent took steps which were within the range available to a reasonable employer; we are satisfied that it did.

66 Once the decision was taken that the redundancy situation would result in the claimant's dismissal, he was offered the opportunity of an appeal which we are satisfied was conducted fairly and independently. The claimant was fully able to state his case; and he was properly accompanied throughout the process. The claimant's belated suggestion that Professor Hunston was not sufficiently independent or impartial is without merit; the proposition was not even put to her when she was cross-examined.

67 Before concluding, I should mention the claimant's reliance on the case of ***Ball -v- University of Aberdeen***: we have not seen an official judgement given in the case; and rely only on commentary on the case produced to us by the claimant. Based on this however it appears that the case has no application to the claimant's case. The University of Aberdeen was criticised firstly, for over-reliance on fixed-term contracts of employment as a way of meeting the challenge of fixed-term funding. Secondly, when employees fixed-term contracts came to an end the University did not go through any recognisable redundancy process but simply dismissed because the fixed-term contract had ended. As a matter of principle, we do not find it surprising that the University would be criticised on these grounds. But the claimant was never subject to a fixed-term contract; and when the fixed-term funding underpinning his role came to an end, the respondent went through a detailed and properly managed redundancy process. Neither of the criticisms levelled at the University of Aberdeen apply to the respondent here.

68 Accordingly, and for these reasons, we find that the claimant was fairly dismissed by reason of redundancy the claim for unfair dismissal is also totally without merit and is dismissed.

## Application for Costs

69 Following our earlier dismissal of the claimant's claims for disability discrimination and unfair dismissal, the respondent had made an application for costs. The application has been made succinctly by Miss Motraghi and supported by her outline written submissions which the tribunal had the opportunity to read during the luncheon adjournment. Miss Motraghi also provided a modest bundle of documents of predominantly of relevant correspondence.

70 Miss Motraghi invites the tribunal to make an order for costs on the basis that in pursuing these claims the claimant has behaved unreasonably; and that his claims had no reasonable prospect of success. There is good evidence in the bundle that the total costs incurred by the respondent is more than £90,000, the claim however is limited to £20,000.

71 The claimant's response was that he was not able to deal with the application today. Initially, we had some sympathy for his position; but, having read Miss Motraghi's submissions, and having considered the bundle, it seems to us that the claimant understood an application would be made today and he was aware of the implications of that. Having engaged in a degree of argument with the tribunal, having accepted some guidance from us, he has, in fact, responded in a perfectly competent and comprehensive manner to Miss Motraghi's submissions. We are therefore able to deal with the costs application here and now.

## The Law on Costs

72 **The Employment Tribunals Rules of Procedure 2013**

**Rule 74: Definitions**

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;
(b) is an advocate or solicitor in Scotland; or

(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

**Rule 75: Costs orders and preparation time orders**

(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

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

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

**Rule 76: When a costs order or a preparation time order may or shall be made**

(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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

**Rule 77: Procedure**

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

**Rule 78: The amount of a costs order**

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules

1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

**Rule 84: Ability to pay**

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.

73 **Decided Cases**

***Beynon & others –v- Scadden & others*** **[1999] IRLR 700 (EAT)**
***Gee –v- Shell UK Ltd.*** **[2003] IRLR 82 (CA)**
An award of costs in the employment tribunal is the exception rather than the rule. Costs are compensatory not punitive.

***Salinas –v- Bear Stearns International Holdings Inc. & another***
**[2005] ICR 1117 (EAT)**
The reason why costs orders are not made in the majority of employment tribunal cases is that the high hurdle has to be overcome for a costs order to be made has not, in fact, been overcome.

***Beynon & others –v- Scadden & others*** **[1999] IRLR 700 (EAT)**
***Monaghan –v- Close Thornton Solicitors*** **UKEAT/0003/01**
***Beat –v- Devon County Council & another*** **UKEAT/0534/05**
***Lewald-Jezierska –v- Solicitors in Law Ltd. & others*** **UKEAT/0165/06**
The tribunal must not move straight from a finding that conduct was vexatious, abusive, disruptive, unreasonable or misconceived to the making of a costs order without first considering whether it should exercise its discretion, to do so.

***Yerrakalva –v- Barnsley MBC*** **UKEAT/0231/10**
There is no general rule that withdrawing a claim is tantamount to an admission that it is misconceived. There is no requirement for a direct causative link between the unreasonable conduct and the costs incurred but there should be some connection.

