THE EMPLOYMENT TRIBUNALS

Claimant **Marie Coley**

Respondent **Addaction**

HELD AT: **London Central**

ON: **22-26 May 2017**

EMPLOYMENT JUDGE: **Mr J Tayler**

Appearances

For Claimant: **In Person/Mr L Ogilvy, Consultant**
For Respondent: **Mrs L Banerjee**

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claims fail and are dismissed

2. The Respondent’s application for costs is refused.

REASONS

Introduction, Issues and Procedure

1. By a Claim Form submitted to the Employment Tribunal on 17 March 2016 the Claimant brought complaints of unfair dismissal, including claims that the reason, or principal reason, for her dismissal was that she had made protected disclosures and/or that her selection for redundancy was for the reason, or principal reason, that she had made protected disclosures.

2. The Claimant is a litigant in person and has struggled at times in dealing with the complex statutory provisions that are in play in cases of this nature. The basic scope of her claim has been clear from the outset. She claims that in her role with the Respondent, as Head of Health and Safety and Environment Management, she raised concerns that there were potential breaches of health and safety regulations. The Claimant alleges that was the reason why during a genuine redundancy exercise her role was deleted and she was dismissed. To that extent, the Claimant's claim has always been clear. The Claimant has had difficulties in dealing with the more specific requirements to particularise a

claim of dismissal for making protected disclosures. There are a number of matters that must be established in such a claim. The Claimant must establish that there has been a disclosure of information; that the information in her reasonable belief tended to show, so far as is relevant in this case, that the health and safety of an individual has been, is being or is likely to be endangered and/or that a person has failed is failing or is likely to fail to comply with a legal obligation. The disclose must in the reasonable belief of the Claimant be in the public interest. The Claimant must identify the occasions on which the disclosure or disclosures were made; to whom; the information imparted and explain why it tended to show the likelihood of endangerment of health and safety or breach of a legal obligation, etc. The Claim Form was relatively brief and included issues under the Health and Safety and at Work Act 1974 that fall outside the jurisdiction of the Employment Tribunal.

3. The Respondent has adopted an extremely robust approach to the litigation from the outset; contending in the response that the claim should be struck out for having no reasonable prospect of success; or be subject to a deposit order as having little reasonable prospect of success.

4. On 20 June 2016, the Claimant was asked by the Respondent to provide Further and Better Particulars of her claim to set out, in particular, the disclosures that she alleged she had made, and various other matters including why she contended that her dismissal was unfair. In a covering letter to the Claimant the Respondent stated that they were prepared to forgo pursuing a claim for costs if the Claimant withdrew the claim in its entirety.

5. The matter was considered at a Preliminary Hearing for Case Management before Employment Judge Stuart on 6 July 2016. The issues were agreed to be as set out in the Respondent's draft List of Issues. The Claimant confirmed that her Claim Form disclosed no complaint of public interest disclosure detriment, and was limited to a claim about her dismissal. Employment Judge Stuart clarified that it would not be within the tribunal's remitted to determine whether or not any alleged breaches of health and safety had actually taken place, but it would determine whether or not Claimant had made protected disclosures and whether or not these had been the reason, or principal reason, for her dismissal.

6. The Claimant was ordered to reply to the Respondent's Request for Further and Better Particulars by 20 July 2016. On 20 July 2016 the Claimant sent an email to which she stated the Further Particulars were attached, whereas they were not. I accept this was an error. At 8.59 on 21 July 2016 the Respondent wrote to the Claimant and stated that if the complete attachment was not sent by 9.30 am they would make the "necessary application". At 10.56 the Claimant responded that she had just received the message, was out of the office and would re-scan the document and send it again by 3pm. Notwithstanding this, at 12.37 the Respondent applied for the claim be struck out without mentioning that the Claimant had stated she would re-send the document by 3pm.

7. On 21 July 2016 the Claimant produced a document in which she sought to provide the Further and Better Particulars(P120). In that document the Claimant set out a great deal of information about health and safety issues, but did not clarify with the particularity required the specific disclosures that had been made. I accept that the Claimant was seeking to answer the questions asked of her and was seeking to cooperate in the tribunal process but focused more on specific breaches of regulations than on the disclosures. In her response to the section dealing with the claim of "ordinary" unfair dismissal the Claimant referred to a lack of support, empathy and guidance by the organisation and a lack of opportunity to utilise the Claimant skills knowledge and expertise within existing role or another position. The Claimant did not refer to any specific position for which she contended that she should have been considered

8. The Respondent again applied for the claim to be struck out on the basis that the response was insufficient.

9. On 26 August 2016 a further Preliminary Hearing for Case Management was held before Employment Judge Grewal who noted that it appeared that the Claimant was also making a claim of selection for redundancy for making protected disclosures, which she added as an issue. The Claimant did not suggest that a claim was being advanced under section 100 ERA (there had been no such contention at the hearing before Employment Judge Stuart). Employment Judge Grewal considered that the Claimant had not set out the disclosures that she relied upon in sufficient detail to enable the Respondent to understand the claim against it, and therefore ordered that the Claimant provide by 9 September 2016 the specifics of any disclosures that she made between 1 November 2013 and 19 October 2015: setting out the information she gave (i.e. the facts that she conveyed) which tended to show that the health or safety of an individual had been, was being or was likely to be endangered; whether the information was given verbally or in writing. If it was given in writing the Claimant was to identify the document in which it was given and to provide a copy of the document highlighting passages in which the information was given; when the information was given; to whom it was given Employment Grewal stated in her introduction "I made a further order that sets out precisely what the Claimant has to set out and emphasised to her that "less is more" and the importance of complying with Tribunal orders by the dates specified". Employment Judge Grewal was concerned that, as so often can happen in cases of this nature, that there would not be a focus on the key disclosures that the Claimant said led to her dismissal. As the Claimant's role was Head of Head and Safety and Environment Management she was bound to have raised issues about health and safety. The real focus needed to be on which of those occasions on which she raised such issues she was providing information that tended to show that the health and safety of an individual was being endangered or that there was a likelihood of a breach of a legal obligation; and to focus on those allegations which the Claimant contended led to her dismissal. Employment Judge Grewal was trying to assist the Claimant to focus on the key issues. I accept that it can be very difficult to determine which disclosures led to dismissal if by the nature of a person's job health and safety issues are raised frequently. I appreciate that particularisation can be difficult for a person who is litigating their own case without advice and assistance; but it was a matter that Employment Judge Grewal explained in

her case management order in simple terms. The Claimant was ordered to provide full replies to the order for additional information and disclosure of documents (in hard copy, indexed, paginated and in chronological order) by 4pm on 9 September 2016.The claim was not struck out.

