Case No: 1900030/2012

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Dr J Gosalakkal		**University Hospitals of Leicester NHS Trust**

Held at: **Nottingham** **On**: **6th and 7th April 2017**

Before: **Employment Judge Heap (Sitting Alone)**

Appearances:

Claimant: **In Person (on the first day only thereafter no attendance)**
Respondent: **Mr. R Powell - Counsel**

JUDGMENT having been sent to the parties on 11 April 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

BACKGROUND & THE HEARING

1. By way of background, this hearing was listed to deal with a Detailed Assessment of the Respondent's costs following a Costs Order made in their favour as a result of a Judgment sent to the parties on 5th June 2015 ("The Judgment"). That Judgment Ordered the Claimant to pay the Respondent's costs to be assessed if not agreed as a result of his unreasonable conduct of the proceedings.

2. I observed to the Claimant at the outset of the Detailed Assessment hearing that I acknowledge that he is dissatisfied with the Judgment but that his appeal to the Employment Appeal Tribunal in respect of the same has been dismissed and any appeal that he has lodged with the Court of Appeal has, as matters stand, not set the Judgment aside. This Detailed Assessment hearing was not, therefore, a further opportunity for the Claimant to seek to argue why he should not have to pay costs at all and for the Judgment to be revoked. That has

already been dealt with previously, including by way of a Reconsideration application.

3. I also made clear at the outset that the purpose of this hearing is not to argue against the decision made by Employment Judge Ahmed and members in their own Judgment that dismissed his claims and which later led to the application for costs from which this detailed assessment now flows. Equally, this hearing was therefore not an opportunity to revisit the Claimant's dissatisfaction with that Judgment either.

4. Despite that position, the Claimant returned on a number of occasions to those particular issues. I have not dealt with his arguments in that regard within this Judgment as those have already been exhaustively dealt with in earlier decisions and correspondence.

5. However, I should observe here that despite the fact that the Detailed Assessment hearing was listed for two days, the Claimant remained for only one of those days and even then not to the conclusion of the day. In this regard, in the afternoon of the first day the Claimant abruptly left both the hearing room and the hearing centre and did not return. That came shortly after I made a determination on one of the Points of Dispute that he had raised that was not resolved in his favour.

6. I considered whether to adjourn the Detailed Assessment hearing at that stage but determined that I would not. Firstly, there was no indication from the Claimant that there was any unexpected issue, such as ill health, which had caused him to leave the hearing. It appears that it was simply a conscious decision to do so in the light of a decision which he considered to be adverse to him. Secondly, there was nothing to suggest that the Claimant would participate in any reconvened hearing and the situation may therefore be no different than it was if there had been no adjournment. Thirdly, significant costs have been incurred in this case and it is of no benefit to either the Claimant or the Respondent for those to increase further. On that basis, I determined that the remainder of the hearing should proceed in the absence of the Claimant. I have taken into account written representations which he had made in his Points of Dispute when determining the remaining matters on the Bill of Costs that had not been dealt with before he absented himself from the remainder of the hearing.

7. I should in fact also say a word here about those Points of Dispute. I have given the Claimant a considerable amount of latitude in the matters that he sought to argue, a point recognised by Mr. Powell on behalf of the Respondent during the course of the Detailed Assessment. That latitude has included allowing the Claimant to raise matters which his Points of Dispute in no way covered and also raising issues with regard to the Bill of Costs served by the Respondent of my own volition. This included the VAT element of the Bill of Costs (a matter dealt with further below) which resulted in a not-insignificant part of the Bill being withdrawn to reflect the fact that the Respondent will be able to reclaim the VAT element of the costs claimed. I took those steps given that the Claimant remains a litigant in person and, despite having also been given considerable earlier latitude in compliance dates for his Points of Dispute to be

served, the fact that the overriding objective requires me to place him on an equal footing with the Respondent. It appeared to me that the Claimant had somewhat lost sight of the wood for the trees insofar as the matter of the Points of Dispute were concerned given his remaining and strident belief that the earlier Judgments in this case should be revisited. Ultimately, the challenges made by the Claimant to the Bill of Costs were somewhat vague, unsupported and without much if any thought as to what his contentions on what sums would have been reasonable would be (see for example on the issue of charging rates below). His overarching position was that he should not have to pay anything at all and that has unfortunately infected his thinking for this hearing and hindered significantly the Detailed Assessment process and his meaningful involvement within it.

8. I have nevertheless and because of those issues given the Claimant a significant degree of latitude in arguing points during the portion of the Detailed Assessment hearing for which he remained, even where those did not feature in his Points of Dispute and I have assisted him insofar as ultimately it is permissible for me to do.