***Dyer –v- Secretary of State for Employment*** **UKEAT/0183/83**
Whether conduct is unreasonable is a matter of fact for the tribunal to decide. Unreasonableness has its ordinary meaning.

***McPherson –v- BNP Paribas*** **[2004] ICR 1398**
The late withdrawal of proceedings is not of itself evidence of unreasonable conduct. The claimant's conduct overall must be considered. But a late withdrawal is a factor in a case where the claimant might reasonably have been expected to withdraw earlier.

***Keskar –v- Governors of All Saints Church of England School***
**[1991] ICR 493**
A tribunal is entitled to take account of whether a claimant ought to have known his claim had no reasonable prospect of success.

***Kaur –v- John Brierley Ltd.*** **UKEAT/0783/00**
An award of costs against the claimant was upheld in a case where the claimant had failed, despite several requests, to properly set out her claim. She proceeded with the claim only to withdraw at the commencement of the trial.

***Vaughan –v- Lewisham LBC (No 2)*** **[2013] IRLR 713 (EAT)**
There is no requirement for the receiving party to have written a costs warning letter. It is not wrong in principle for an employment tribunal to make an award of costs against a party which that party is unable to pay immediately in circumstances where the tribunal considers that the party may be able to meet the liability in due course.

**Discussion**

74 Any reader of our earlier judgment will appreciate that we cannot but find that the claimant's conduct in bringing these claims; and in their pursuit, has been unreasonable; and that his claims for unfair dismissal, disability discrimination and unfair dismissal related to protected disclosures had no reasonable prospect of success when properly analysed in the light of available evidence.

75 The claimant responds that he was subject to an Open Preliminary Hearing in October of last year before Employment Judge Dimbylow; he regarded this as a filtering process and took the view that it must be implied that those cases which were not struck out by Judge Dimbylow, and for which he was not ordered to pay a deposit, must thereby, have been thought to have some prospect of success. There is of course force in that argument, but there is also legal authority against the claimant. Firstly, legal authority to the effect that Employment Judges must not strike out claims as having no reasonable prospect of success, except in the clearest possible cases, because the judge at the Preliminary Hearing has not had the opportunity to hear the witnesses or consider all of the evidence; and secondly, following from that, therefore, inevitably there are cases which are not struck out an early stage, but which, once all of the evidence is available, clearly had no reasonable prospect of success. Our conclusion is that this is one of those cases. Indeed, before the end of the trial, the claimant himself had recognised that he had no prospect of success in the protected disclosure claim - this undoubtedly accounted for a substantial proportion of the costs incurred.

76 In our judgment, the threshold criteria contained in Rule 76 have been crossed. The costs bundle clearly shows that the respondent has written to the claimant on several occasions; pointing out the weaknesses of his case; and providing him with the opportunity to withdraw; the respondent's position has been entirely vindicated by our judgement given above. The claimant behaved unreasonably in bringing the claims; and in pursuing them. Our judgement is that the claimant could not ever have entertained any reasonable belief that his dismissal was influenced either by his disability; or by his alleged protected disclosures. The claimant's focus throughout has been on the 2014 redundancy process; rather than on his dismissal in 2015. To this extent the claims were wholly misconceived.

77 We exercise our discretion in favour of making an award of costs in this case. We do so because firstly, the claimant has not simply brought a claim asking the tribunal to consider whether his dismissal was fair or unfair (that is something which an individual who has lost their job through no fault of their own would ordinarily be thought to be entitled to do), but the claimant went much further in this case - he had a mission to establish the correctness of his position

regarding the alleged financial irregularities; he made serious, potentially career ending, allegations against Mrs Oakes and Ms Dhillon. Those allegations were entirely unjustified; but the respondent was obliged to respond. The respondent cannot be criticised for using experienced counsel to support them in that.

78 As to the amount of an order, we have taken account of the claimant's means; he provided details to Judge Dimbylow at the Preliminary Hearing, and he has updated this information today. The amount sought by the respondent is limited to £20,000, and we are satisfied that he can well afford to make that payment. We are satisfied that the total costs which are set out in the schedules have been reasonably incurred; and therefore, to limit the claim to £20,000 means we can be satisfied that the claimant is not being asked to pay anything other than a modest proportion of the total.

79 Accordingly, and for these reasons, we award costs which we summarily assess in the sum of £20,000.

Mr Gaskell_____
Employment Judge
12 April 2017
Judgment sent to Parties on

20 July 2017_____

Shareen Brown_____