10. On 12 September 2016 the Claimant provided disclosure, but it was not indexed, paginated or in chronological order. The Respondent again applied for the claim to be struck out.

11. On 28 September 2016 the Claimant provided further particulars. They still lacked the clarity that was required and were not set out in the format that Employment Judge Grewal had requested. For example, specific documents with the highlighted sections were not provided. The Claimant provided a further draft on 12 December 2016. It was still lacking in clarity, although her basic complaint that she was dismissed for raising health and safety concerns on repeated occasions was clear.

12. The matter then came before me for a further Preliminary Hearing for Case Management on 14 December 2016. I was concerned that the attempts to get further particularisation was getting out of hand. The Claimant had provided a further set of protected disclosures in a tabular form that ran to 31 separate disclosures. Unfortunately, the Claimant had not felt able to heed Employment Judge Grewal's advice that "less is more". There was in my view a risk that the case was growing more and more detailed without a focus on the specific disclosures upon which the Claimant was relying and why she said that they led to her dismissal; or her selection from redundancy. I emphasised that those were the key matters for the tribunal. I concluded, despite an application from the Respondent seeking yet another version of the further particulars, this was unlikely to move the matter further; and might add to the confusion. I ordered the sequential exchange of witness statements so that the Claimant could explain in her witness statement the specific disclosures upon which she relied and why she contended that in her reasonable belief they tended to show that health and safety was being endangered and/or that there was a likelihood of a breach of a legal obligation etc. so that the Respondent would have an opportunity to reply.

13. The Claimant provided her witness statement on 3 March 2017. The Respondent provided their witness statements on 31 March 2017. Regrettably the Claimant's witness statement did not to any great extent clarify the specific disclosures that she relied upon. However, it has been clear from the outset that the fundamental claim the Claimant sought to put before the tribunal was that she raised health and safety concerns and that she was singled out for dismissal during a genuine reorganisation as a result of making the disclosures. There was no dispute about the fact that the Claimant had regularly raised health and safety issues. It has always been clear that the key issue in the case was to be the reason for the Claimant's dismissal.

14. This hearing commenced on the 22 May 2017. The Claimant was supported by Ms S Morat, a paid McKenzie friend. The Respondent had no objection to her assisting the Claimant.

15. At the outset, and repeatedly through the hearing, I explained to the Claimant that it was of fundamental importance that she should put the specific disclosures that she was relying on to the Respondent's witnesses and that she should put her case that it was those disclosures that led to her selection for redundancy and to her appeal not being allowed. I was concerned to ensure that the Claimant put her claim properly, particularly in circumstances where despite the numerous efforts at particularisation she had not provided the clarity that would be hoped for. While I appreciate the very great challenges that face a litigant in person, the conduct of a fair hearing also requires that the Respondent should understand the allegations made against it and have an opportunity to answer them.

16. Mr Ogilvy was present towards the latter part of the evidence. After the evidence had concluded, at the outset of closing submissions, Mr Ogilvy stated that the Claimant wished him to act as a McKenzie friend and that he was planning to assist her in making her submissions but that she would continue to represent herself. He stated that he was acting pro bono not being paid any fee or a share of any award that might be made to the Claimant.

17. The matter came before me at 10 o'clock on 26 May 2017 to give Judgment. Mr Ogilvy stated that the position changed and that he was now instructed to represent the Claimant as a consultant still on a pro bono basis. He provided contact details but stated that correspondence should continue to be sent to the Claimant at her home address.

18. The Claimant and Mr Ogilvy then made a number of submissions to the effect that the Claimant wished to rely on section 100 ERA. That had first been raised in the written submissions that the Claimant submitted when Mr Ogilvy was acting as her McKenzie friend. At that stage I pointed out that no such claim had been identified in the Claim Form or at the three Preliminary Hearings. The Claimant stated that she was not seeking to advance such a claim. However, on the morning 26 May 2017 the Claimant and Mr Ogilvy stated the Claimant was seeking to advance such claim. After a relatively lengthy discussion, I asked Mr Ogilvy to state whether it was his intention to apply to amend the Claim Form to make such a claim or whether he was stating that such claim was already made in the Claim Form. I also stressed the importance of there being some clear explanation as to why the addition of the claim would add significantly to the claim being advanced by the Claimant. Mr Ogilvy stated that he was not seeking to make an amendment but was contesting the claim was made in the Claim Form. Mr Ogilvy and the Claimant were not able to explain to me the real significance of this additional claim. It was suggested that it would require the recalling of witnesses and new evidence to be taken. It was suggested that the Claimant had not understood that she could put forward a claim that she had been dismissed for raising health and safety concerns. I do not accept that that is the case. I explained to the Claimant that that was precisely what the tribunal was here to determine. I had explained that she must put forward in clear terms to the Respondent's witnesses the disclosures that she relied upon and her case that the making of those disclosures had resulted in her dismissal and/or the fact that her appeal was not allowed. I do not accept, even though the Claimant is a litigant in person, that she could have been in any doubt that that was the case that was being advanced.

19. While the Claimant has struggled in dealing with the detail of individual disclosures she has from the outset been clear that her claim is that she was dismissed for raising health and safety concerns, which were alleged to be protected disclosures. The claim that the Claimant was dismissed for undertaking the activities of a health and safety representative was not set out in Claim Form. That was not how the claim had been advanced previously. It would have required further evidence with the consequence that the hearing would go part heard, involving additional expense. I did not accept that claim was made in the Claim Form or that there was be a proper basis for it being advanced at this stage.

20. There also appeared to be a suggestion that the Claimant wanted the tribunal to decide whether the Respondent had breached its health and safety obligations. At the commencement of the Claimant's closing submissions she suggested that that was why we were here. It was explained from the outset by Employment Judge Stuart that is not the role of the Employment Tribunal.