9. I have before me the Bill of Costs (which as originally drawn stood at £98,321.23), the Points of Dispute served by the Claimant and other relevant documentation within a hearing bundle prepared by the Respondent and which ran to 256 pages. I have also had the benefit of sight of the original files of the Solicitors instructed by the Respondent, which run to some 27 lever arch files. I have heard oral representations from Mr. Powell on behalf of the Respondent and also from the Claimant on his own behalf during the part of the hearing for which he was in attendance.

THE LAW

10. The relevant principles to be considered are as set out in the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 and, particularly, Rule 78 which provides as follows:

The amount of a costs order

"78.—(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.

THE POINTS OF DISPUTE

11. The Points of Dispute served by the Claimant in response to the Respondent's Bill of Costs are included in the hearing bundle at pages 98 – 103 and include 17 points, some of which overlap with each other and others of which can be conveniently dealt with together. I have nevertheless considered all points contained therein and have dealt with each part in turn and after hearing oral representations from the Respondent and also the Claimant for the period when he was present at the Detailed Assessment hearing.

12. I turn then to deal with each of the Points of Dispute raised by the Claimant.

Point One

13. Point one of the Points of Dispute is not disputed on behalf of the Respondent.

14. This point deals with the fact that the Claimant notes that the Judgment Ordered that no account should be taken of costs incurred prior to 27th May 2013. That is reflected by paragraph 120 of the Judgment and it is not in dispute.

15. Although the Claimant has not highlighted any instance in the Bill of Costs where costs pre-dated 27th May 2013, I did in fact identify two occasions where that had occurred. In this regard, the Bill of Costs did in fact include costs incurred on 3rd May 2013 of £513.00 (page 53 of the hearing bundle). The Respondent agrees that those costs should not feature on the Bill and they have therefore been disallowed.

16. Similarly, item 30 at page 68 of the hearing bundle is also an entry of costs from 3rd May 2013 and as such I have reduced the bill by the sum of £148.50 to take account of that.

17. Those reductions are set out in the revised Bill of Costs submitted by the Respondent at my direction after the conclusion of the Detailed Assessment hearing and which is annexed to this Judgment.

Point Two

18. Point two of the Points of Dispute is not disputed on behalf of the Respondent.

19. This reflects the fact that the costs to be assessed are to relate only to the complaints of detriment contrary to Section 47B Employment Rights Act 1996 and the claim of automatically unfair dismissal pursuant to Section 103A Employment Rights Act 1996 and not to the claim of "ordinary" unfair dismissal. Adopting the words at paragraph 14 of the decision of the Employment Appeal Tribunal when considering the Claimant's appeal against the Judgment, those costs will have to be disentangled from the costs incurred with regard to the "Whistleblowing" claims. The disentanglement issue is dealt with further below.

Point Three

20. The third point of dispute raised by the Claimant is that it is said that it was the Respondent's late introduction of what is referred to as the "time limit argument" (i.e. the matter of jurisdiction) which took up six days of the hearing before Employment Judge Ahmed and members. The Claimant has expanded upon his argument in that regard during the course of the hearing and, as will become clear below, I have afforded him a considerable amount of latitude in permitting him to expand substantially on this point from that set out in the Points of Dispute.

21. In essence, his contention is that aside from the issue of late raising of the "time limit argument", a matter which I understand the parties to be agreed was to be dealt with at the main hearing, the Respondent had also requested a postponement of a scheduled hearing, which at that time had been due to commence on 25th April 2014.

22. It is the Claimant's case that matters were misrepresented to Employment Judge Hutchinson at a Preliminary hearing on 3rd April 2014 with the result that Employment Judge Hutchinson was effectively persuaded to postpone the 25th April hearing. It is the Claimant's case that given that was done on a false footing, that is that the Respondent made representations that this was necessary because of a pending GMC hearing, then costs incurred after the date when the hearing should have commenced on 25th April 2014 should not fall at his door.

23. I have heard representations from the parties on those matters and considered them carefully. I deal firstly with the initial point raised by the Claimant in respect of what is referred to as the late introduction of the time limit argument. It is the Respondent's case in this regard that those matters were raised approximately 6 months prior to the commencement of the hearing and

there was a dispute on the facts in relation to that issue. However, I do not need to resolve that on the basis that it is clear from the judgment of Employment Judge Ahmed that the Claimant's detriment complaints had in fact been presented out of time. It is also clear from paragraph 6 of the Judgment of Employment Judge Ahmed and the members that that was not a matter which became clear until the first day of the hearing in all events when the last act of detriment complained of was specifically identified by the Claimant. Until that identification had taken place, it was somewhat difficult, it seems to me, for the Respondent to have honed any jurisdictional arguments. Paragraph 6 of the Judgment of the Ahmed Tribunal appears to me to clearly lay the blame for the lack of clarity in the Claimant's court and not that of the Respondent and it is difficult therefore to see how his arguments in this regard could stand.

24. More importantly than that, however, jurisdiction is a matter which strikes at the heart of any Tribunal claim. If it is the case that a claim has been presented "out of time" (and assuming that there are no grounds to extend time to allow the complaint to be considered) then the Tribunal quite simply does not have jurisdiction to entertain the complaint. Therefore, irrespective of whether the Respondent raised the issue at the outset of the proceedings or part way through, it would in all events have had to have been one which was attended to by the Tribunal at the hearing when that matter became apparent to them. It was not a matter that the Tribunal could possibly have ignored.

25. Therefore, irrespective of whatever stage the Respondent raised the jurisdictional argument this has no bearing on the costs issue as those matters would have had to have been dealt with anyway once the Tribunal became alive to the fact that the claim appeared to be out of time, as indeed was dealt with by Employment Judge Ahmed and his members. There is, therefore, nothing in the Claimant's contention that six days of hearing time should be discounted on account of what he says to be a late introduction of the time limit point by the Respondent.

26. The second aspect of the Claimant's argument relates of course to the issue of the postponement of the hearing listed for 25th April 2014, a matter which was considered by Employment Judge Hutchinson at a hearing on 3rd April 2014.

27. I have considered the Order made by Employment Judge Hutchinson. Although his decision to postpone the hearing listed for 25th April 2014 did relate in part to representations made concerning an ongoing hearing before the GMC, it is quite clear that that was not the sole basis for the postponement of that particular hearing. Particularly, I note that at paragraph 1.4 of Employment Judge Hutchinson's Order, he made it clear that both parties had agreed that the 10 days of hearing time which had been allocated would be insufficient time to hear the claim and that they had asked that it be listed for 15 days instead.

28. Whilst the proceedings in the final event did not run for 15 days, they did nevertheless occupy 13 days of Tribunal time (although I understand there to have been only 11 effective days of hearing time). I should observe that it appears to me that that reduced time estimate was on the basis that there were a number of witnesses who did not give evidence on the basis that the

"Whistleblowing" claims had already been dealt with as a preliminary matter by the Ahmed Tribunal who had determined that they had no jurisdiction to consider them. On that basis, it is not surprising that those witnesses did not give evidence and also that the hearing was shorter than had originally been anticipated on 3rd April 2014 when some 15 days of hearing time were being suggested as being needed. However, whatever the position, it is abundantly clear that had the hearing remained in the list for 25th April 2014 the parties were agreed that it would not have been completed in the 10 days that had been allocated. The parties made representations to Employment Judge Hutchinson that the claim would take substantially longer than the 10 days that it was already listed for and that played a not inconsiderable part in the decision to postpone the hearing.

29. Paragraph 1.9 of Employment Judge Hutchinson's Order encapsulates all reasons for postponement, including the length of hearing time and preparedness. Therefore, I need make no determination as to whether the postponement was necessary as a result of the GMC proceedings given that it was also postponed on other grounds and, particularly, that the time allocation was insufficient.

30. On that basis, I reject the Claimant's contention that costs should be limited to the date of the original hearing of 25th April 2014.

Point Four

31. Point four is essentially the same argument or an expansion thereof of point three in that the Claimant contends that the Respondent should have raised the jurisdictional arguments at hearings which had been conducted for the purposes of case management earlier in the proceedings.

32. I have already dealt with that argument above and therefore do not need to rehearse those reasons again here.

Point Five

33. Point five of the Claimant's Points of Dispute references the death of Mr. Patterson, who was initially the solicitor at Messrs Browne Jacobson with conduct of the matter on behalf of the Respondent. Mr. Patterson sadly passed away during the course of the early stage of these Tribunal proceedings.

34. It is not clear, and the Claimant has not been able to help me with this point at the Detailed Assessment hearing, as to how that matter affects the content of the Bill of Costs. The Claimant has referred me to the fact that in his view Mr. Patterson would be a "main witness", but that does not take matters any further forward as to the content of the Bill of Costs and what sum should be Ordered to be paid upon Detailed Assessment. As I say, the Claimant has not been able to assist me in his oral submissions on that point and therefore I say no more about that particular matter.