Evidence

21. At the outset of the hearing, the Claimant agreed that the Respondent’s witnesses would give evidence first.

22. The Respondents called:

    22.1 Simon Antrobus, former Chief Executive Officer

    22.2 Guy Pink, Executive Director of HR (Currently Acting Chief Executive)

23. The Claimant gave evidence on his own behalf.

24. The Claimant provided witness statements from the following witnesses who were not called as the Respondent indicated that there were no questions for them:

    24.1 Sheran Forbes, Graphic Designer

    24.2 Amy McFarlane, former Risk Assistant

25. The witnesses who gave evidence did so from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

26. I was provided with an agreed bundle of documents. References to page numbers in this judgement are to the page number in the agreed bundle of documents. In addition, a supplementary bundle was provided by the Claimant.

27. On the second day of the hearing the Respondent provided transcripts of audio recordings that the Claimant had covertly taken of the three consultation meetings that she attended. I accept that the Respondent's contention that these were professionally produced, although there are a number of places in

the transcripts where the transcriber was unable to transcribe the recording because it was not clear. The transcripts added little of significance save in respect of the third consultation meeting in respects of which in the Claimant's note produced for the tribunal the Claimant stated “I have raised health and safety concerns with you and now this has happened” whereas in the transcript it is recorded “I've raised particular concerns with you that you've decided not to take forward obviously then this has happened”. The Claimant listen to the recording and accepted that the Respondent transcription was accurate. I was concerned about the addition of the words “health and safety” although on reflection I accept that the Claimant in her note was trying to explain the nature concerns that she was raising in context where the reference to “particular concerns” must have been to the concerns about health and safety that the Claimant raised at various meetings. I accept that that difference in the transcripts is not as significant as I thought it might be.

The Law

28. Provision is made in respect of protected disclosures in Part IVA of the Employment Rights Act 1996 (“ERA”). A protected disclosure is defined by Section 43A. A qualifying disclosure is defined by Section 43B ERA. A qualifying disclosure is rendered a protected disclosure provided it comes within, so far as is relevant to this case, Section 43C ERA.

29. The employee must make a disclosure of information; it must, in the belief of the worker, tend to show, so far as is relevant in this case, that the health and safety of an individual has been, is being or is likely to be endangered and/or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The term 'likely' requires that it is more probable than not that the employer will fail to comply with the relevant legal obligation: **Kraus v Penna plc** [2004] IRLR 260. The belief must also be reasonable. The disclosure must be must be made to one of a number of prescribed persons, including the worker’s employer. In the reasonable belief of the person making the disclosure it must be in the public interest.

30. S103A of the ERA 1996 provides:

> “An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure”

31. The approach to the burden of proof in dismissal claims was considered by the Court of Appeal in **Kuzel v Roach Products Ltd** [2008] ICR 799. Where the Claimant sets out an evidential basis on which it could be concluded that the reason for the dismissal is the making of protected disclosures, the Tribunal will look to the Respondent for its explanation of the treatment of the Claimant. If it is unsatisfied with that explanation, it may conclude that the real reason for the Claimant’s treatment was the making of the protected disclosure. As with discrimination claims the key issue will often be the “reason why” question; in this case why the Claimant's role was selected for deletion in the redundancy process, why was the Claimant dismissed and her appeal not allowed.

32. If the reason, or principal reason, for dismissal was not that the Claimant made protected disclosures the tribunal will go on to consider whether the Respondent has established a reason, or principal reason, for the dismissal that is potentially fair. Redundancy is a potentially fair reason for dismissal. A redundancy is defined in section 139 ERA. An employee who is dismissed shall be taken to be dismissed by reason of redundancy, so far as is relevant to the facts of this case, if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind has ceased, or is expected to cease or diminish. Cease mean cease either permanently or temporarily, and for whatever reason.

33. In **Safeway Stores plc v Burrell** [1997] ICR 523 his Honour Judge Peter Clark set out a three-stage test: was the employee dismissed?; if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?; if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution

34. In **Polkey v AE Dayton Services Ltd** [1987] 3 All ER 974 Lord Bridge held at 984:

> "in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, 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 within his own organisation."

35. Section 105 ERA applies where the reason, or principal reason, for the dismissal is that the Claimant was redundant, but it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertakings who held positions similar to that held by the Claimant who have not been dismissed; and it is shown that reason, or principal reason, for the Claimant's selection is the fact that she has made protected disclosures. The Respondent accepted that the approach set out in **Kuzel** applies to such a claim.

Findings of fact

36. While it is generally appropriate to deal entirely separately with findings of fact and application of the law those findings of fact; in this case, as a large number of protected disclosures are alleged, dealing with the matter in that way would involve excessive repetition as it would be necessary to set out the facts in respect of each disclosure, then set them out again when analysing whether they amounted to protected disclosures. Accordingly, I considered the totality of the evidence and, having reached my findings of fact, I considered the disclosures and decided whether the statutory requirements were met so that they were protected disclosures. I have set out those determinations chronologically along with the findings of fact.

37. The Respondent is a charity specialising in the assistance and treatment of those with addictions. The Claimant was employed by the Respondent as Risk

Facilities Manager on 24 April 2006. The Claimant's line manager was Guy Pink. I accept that the Claimant has a genuine commitment to her work, particularly in respect of health and safety. She took her role very seriously and was keen to ensure that the Respondent not only complied with its legal obligations but applied best practice. I accept that the Claimant understandably, and laudably, considered health and safety to be of very great importance. I also accept that this commitment was recognised by the Respondent. Her managers considered that she carried out her role to a high standard. The Claimant was involved in introducing health and safety policies and a premises policy. She was also involved in bringing in outside consultants to inspect the Respondent's premises and to ensure compliance with health and safety regulations.

38. The Respondent occupy a large number of properties. Most of them are not owned by the Respondent. Most health and safety matters are dealt with at a local level. It is for local managers to ensure that regulations are complied with and that appropriate documentation is in place. The Claimant's fundamental concern was that health and safety might not be dealt with, or properly evidenced, at a local level. She considered that to ensure that health and safety surveys were conducted and evidenced would require that there be national contracts, covering matters such as testing for asbestos, testing water supplies for Legionella and fire safety. One only need list the matters about which the Claimant was concerned to appreciate how very serious they are. I accept that the Claimant has been genuinely motivated throughout by her concern that these serious health and safety issues should be properly addressed.

39. I repeatedly made it clear to the Claimant that disclosures must be put to Respondent's witnesses. I shall not deal with those disclosures that were not put to the Respondent's witnesses. I accept that the key allegations were, at least in broad terms, put.

40. The Claimant's job title changed to Head of Risk on 3 August 2012. Her substantive duties were unchanged. Simon Antrobus became her line manager.

41. The Claimant in her further particulars refers to disclosures on 19 December 2012, in January 2013, on 6 and 27 June 2013. None of those disclosures were put the Respondent's witnesses. They also fall outside the timeframe of disclosures that were permitted to be advanced by Employment Judge Grewal. I do not deal further with them.

42. The further particulars refer to disclosures in August 2013 and September 2013 that were not put to the Respondent's witnesses. I do not deal further with them.

43. In August 2013 (p295A) a risk management strategy was produced. A number of "pillars" of risk were recognised by the Respondent. One was health and safety. I accept that the Respondent took health and safety seriously and that they recognised the merit in the work that the Claimant was doing.

44. The first disclosure the Claimant put to the Respondent's witnesses was an element of disclosure 2 in October 2013. This falls outside the time period for which disclosures were permitted by Employment Judge Grewal. The Claimant contends that in a Health and Safety and Organisational Risk Management Issues Table she put forward a number of proposals for minimising risks. She suggested that certain roles or responsibilities should be given to a third party contractor to ensure that contracts were in place for water testing, asbestos testing and fire risk management. She stated the risk were in respect of water testing, Legionella and for asbestos management, respiratory problems such as mesothelioma. While I accept that there was a disclosure of information, I do not accept that the information disclosed showed either that there had been, was or was likely to be an endangerment to health and safety or a breach of a legal obligation. The Claimant was raising the possibility of such a risk rather than the likelihood that a person's health and safety being endangered etc or of there being a breach of a legal obligation. Further, the allegation falls outside the timeframe in which the Claimant was permitted to rely on disclosures.

45. A central feature of the Claimants evidence to the tribunal was that having raised this matter in October 2013 it was not dealt with thereafter. If the Claimant had genuinely believed that there was an ongoing failure from October 2013 to the termination of her employment in 2015 that was leading to a likelihood that the health and safety of individuals was being endangered or there was a breach of a legal obligation, I consider that the Claimant would have raised the matter under the Respondent's whistle blowing policy or raised a grievance. The Claimant did not do so at any stage prior to the termination of her employment.

46. The Claimant suggested that although she was present at the meeting at which the Respondent agreed a whistleblowing policy, she did not read the policy. I find that hard to credit. The Claimant's role involved dealing with risk management. Had the Claimant thought that the matters were of such severity that they must be raised to protect individuals from a real risk to the health and safety she would have read policy and made a disclosure under it.

47. The next disclosure the Claimant relies upon is on 4 March 2014 (P339). She contends that in a Risk Control Pro Forma that the matters that she had raised about properties had been removed from the risk register. When one looks at the document it is recorded that the risk will <u>not</u> be removed from the risk register. There is no disclosure by the Claimant in that document that there has been a removal of the risk from the risk register. Accordingly, there can be no protected disclosure.

48. In April 2014 the Claimant's job title was changed to Head of Health and Safety and Environment Management. Her line management reverted back to Mr Pink.

49. On 24 April 2014 the Claimant contends she raised a health and safety concern in an email about the possibility of the Respondent being perceived as failing to meet their duty of care (P354). At page 343 there is a draft of the email in which the Claimant stated "we are currently not meeting our duty of care and I am concerned that this is not being addressed as a priority". The

draft was not sent to the Respondent. This emphasises an issue that may be of some significance in that it is not sufficient that the Claimant may have had concerns that there was a likelihood of a breach of a legal obligation or about an individual's health and safety; the Claimant must have disclosed information that tends to show that is the case. It is the disclosure upon which the focus must be placed. In the email the Claimant sent to Mr Pink on 24 April 2014 she stated that the Respondent had passed the Contractors' Health Assessment Scheme, but stated that certain checks were not undertaken on every occasion when such the assessment was undertaken and that it might not be possible to provide evidence to show that the duty of care was being met. She stated "I am concerned that the organisation could be perceived as failing to meet their duty of care which could result in prosecution if an incident were to occur". Although I accept that the Claimant was genuinely raising a health and safety issue I do not accept that the information disclosed had crossed the threshold so that the Claimant reasonably believed that there was a likelihood, in the sense of it being more probable than not, that there would be an endangerment of the health and safety of an individual or the likelihood of a breach of a legal obligation.

50. On 30 April 2014 there was a Risk Management Group Meeting where it was noted that there were currently no health safety and environmental risks on the register. It was noted that that the Respondent was being asked more frequently about maintenance schedules in order to ensure that they met their duty of care as an organisation. The group discussed the development of the premises policy and the need to pull together all the property issue. I do not accept that at the meeting the Claimant was disclosing information that in her reasonable belief showed the endangerment of health and safety or of a breach of legal obligation or the likelihood of such occurring. The Claimant was quite properly raising concerns in respect of the documentation and procedures to be used when checking health and safety compliance at premises. That was a central feature of her role.

51. The premises management policy that the Claimant went on to draft provided for issues such as asbestos and water certification to be dealt either at a local level or through national contracts. It was the Claimant's preference that the matter dealt with nationally. She felt that would ensure that the relevant documentation could be found during any regulatory review.

52. On 30 May 2014 in the Claimant's further particulars there is an alleged disclosure that was not put to any of the Respondent's witnesses, so I do not deal with it any further.

53. In May 2014 (P378A) the Claimant produced a Premises Policy which included provision that service managers must ensure that asbestos surveys are carried out and the report is kept on site respect. The Policy provided that the local service must arrange periodic testing of water systems. In the policy the emphasis was placed on the local management, although I accept, as set out above, the Claimant thought that there should be national oversight.

54. In June 2014 (P390) an email was sent from Third Sector Properties which had a management function in respect of certain of the Respondent's premises. They stated "we do not provide health and safety management for

Adaction". I do not accept that this meant they were contending that they had no responsibility for health and safety. They were refering to the management of health and safety, which was undertaken by the Claimant.

55. In October 2014 the Respondent agreed in principle to merge with another charity, KCA. KCA was considerably smaller than the Respondent. It was decided to consider the structure and management of the combined organisation.