Point Six

35. Point Six, as expanded upon by the Claimant at the Detailed Assessment hearing relates to the fees charged by Mr. Powell, who at all material times as represented the Respondent as Counsel instructed by Messrs. Browne Jacobson.

36. In regard to this particular point, the Claimant takes issue with the fees incurred in respect of the various hearings which took place after 27th May 2013, including the substantive hearing before Employment Judge Ahmed and members and which are set out in the Bill of Costs. Although the Points of Dispute are limited to Counsel's fees with regard to Mr. Powell for the relevant hearings, the Claimant has sought to expand that argument also to the charging rates of each of the fee earners assigned to deal with matters at Messrs Browne Jacobson with regard to all work done. Again, in accordance with the degree of latitude that I have afforded to the Claimant, I have allowed him to argue those matters at this Detailed Assessment hearing and I deal with Counsel's fees and solicitors fees below.

(i) Solicitors fees

37. The Claimant contends that the rates charged by the solicitors who undertook relevant work on this matter are excessive and ought to be reduced. As is set out below, the fees are in fact less than the published guideline rates in the Guide to Summary Assessment of Costs which I have considered with the parties during the Detailed Assessment hearing. The Claimant does not suggest that those guideline rates are not applicable or that some other rates should be applied. He appears to argue that simply because there are guideline rates, those do not need to be applied. He points for example to the fact that a Consultant Neurologist can charge £300.00 per hour whilst he himself may only charge £100.00 per hour and that therefore the rates should be discounted, although he does not suggest what rate(s) he contends would be appropriate.

38. The solicitors who undertook work on this matter were as follows:

(i) Ian Patterson and Helen Badger (Grade A Partners) at a rate of £145.00 per hour;
(ii) Rachael Jellema (an Associate Solicitor with circa 9 years post qualification experience ("PQE") at a rate of £135.00 per hour;
(iii) Gemma Steele (An Associate Solicitor with circa 7 years PQE) at a rate of £135.00 per hour; and
(iii) A number of trainee solicitors at a rate of £70.00 per hour.

39. I have seen the invoices in respect of those individuals and the applicable hourly rates are set out above. Those hourly rates are in fact substantially lower than those which could have been charged based on the published guideline rates in the Guide to Summary Assessment of Costs. In that regard, Band 1 for Nottingham City Centre sets out the following rates:

(i) Grade A Partner - £217 per hour;

(ii) Grade B fee earners (i.e. those with over 4 years PQE) - £192 per hour: and
(iii) Grade D fee earners (trainee solicitors) - £118 per hour.

40. The rates charged by Browne Jacobson in regards to each of the fee earners who undertook relevant work was therefore substantially below those guideline rates. They are eminently reasonable fees to be charged having regard to the PQE of the fee earners concerned and the fact that the firm practices from city centre offices. I therefore see nothing unreasonable in relation to the fees which have been charged with regard to the charge out rates of each of the fee earners concerned and I therefore reject the Claimant's contention that lower rates should be substituted.

(ii) Counsel's fees

41. Perhaps somewhat unusually, the fees of Mr. Powell are not expressed in terms of a brief fee and refreshers as would normally be the case. Instead, Mr. Powell has applied what is referred to in his invoices as a "unit price".

42. However, what is clear is that the total time that Mr. Powell has spent on the matter is some 316 hours in total and that when that time is taken into account as against his fees charged, it takes the applicable hourly rate that he has been working at to less than £85.00 per hour. Moreover, it is clear from the invoices that he has discounted work done and has also dealt with a number of conferences without any charge at all. For Counsel with the number of years call of Mr. Powell (year of call: 1991), the fees charged cannot sensibly be said to be anything other than reasonable. They are below that which much more junior barristers might have levelled if instructed in these proceedings.

43. Indeed, when taking into account those matters into account, I am satisfied from the time spent by Mr. Powell and the arguments before me that his fees are in fact on an hourly basis less than that which would be charged by a trainee solicitor on the Guideline rates. While those matters are not strictly comparable, it is clear that the fees as charged, having regard to the amount of work which has been done, are manifestly reasonable taking into account the year of call of Mr. Powell and the complexity of these proceedings and the time that has been occupied dealing with them.

44. I therefore reject the Claimant's contentions that the fees charged by Counsel are in any way excessive and I make no reduction in the sums charged other than those areas otherwise dealt with below.

45. On that basis, I am entirely satisfied that there is nothing within the rates charged, either by Browne Jacobson or otherwise those incurred by way of Counsel's fees, that could be said to be unreasonable in respect of this matter and I reject the Claimant's arguments to the contrary.