56. On 8 October 2014 the Claimant alleges that she made a protected disclosure in an email exchange about an attempted suicide at one of the Respondent's premises. The Claimant was asked whether there were specific criteria for control at the premises. The Claimant stated "I think we should let Third Sector Property take the lead in putting the document together as they are in the best position to determine property requirements. Adaction can provide their input re: service/premises provisions". I do not accept that in that email exchange there was a disclosure of information which in the reasonable belief of the Claimant tended to show the endangerment of health and safety or of a breach of legal obligation etc, or the likelihood of the same. It was merely a discussion about setting appropriate controls.

57. The Claimant relies on email exchanges on 15 December 2014 (P461) in which a request was made for information about water testing. The Claimant responded: "Water testing is carried out by a competent person or company who is appointed by an organisation to check the water is safe. … The best course of action is to obtain three quotes from a company and review what work needs to be carried out… There are somethings that can be done internally- but at this stage it's best to let the experts take the lead." That was simply the Claimant's response to a request for information. I do not accept that there was a disclosure of information that tended to show a breach of legal obligation or the endangerment of the health and safety etc, or the likelihood of the same.

58. On 6 January 2015 the Claimant in her further particulars refers to a disclosure that was not put to any of the Respondent's at witnesses, so I make no finding in respect of it.

59. On 25 January 2015 the Respondent appointed a task force of executive directors to manage the restructure.

60. On 6 February 2015 there was an email exchange in respect of health and asbestos surveys. The Claimant was concerned that there was a risk that a risk a number of locations might not have an asbestos report in place. This is not a document relied upon by the Claimant at as being a protected disclosure in her pleadings.

61. On 26 March the Claimant contends she made disclosure in her further particulars that was not put to the Respondent's witnesses, so I do not consider it further.

62. The Claimant was signed off work from 27 March to 22 April 2015 due to a knee operation.

63. On 1 April, 3 April and 14 may 2015 the Claimant alleges in her further particulars that she made disclosures. These were not put to any of the Respondent's witnesses, so I do not consider them further.

64. On 12 June 2015 to 7 July 2015 the Claimant was signed off work due to a second knee operation.

65. he Respondent signed off restructure plans on 29 June 2015. The plans included the likelihood of the deletion of the Claimant's post. Accordingly, only disclosures that had occurred prior to this date could have affected the new structure, although that does not preclude the possibility that thereafter in seeking further employment for the Claimant, or in deciding whether that structure should be amended, further disclosures could not have played a role.

66. In July 2015 the Claimant contends in her further particulars that she made a further disclosure. This was not put to the Respondent's witnesses, so I do not consider it further.

67. On 8 July 2015 the Claimant returned to work after her second knee operation.

68. On 15 July 2015 the Claimant attended the Audit and Risk Group meeting (P590) The Claimant contends that she made a disclosure. There was a discussion about risk and, specifically, properties. It was recorded:

> “As we need to maintain the property we occupy and there are gaps in this process. We need to have a process for engaging with contractors on a national and regional basis and have a clear maintenance program.
>
> The new CQC standards have a focus on property and we need to ensure we meet this standard
>
> The Group discussed if by meeting our statutory and legal obligations in relation to property this would also satisfy CQC responsibilities. The issue is that we do not hold central records on if services are conducting the relevant checks (asbestos water etc …) so we cannot be sure we are meeting our statutory obligations.
>
> The Group requested a report on the current position with the property to identify what we currently do, what we need to do, if we are meeting CQC responsibilities and solutions to the matter.”

69. The Claimant was charged with producing the report. The Claimant contended in her oral evidence that at the meeting she said “enough is enough, we are not complying with our health and safety obligations” and that she said that she had been raising the issue for some time. I do not accept that evidence. The concern raised at the meeting was a that if national records were not held there would be no central record of whether checks were being undertaken by the Respondent and it could not be sure it was meeting statutory obligations. I do not consider that this disclosure in the reasonable belief of the Claimant tended to showed the occurrence of, or the likelihood (in the sense of it being more probable than not) of endangering the health and safety of an individual

or of a breach of a legal obligation,. The Claimant was raising a genuine and important concern. The Respondent was in was keen to engage with issue and ensure that the matter was dealt with properly.

70. The Claimant produced a report in which she set out at a large number of health and safety regulations as bullet points. The Claimant proposed national contractors. The Claimant recommended "based on the information provided in this paper it is recommended an assessment is carried out by a competent contractor to determine the level of risk … to avoid a critical incident from occurring". The Claimant was referring to risks. She suggested that a contractor should be engaged to undertake the work she had been asked to undertake herself.

71. In the further particulars, the Claimant's refers to a further disclosure on 15 July 2015 that was not put to any of the Respondent's at witnesses, so I make no finding in respect of it.

72. On 16 July 2015 the Claimant states that she made a disclosure at a meeting with Third Sector Property that there was no process in place for property management. In fact, the Claimant did not attend the meeting and so cannot have made a disclosure. In email correspondence with Mr Pink the Claimant set out her suggestion that Third Sector Property provide guidance on property management across the portfolio. She stated "no process is currently in place for premises management nor is this information being captured locally or centrally". The Respondent was in discussions with Third Sector Property about these issues. The Claimant stated "if you can please let me know the outcomes I do feel this is a concern we need to address this matter urgently". I consider that this is an example of the Claimant undertaking her role. The Claimant was keen to ensure that there was a move to a national scheme whereby health and safety risks, such as asbestos, would be centrally recorded. However, I do not accept that the email establishes that the Claimant was disclosing information that showed in her reasonable belief the occurrence of or likelihood of a breach of health and safety so as to endanger an individual or involving a breach of a legal obligation.

73. On 30 July 2015 the Claimant was invited to a redundancy consultation meeting on 4 August 2015. The meeting was rescheduled at the Claimant's request due to the Claimant having insufficient time to arrange a representative. The Claimant contended that she was misled as the meeting was originally to be a catch-up meeting. Mr Pink made it clear that there should be a formal meeting to consider the restructuring and the likely implications for the Claimant's role; and that she would be entitled have a workplace or trade union representative present.

74. In August 2015 the Claimant produced a Health and Safety Report. It was noted that some members of staff had been caught in a lift and that local staff had been unaware who was responsible for maintenance. It transpired that the landlord of the premises was responsible. While I accept that is a matter concerning health and safety, I do not accept there was a disclosure of information that tended, in the reasonable belief of the Claimant, to show a breach or likelihood of a breach of a legal obligation or that the health and

safety of an individual had been or was likely to be endangered. It was merely an exchange about who was responsible for maintaining the lift.

75. The Claimant alleges in her further particulars that a disclosure was made on 7 August 2015. That was not put to the Respondent's witnesses and I make no finding in respect of it.

76. The Claimant attended a first consultation meeting on 10 August 2016. During the meeting the Claimant was shown a PowerPoint of the proposed new structure. The proposal for administration was for business support on a regional basis with the main support functions for health and safety and corporate governance being conducted in regional hubs. The Respondent proposed the appointment of Business Support Managers and a National Business Support Manager who would have day-to-day responsibility for health and safety issues. It was proposed that there would be a new Director of Business Support/Company Secretary who would have a more strategic role in dealing with health and safety and the statutory responsibilities for the Respondent as a charity and in undertaking its work for those with addictions. I accept that the Director of Business Support/Company Secretary role was to be at a considerably higher level than the role that the Claimant undertook. The post holder was to attend all senior management meetings. The Claimant only attend those related to health and safety. The Director of Business Support/Company Secretary was to provide strategic guidance in respect of charity and company law and would have a strategic role in respect of property management and health and safety. For the first time at the hearing the Claimant has focused on the suggestion that she should have been considered that the Director of Business Support/Company Secretary role. That was not set out in her further particulars or raised prior to the hearing which has to some extent limited the evidence put forward by the Respondent in respect of that role.

77. I accepted that at the first consultation meeting the Claimant was taken through the new structure, specifically the roles. The Claimant was told that it was proposed that there would be a property manager role but that would not come into existence until the new financial year as there would be no funding for the role before then.

78. The Claimant had an opportunity to put forward any concerns about the new structure or any alternative structures that she contended should be adopted. Mr Pink asked for any recommendations, thoughts and questions. The Claimant responded that they should continue with the next stage.

79. The Claimant was told about an expressions of interest process for staff who wished to be considered for the Business Manager or National Business Manager roles.

80. I accept that the Respondent had concluded that the proposed changes to the management of health and safety and corporate governance, with the proposed appointment of a Director of Business Support/Company Secretary, the roles of Manager of Health and Safety and Manager of Corporate Governance would be likely to cease.

81. Mr Pink wrote to the Claimant on 10 August 2015. The Claimant was informed that no decision had yet been made and that she should bring forward any suggestions or proposals as to how the need for redundancies could be avoided or reduced. The Claimant was informed that there would be a further consultation meeting. The Claimant was invited to interview skills training. The Claimant was provided with an expression of interest form to complete and return by 20 August 2015. I consider that had the Claimant wished to be specifically considered for the Business Support Manager, National Business Support Manager or the Director of Business Support/Company Secretary she would have completed the expression of interest form. Although the Claimant asked for at the job descriptions for the roles she did not apply.

82. The Claimant states in her further particulars that she made disclosures on 11 August 2015. That was not put to any of the Respondent's at witnesses, so I make no finding in respect of it.

83. The next consultation meeting was fixed for 20 August 2015 but was rearranged at the Claimant's request to 26 August 2015.

84. The Claimant was given an opportunity to put forward any methods of reducing the need for redundancies. The potential redundancy package was explained to the Claimant. The Claimant was told that the Director of Business Support/Company Secretary role was a much more senior position and that the Claimant and that there was a candidate from at KCA who was to be job matched into the role. Although he did not have a formal company secretary qualification he had been conducting a similar role at KCA and was therefore job matched to the role. The Claimant was again told that the team manager role would not be available until April 2016.

85. During the first and second consultation meetings the Claimant did not specifically state that she wished to be considered for any of the new roles. The Claimant also did not state that she believed that the redundancy exercise was being conducted as a result of her having raised any concerns about health and safety.

86. On 27 August 2015 the Claimant produced a risk control proforma again raising the issue of provision of national contracts for property maintenance. She again raised her concern that there were no national controls of high-risk property maintenance issues The Claimant was again raising the issue of national control of documentation in respect of health and safety. I consider that she was genuinely raising issues of concern, but I do not accept this stage she disclosed information that in her reasonable belief tended to show the occurrence of or likelihood, in the sense of it being more probable than not, a breach of a legal obligation and/or that the health and safety of an individual being endangered etc. While I do not accept that there was a protected disclosure I do accept that the Claimant genuinely put forward a concern about the way health and safety matters were dealt with nationally. That was a matter of real concern to her.

87. The Claimant alleges that a disclosure was made at a Clinical and Social Governance Group meeting on 10 September 2015. The issue about the lift was raised but the Claimant was not in attendance and I do not accept any protected disclosure was made at her

88. On 14 September 2015, the Claimant wrote to the Respondent explaining that she was unwell. The third redundancy consultation meeting was postponed and eventually took place on at 19 October 2015.

89. The Claimant alleges she made disclosures on 8 October 2015 and 19 October 2015. They were not put to any of the Respondent's at witnesses, so I make no finding in respect of them.

90. At the consultation meeting on 19 October 2015, the Claimant having not put forward any specific alternatives, or applied for any of the new roles, the consultation was brought to an end. The Claimant was informed that she was to be made redundant. It was only at and that stage the Claimant made the comment about having raised "particular concerns and now this has happened".

91. The Claimant's employment terminated on 31 October 2015.

92. The Claimant contends she made a disclosure on 1 November 2015. This was not put to any of the Respondent's witnesses.

93. On 29 January 2016, the Claimant appealed against her redundancy. She stated (P783):

> "The few other positions advertised on the intranet site and website … meant I was not suitably qualified or it did not match my skills set. As part of my efforts to justify the need for my role to be kept in some capacity I carried out a survey of how key staff would like to be supported in terms of health and safety."

94. The Claimant's key contention at the time was that her role should continue rather than that she should have either been slotted into a role, or allowed to apply for any of the new roles.

95. The Claimant she set out her specific appeal points:

> I would like to raise concerns about the following points:
>
> 1. Lack of evidence to justify the Head of Health and Safety and Environmental Management role being made redundant
> 2. Being misled that the role would remain within Adaction in some capacity prior to consultation meeting
> 3. Lack of management support during my appointment in relation to health & safety risk matters
> 4. The lack of HR support provided during the redundancy process

96. The Claimant did not raise in her appeal a contention that she should have been allowed to apply for slotted into the Business Support Manager, National Business Support Manager or Director of Business Support/Company Secretary roles. She did not contend that she had been dismissed because she had raised health and safety concerns.