Point Seven

46. The Claimant again raises in respect of this point the fact that the jurisdictional issue was not identified earlier in the proceedings, either by the Respondent or by the Employment Tribunal. The arguments advanced in this regard do not, however, take matters any further forward than those that I have already dismissed with regard to points three and four above.

47. However, during the course of the discussion in respect of this particular point, the Claimant has raised again his general dissatisfaction both with the Judgment and also the decision of Employment Judge Ahmed and his members to dismiss the claims that he had brought. However, as outlined previously and also at the outset of these proceedings, that is not a matter which I am either prepared or indeed able to re-open. All of the Claimant's arguments in this regard have already been ventilated previously, including at appeal stage, and this Detailed Assessment is not an opportunity to seek to argue those matters again. Therefore, there is nothing raised by the Claimant in respect of this Point of Dispute which takes matters further forward in relation to this point seven and therefore I say no more about it.

Point Eight

48. This part of the Points of Dispute raises the exact same issue as is dealt within his expanded argument in respect of point three above. Again, the Claimant represents that as the Respondent had caused there to be a postponement of the hearing scheduled to begin on 25th April 2014, any costs incurred after that date should be disregarded. I have already rejected that argument above and the same rejection therefore applies to this further point eight.

Point Nine

49. The Claimant essentially contends here, as I understand it, that given that the Ahmed Tribunal dismissed the "Whistleblowing" claims as a preliminary matter, there was little or no discussion after that on those issues and the predominant part of the hearing was in respect of the "ordinary" unfair dismissal claim which I have not made subject to any Order for costs. In essence, the Claimant further contends that it is unjust that he should have to pay any costs in relation to the "Whistleblowing" complaints when the merits of those complaints were never finally determined.

50. Leaving aside the fact that this argument appears to conflict with the Claimant's contention that the jurisdictional issues took six days to determine (see point three above), it is clear that the Tribunal had to deal not only with the detriment complaints where it found that it lacked jurisdiction but also the question of whether protected disclosures had been made at all and, if so, whether they were the reason or principle reason for the dismissal so as to deal with the claim brought under Section 103A Employment Rights Act 1996.

51. There can, in my view, be no reasonable suggestion that significant costs were not incurred in respect of preparation for and the hearing of the "Whistleblowing" elements of the claim in addition to the ordinary unfair dismissal complaint.

52. There will be, as detailed below, a "disentanglement" of those costs but it cannot reasonably be said that the Claimant should pay nothing at all in respect of what was clearly significant preparation and representation for the "Whistleblowing" claims.

Point Ten

53. Point ten of the Points of Dispute is essentially a matter in two parts.

54. The first issue is that the Claimant contends generally that there had been what he has referred to as a "significant escalation" in costs during the latter stages of the proceedings, which he does not believe were essentially genuinely incurred at that time. The problem in relation to this position is that the Claimant has failed to file Schedule G as required by paragraph 1.8 of my original case management Order, despite the opportunity to do so on more than one occasion.

55. Therefore, I have made it clear that I am not, as the Claimant's appears to wish to do now, intending to pick through item by item of some 27 lever arch files of correspondence, to see what was done in respect of each of those matters contained within the Bill of Costs and to then allow the Claimant the opportunity to challenge any with which he does not agree. The time for dealing with that situation has now since passed and I am satisfied that the Claimant has had the opportunity to deal with that at a much earlier point and has simply chosen not to do so. Moreover, there is nothing at all to support the Claimant's contention that Browne Jacobson have manufactured costs or somehow skewed their bill so that the balance falls at the conclusion of the proceedings. Indeed, it would in all events not be unusual for a significant proportion of costs to be incurred towards the conclusion of the proceedings given the need for preparation for and attendance at the substantive hearing.

56. The second aspect of the Claimant's submission on point ten is with regard to the "unpicking" of costs incurred in respect of the ordinary unfair dismissal claim (in respect of which there is no Order for costs) and the Whistleblowing complaints (for which costs have been Ordered to be paid). That is an issue which has been dealt with below and in respect of which appropriate deductions have been made from the Bill of Costs.

Point Eleven

57. Again, this point relates to the postponement of the hearing originally scheduled for 25th April 2014, which has already been dealt with earlier in this Judgment with regard to point three The Claimant has confirmed that he has no further submissions to make in respect of point eleven, over and above those already made above, and therefore I say no more about this particular issue.

Point Twelve

58. Point twelve essentially seeks to again challenge the Judgment and argue that no Order for costs should ever have been made in favour of the Respondent. As highlighted to the parties at the outset, that is not a matter which it is open to the Claimant to seek to argue and re-open at this Detailed Assessment hearing. Therefore, I say no more about it.