97. The Respondent decided to appoint an external investigator. During the course of the investigation the Claimant raised a contention she had raised health and safety concerns and been dismissed as a result. The investigator did not accept that that was case, being of the opinion that if there had been such serious health and safety concerns at the Claimant would have raised them under the Respondent's whistle blowing policy.

98. The Claimant attended an appeal hearing on 23 February 2016. Mr Antrobus dismissed the appeal. The Claimant did not raise any complaints about the way in which he dealt with the meeting during her cross-examination.

Analysis

99. I consider that the Respondent has fully established to my satisfaction that the real reason for the dismissal of the Claimant was redundancy. Having carried out a genuine business reorganisation they decided that the role of Head of Health and Safety and Environmental Management was no longer required, as day-to-day operational matters were to be devolved to the Business Support Hubs and more strategic and compliance issues were to be dealt by the Director of Business Support/Company Secretary.

100. I consider that the real issue in this case is that of the reason for the Claimant's dismissal and/or her selection for redundancy. While I have set out above the reasons why I considered that the disclosures of information Claimant relies upon do not meet the statutory test to establish that they are protected disclosures, this is largely on the basis that while health and safety matters were raised by the Claimant, I do not accept that involved disclosures on information that in the reasonable opinion of the Claimant tended to show the occurrence, or the likelihood, of a breach or of a legal obligation or of the endangerment of out the health and safety of an individual. That being said I accept that the Claimant raised health and safety issues that she considered those issues to be significant. She had genuine concerns about the national control of matters such as water testing and asbestos surveys.

101. Therefore, I have considered, irrespective of whether that the disclosures meet the statutory test of being protected disclosures, whether the raising of health and safety issues played any part in the Respondent's decision that the Claimant's role should be selected for redundancy. I note that while the Claimant had raised these issues, she had not raise them in a way that would suggest at that they were outside the normal ambit of her job. It was the role of the Claimant to raise health and safety issues. I do not accept that the Respondent were annoyed by the Claimant raising the issues. I consider they wished to take such matters seriously and to deal with them in a more effective manner in the new structure. I am entirely satisfied that a genuine view was reached that there should be a new structure where the day-to-day role of checking that documentation such as water safety reports and asbestos report

would be devolved to regional hubs. That made sense in that the staff at the hubs would be in a better position to check such documentation locally.

102. Although the Claimant had concerns about documentation evidencing water tests etc and had produced a draft questionnaire to be sent to local managers, that had never taken place.

103. I accept that the Respondent reasonably concluded that the Director of Business Support/Company Secretary was at a considerably more senior level to that of the Claimant and was not a role at into which she could be matched, whereas there was an employee from KCA who had the skills that enabled him to be matched into the role.

104. I do not accept that the health and safety at concerns raised by the Claimant played any part in the decision to dismiss her at I do not consider it played any role in the decision by selecting her for redundancy. In respect of the section 105 claim I note that, in any event, I note that there were no similar roles.

105. I consider that the Respondent has established that the real reason for dismissal was redundancy. They conducted a reasonable consultation process with three meetings at which the Claimant could raise issues about the structure and alternative employment. At the meetings and in email correspondence, although the Claimant asked for job descriptions for certain of the roles she never filled in the expression of interest form. In her evidence to the tribunal she stated that she did not consider that the Business Support Manager or National Business Support Manager roles represented suitable alternative employment. Subsequently, she stated that notwithstanding this, she would wish to at least to been considered for them. If that had been the case I consider that the Claimant would have completed the form and expressed her interest in the roles. I do not accept that what was said to her in the consultation meetings prevented her from so doing. I do not consider that the manner in which the Respondent dealt with the possibility of alternative employment was unfair.

106. In all the circumstances, I consider that the Claimant was dismissed by reason of redundancy, that the dismissal was not related to any health and safety concerns she raised, that raising those concerns did not amount to the making of protected disclosures, and that the dismissal was within the band of reasonable responses and fair.

107. At the conclusion of the hearing the Respondent made an application for costs. It was supported by a lengthy skeleton argument that had been provided to the Claimant just before lunch. I was also informed that a detailed schedule of the Respondent's costs had been provided yesterday. The Claimant's representative stated that the Claimant did not have the opportunity consider the schedule in detail. Mr Ogilvy had also provided written submissions on costs. I granted an adjournment to give the parties and myself an opportunity to consider the submissions.

108. When we resumed at I suggested that there were three points of principle. Firstly, whether the claim was one that had no reasonable prospects of success and, if so, whether that should, in principle, give rise a costs order.

Secondly, whether the Claimant was guilty of unreasonable conduct and, if so, whether that should, in principle, give rise a costs order. Thirdly, if in principle an order for costs should be made, the sum having regard to the schedule of costs produced by the Respondent and, if I considered appropriate, the Claimant's means.

109. Mr Ogilvy, on behalf of the Claimant had suggested that it might not be possible to deal with costs. After the break Mr Ogilvy agreed that it would be possible to deal with the first two points of principle, at least, after which we would consider the amount of any award of costs, if time permitted.

110. The power to make an order for costs are set out in section 76 of the Employment Tribunal Rules 2013. Such orders are at the exception rather than the rule. That was emphasised in **Gee v Shell UK Ltd** [2003] IRLR 82 at paras 22, 35 and **McPherson v BNP Paribas** (London Branch) [2004] EWCA Civ 569, [2004] ICR 1398.

111. A significant feature in application costs applications is the position of litigants in person. In **Gee**, Lord Justice Sedley, stated at para 35:

> "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that – in sharp distinction from ordinary litigation in the United Kingdom – losing does not ordinarily mean paying the other side's costs. …
>
> the governing structure remains that of a cost-free userfriendly jurisdiction in which the power to award costs is not so much an exception to as a means of protecting its essential character."

112. The Claimant has for the majority of the time be a litigant in person although she has had some limited assistance from a solicitor for which she claimed £1,400 in her schedule of loss. She has sought to obtain advice from Citizens Advice and other such organisations. Notwithstanding that, for the main part she has been litigating the matter on her own behalf. The significance of the position of a litigant in person was set out by His Honour Judge Richardson in **AQ Ltd v Holden** [2012] IRLR 648, EAT at para 32:

> "A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be

exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

113. I consider it is important to bear in mind that public interest disclosure claims, as has often been said of discrimination claims, are claims of particular public importance. They are claims of great significance and their fair determination is a very important aspect of the tribunal's jurisdiction.

114. The Respondent first contends that the claim had no reasonable prospect of success. While I have held that the threshold was not passed whereby the Claimant established a that she disclosed information that in her reasonable belief tended to show the likelihood of a breach of a legal obligation or of the endangerment of an individual's health and safety, so as to make the disclosures of information protected disclosures, I consider this was clearly arguable. It is to be borne in mind that the test of a claim having no reasonable prospect of success is a high threshold: see in the context of strike out applications **Balls v Downham Market High School & College** [2011] IRLR 217 in which Lady Smith held at para 6 in considering whether a claim has no reasonable prospect of success "no means no".

115. I consider the Claimant had a properly arguable claim that she made protected disclosures. If she had succeeded in establishing such disclosures I consider that she had an arguable claim that they were the reason for her dismissal. The fact that on a consideration of the totality of the evidence I concluded against her on this point does not mean that the claim was unarguable. Whether the disclosures were the reason, or principal reason, for the Claimant's dismissal was something that she could not know herself. Her contention was that a restructure occurred in which her role was split in a manner devised to remove her role so that she could be dismissed because her raising of health and safety concerns had become a thorn in the Respondent's side. There is nothing inherently implausible in this contention. I accept that it was arguable. Accordingly, I do not consider that the Respondent has come close to establishing that this was a claim that had no reasonable prospects of success.

116. In respect of the contention of unreasonable conduct, the first contention is that the Respondent on a number of occasions pointed out, as had Employment Judge Stuart, that this was likely to be a claim of little or no value as the Claimant shortly after her dismissal obtained alternative employment at a higher rate of pay. They repeatedly offered the claimant the opportunity to withdraw on the basis that they would not apply for costs. I accept that the Claimant genuinely believed that she had made public interest disclosures and thought it important to pursue this claim irrespective of the monetary value (although she was not prepared to accept that it was a limited as the Respondent and Employment Judge Stuart had suggested). The Claimant raised genuine concerns about important matters such as fire safety and asbestos testing. The fact that she was unlikely to recover any substantial compensation should the claim succeed does not mean that is was unreasonable to bring the claim. The logic of the Respondent's argument is that it would have been unreasonable to bring a no or very limited value claim

even if the Claimant had succeeded in it. It would be surprising if a claimant who had established that she had made protected disclosures about fire safety and asbestos testing and was dismissed as a result, would face an award of costs because she had fully mitigated her losses. That would be tantamount to punishing a claimant for acting solely in the public interest.

117. While the Claimant was confused as to whether the tribunal can consider the underlying question of whether there have been any such breaches of health and safety, always in the forefront of her claim she alleged that her disclosures were about her concern that there was no national control over fire safety, asbestos and water testing and that was the reason for her dismissal.

118. It was, of course, the nature of the Claimant's job that she would raise health and safety concerns. This always puts those who hold such roles in some difficulties in particularising protected disclosures where matters have been raised on multiple occasions. It can be difficult for a Claimant to identify which are the specific disclosures that are alleged to have led to dismissal or detriment.

119. While I accept that the Claimant has struggled to deal with providing additional information, I accept that she has genuinely attempted to provide the information required by the Respondents and that in dealing with documentation she has genuinely tried to provide the documentation that is required for the tribunal.

120. It is very easy for those of us that have been engaged in litigation for many years to forget how difficult it is for a litigant in person to deal with disclosure of documentation and the production of a bundle. It can be very difficult for a litigant in person to understand exactly what is required and they may become so overwhelmed that they cannot follow even clear instructions.

121. From the date of the response the Respondent has been making applications for the claim to be struck out. It is understandable that the Claimant as a litigant in person become embattled. Volume 1 of the bundle includes the full correspondence that demonstrates the regularity of these threats; many of which were unrealistic; see the example at paragraphs 2-6. The Respondent also sought to strike out the claim on the basis that the Claimant had failed to provided wage slips evidencing her rate of pay with her new employer despite the fact that the Claimant accepted it was higher than that with the Respondent. While they were entitled to the information this was not a matter that was at all likely to result in a strike out of the entire claim.

122. The Claimant believed that an attempt was being made to rob her of a valid claim. Where a respondent adopts such a combative approach to litigation it is common for ever more information to be provided by way of particularisation and provision of documents.

123. I accept that this is not a case where the Claimant thought ulterior motives has sought to harass the Respondent into a settlement. She has sought to put forward a claim which at heart was very straightforward; namely, that she raised concerns on numerous occasions that there was a failure to deal

adequately with certain health and safety issues and that was the reason, or a principle reason, for her dismissal and/or selection from redundancy.

124. I considered that she has attempted to deal with what has become extremely hard fought litigation on the Respondent's part. I accept that he Claimants has provided information and documentation late on numerous occasions and that documentation has been produced in duplicate without proper indexing. However, I consider that the Claimant has been seeking to provide the required information and documentation. To the extent that her conduct in this regard has been unreasonable I not do not consider that I should exercise my discretion to order costs in this matter.

125. I appreciate that there were an unusual number of Preliminary Hearings, that there has been lengthy correspondence and that the Claimant has, on a number of occasions, fallen down in provision of particulars and in dealing with documentation, even when given clear instructions by Employment Judges, as set out in the Respondent's written submission. However, in hard fought litigation litigants in persons can become so embattled that they are not able to focus even on clear instructions. While that may be unreasonable, it does not necessarily result in an exercise of the discretion to award costs.

126. I have taken into account the fact that the Respondent is a charity and that it can be difficult for a Respondent dealing with litigation brought by a litigant in person, but as Lord Justice Sedley made clear in **Gee**, one of the difficulties that arise from the fact that there is no public funding of claims before the Employment Tribunal is that they will often be fought by litigants in person. There are, of course, claims in which litigants in person act so unreasonably and/or for ulterior motives such that it is appropriate, notwithstanding the difficulties that they face, for them to be ordered to pay costs. However, on balance, I do not consider that this is one of those occasions and, accordingly, I refuse the Respondent's application for costs.

Employment Judge Tayler
27 July 2017