Point Thirteen

59. Although it initially appears that this particular point is a further expansion on the argument set out at point twelve, the Claimant has informed me that in fact this is a reference to the "disentanglement" point which was referred to at paragraph 14 of the decision of the Employment Appeal Tribunal upon the Claimant's appeal against the Judgment.

60. Again, that is a matter which is attended to below.

Point Fourteen

61. Again, essentially this point of dispute centres on the Claimant's argument that the Judgment is wrong and that costs should not have been Ordered to be paid at all. The same conclusions therefore apply here as to point twelve above.

62. However, the Claimant has expanded upon the issue and contends that as it will be inherently difficult to disentangle the costs of the ordinary unfair dismissal claim from that of the Whistleblowing complaints, it must be the case that only a nominal sum should be Ordered to be paid in costs. I do not accept that submission. It is clear that the Whistleblowing complaints – which I observe again included an allegation of automatically unfair dismissal – were a major part of the claim and clearly generated a significant amount of costs to be incurred. It is simply in my view misconceived to try to argue otherwise. The costs of the ordinary unfair dismissal claim will be subject to the disentanglement exercise envisaged by the Employment Appeal Tribunal and as referred to further below.

Points Fifteen to Seventeen

63. The Claimant has confirmed during the Detailed Assessment hearing that all remaining points set out in his Points of Dispute relate to his continued submission that the Judgment was wrong and that there should have been no Order for costs in the first place. For the reasons given in respect of point twelve above, I say no more about these arguments.

Further argument at the Detailed Assessment hearing

64. However, there is one further issue that the Claimant has raised in respect of the Bill of Costs. It is not a matter which is even alluded to at all within his Points of Dispute and Mr. Powell strongly opposes the matter being considered in view of the failure of the Claimant to raise the issue well before now.

65. In view of that objection, I have therefore considered, in line with Rule 43 Civil Procedure Rules ("CPR"), whether I should allow that fresh matter to be ventilated by the Claimant. Ultimately, I determined that I would hear argument on the point notwithstanding the fact that I have given the Claimant more than ample opportunity to serve full Points of Dispute. Given that he has at all material times been unrepresented, and so as to ensure him a fair hearing, I permitted him to raise this additional argument and have it determined.

66. The point in contention in this regard is that it is the Claimant's case that costs should be limited to those incurred between 27th May 2013 and at the latest 17th November 2015 on the basis that that was the last day of the hearing before Employment Judge Ahmed and members. The Claimant contends that as the Order for costs related to his unreasonable conduct in pursuing the claim after the Deposit Order was made, there should be a cut off in respect of costs incurred at the point that the claim failed and final judgment was given by Employment Judge Ahmed. There should, the Claimant argues, therefore be no account taken of any costs incurred after the claim was dismissed on 17th November 2015.

67. Mr. Powell argues against that and contends that the costs which have been incurred essentially flow directly from the Claimant's unreasonable conduct as the Judgment had found it to be.

68. Having noted representations on the point from both parties, I have concluded that the issue should be resolved in favour of the Respondent. My reasons for doing so arise from the provisions of Section 78(1)(b) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. This provides that where an Employment Judge is carrying out a detailed assessment, then this is to be dealt with under the same principles as that which would be dealt with in the County Court by reason of the Civil Procedure Rules 1998.

69. On that basis, it is clear that costs up to and including this Detailed Assessment hearing would be taken into account if one was to follow the provisions of the Civil Procedure Rules. That is what I am required to do by virtue of Rule 78(1)(b) and it cannot be that there would be a different result in the Tribunal from the way that the matter would have been approached in the County Court had the claim been sent there for Detailed Assessment. I have therefore determined against the Claimant's argument that costs should only be allowed if they were incurred during the period 27th May 2013 to 17th November 2015.

70. It was at this stage that the Claimant left the Detailed Assessment hearing and did not return for the remainder.

Disentanglement

71. As referred to above, the Judgment Ordered costs only to be paid with regard to the Whistleblowing claims (both of detriment under Section 47B Employment Rights Act 1996 and of automatically unfair dismissal contrary to Section 103A of that Act). No Order for costs was made in respect of the

"ordinary" unfair dismissal claim and therefore it falls that there must be a deduction from the Bill of Costs to reflect the fact that costs would still have been incurred defending the ordinary unfair dismissal claim, including at a final hearing, and that it would be unjust for a reduction not to be made to the Bill to reflect that. I must therefore disentangle the costs which would have been incurred in relation to the ordinary unfair dismissal claim for which there has been no order for costs to be paid from those which were incurred in respect of the unreasonably pursued Whistleblowing complaints.

72. That was an issue set out in the Judgment of the Employment Appeal Tribunal at paragraph 14 of the decision of the Mrs Justice Simler when considering the Claimant's appeal against the Judgment. The relevant part of that decision said this:

"At the detailed assessment the Judge conducting the detailed assessment will have to disentangle those costs that are only attributable to the whistleblowing complaints or only attributable to the ordinary unfair dismissal complaints and if and to the extent that the costs are attributable to both will have to make some form of apportionment."

73. Mr. Powell accepts that there must be some reduction to the Bill of Costs to deal with the disentanglement of the ordinary unfair dismissal costs. He and the Claimant are poles apart as to how that should be achieved.

74. Mr. Powell contends that the bulk of the work was in relation to the Whistleblowing complaints and therefore any reduction should not be significant.

75. The Claimant argues to the contrary and contends that disentangling the costs would be impossible and so only a notional sum should be paid to represent the costs of the Whistleblowing claim. He does not suggest an amount but I take from his general representations this to be an extremely minimal sum. I have already set out above in respect of point fourteen above why I have rejected that argument.

76. In truth, the reality of the situation in my view is one which falls between the two stools. It is, however, a difficult exercise and one ultimately which I can only take a relatively broad brush approach in relation to with regard to some elements of the Bill of Costs.

77. However, one area where the task is slightly more straightforward is in respect of the substantive hearing before Employment Judge Ahmed and members. That hearing would have been necessary in all events to deal with the ordinary unfair dismissal claim, although of course it would not have been nearly so lengthy. It is clear having heard from the parties that there would have had to have been three witnesses who would have had to have attended on the part of the Respondent to deal with the ordinary unfair dismissal claim alone. Those would have been the investigating officer, appeal officer and dismissing officer. I do not accept the Claimant's representations that it would have needed more than that as that is the norm in Tribunal proceedings and I have not been taken to any other witness statement of any other individual, which suggests that

anyone else would have been necessary. The other witnesses were to deal with the issues and facts arising from the Whistleblowing complaints.

78. I have seen the witness statements of the three individuals referred to above. They do not occupy a significant number of pages and there is a significant dispute between the parties as to the length of time that it took for each of them to give evidence. Whilst the Respondent had taken a note of the proceedings, which appears within the volume of correspondence files which are before me, unfortunately whomever had taken that note had neglected to place any timings on cross-examination. There is therefore a dispute between the parties with the Respondent indicating that cross-examination of those three individuals was likely to have taken a day and a half to two days at the most. The Claimant's position is that they would have taken some two days.

79. I have, in the absence of any timings being recorded in the attendance note to which I have been taken, resolved that matter in favour of the Claimant. Three days for the Respondent's evidence on the unfair dismissal claim issues alone would not be disproportionate. There would also still have had to have been cross examination of the Claimant as to the unfair dismissal claim (albeit not for the six days that his evidence did in fact occupy) and submissions to have been made on the claim. Moreover, there would still have been a relatively significantly sized hearing bundle to consider. I have a copy of the hearing bundles before me, around 600 pages of which appeared to relate purely to the Whistleblowing complaints. That is not to say that there were not more than that, but certainly those 600 pages which pre-date February 2011 can only be said to relate to the Whistleblowing complaints. There would still therefore have been a sizeable bundle for the ordinary unfair dismissal complaint alone.

80. I can only take a relatively broad brush approach in relation to how much Tribunal hearing time would have been occupied in respect of the unfair dismissal claim element only. Taking into account the matters set out above, sues, I am satisfied that a period of no more than five days at most would have been needed to hear all of the evidence in the ordinary unfair dismissal claim. The Respondent's Bill of Costs as originally drawn was therefore reduced by the costs of five days of hearing time, both in respect of Solicitors costs and Counsel's fees. That reduction is set out in the revised Bill of Costs submitted by the Respondent at my direction after the conclusion of the Detailed Assessment hearing and which is annexed to this Judgment.

81. That deals then with a reduction of costs from the Bill as drawn in regards to the hearing itself, but there are also the other costs incurred outside the hearing and, most notably, in preparation for it. Again, that is an element of the Bill of Costs which requires disentanglement.

82. Clearly, this was a case where costs would have been incurred if the Claimant had simply pursued the ordinary unfair dismissal claim. There can be no question about that. However, this is a case which generated a significant amount of correspondence. I have before me at least 27 lever arch files representing the original files of Browne Jacobson, which I cannot conceive in any circumstances would have been generated by what should have been an

ordinary and straightforward unfair dismissal claim. The matter was clearly seriously complicated by the Whistleblowing claims, not only in respect of hearing time but in regards to disclosure, witnesses and preparation and dealing with the issues generally. It is impossible to go through each activity on the Bill of Costs and attribute them to either one or other of the Whistleblowing complaints or the ordinary unfair dismissal claim. The two sets of complaints were inextricably linked; not least the fact that the Claimant was alleging automatically unfair dismissal contrary to Section 103A Employment Rights Act 1996. Therefore, in respect of those costs I consider that the only possible way forward is to make an apportionment.

83. The parties are once again diametrically opposed in relation to the assessment which should be made in relation to that matter. Mr. Powell agrees with my assessment this can only be done effectively on a percentage basis given the circumstances and the fact that the claims were interwoven with each other as was in turn the work that had to be done in respect of each. The Claimant's position is more uncertain on that but he does not argue strenuously, if I can put it that way, against a percentage reduction basis.

84. Mr. Powell puts the percentage of work that would have been done in a normal unfair dismissal claim as against that which was done of around 5% - 10% of the overall work. The Claimant's position is diametrically opposed and he contends that 90% of the work which was done would still have needed to have been done simply to deal with the ordinary unfair dismissal claim. He therefore contends that there should be a reduction of 90% of the bill to take account of that.

85. I have considered both aspects of those submissions carefully. I do not agree that either of them represent an accurate assessment, but the Respondent's position quite clearly is towards the more accurate end of the spectrum. It is very difficult to ascertain without going through each item individually what proportion of costs would have been incurred on the ordinary unfair dismissal claim, but I can certainly say that it would not have been the volume of work which I have before me in the 27 lever arch files. That much is clear and obvious having regard to the issues which were at stake in the unfair dismissal claim and the length of the hearing as I have ascertained it to be.

86. I consider in the circumstances that an appropriate percentage reduction in these circumstances of the costs other than those in respect of the hearing is 20% to take account of the work which I am satisfied would have had to have been done in respect of the unfair dismissal claim in all events. That reduction is set out in the revised Bill of Costs submitted by the Respondent at my direction after the conclusion of the Detailed Assessment hearing and which is annexed to this Judgment.

Miscellaneous issues

87. There are a number of issues on the Bill of Costs which I have raised with the parties of my own volition, notwithstanding the fact that those do not feature in the Points of Dispute and were not otherwise raised at all by the Claimant.

88. Although the Claimant does not accept this to be the case, I have sought to do so in order to ensure fairness to him and so that he is placed on an equal footing with the Respondent in respect of arguments available to him in respect of this hearing.

89. I have raised and made reductions to the Bill of Costs as originally drawn to take into account the following:

(i) Value Added Tax ("VAT")

90. After enquiries that I made of Mr. Powell, it transpired that Counsel's fees as set out in the bill breakdown at page 72 of the bundle were said to be in the sum of £31,200.00. That transpired to be a VAT inclusive amount. Mr. Powell accepts that the Respondent can in fact reclaim that element of VAT on legal costs and therefore this should not properly fall to be part of the bill. It is accepted on that basis by Mr Powell on behalf of the Respondent that the figure for Counsel's fees which should feature on the bill is £26,400.00 and not £31,200.00. The Respondent therefore accepted that a reduction of £4,800.00 was appropriate. That reduction is set out in the revised Bill of Costs submitted by the Respondent at my direction after the conclusion of the Detailed Assessment hearing and which is annexed to this Judgment.

91. As set out above, I have otherwise found Counsel's fees to be reasonable and proportionate having regard to the work undertaken, the length of the hearing and the complexity and importance of the proceedings.

(ii) Attendances

92. I have also caused a reduction to be made from the Bill of Costs in respect of item 4 at page 57 of the hearing bundle. That item provides for a charge for attendance by a trainee solicitor, in addition to that of a partner and Counsel, at a conference with both Counsel and witnesses. Whilst that individual apparently took notes of the conference, that is a luxury which could clearly have been avoided with the partner who was in attendance taking notes. There was no need for a trainee solicitor to also be present for that purpose. I have therefore disallowed £840.00 in relation to that aspect.

93. I have also disallowed costs in relation to what is clear duplication for attendance at the full merits hearing. In this regard, not only was Counsel in attendance but also a Grade A partner and a trainee solicitor. I accept the explanation of Mr. Powell that the attendance of the Partner was necessary to provide him with assistance in complicated issues where he had had conduct on a day to day basis and from the outset. The trainee solicitor, however, was only there to take notes. There seems to me to be no reason why the Partner could not have stepped into the breach on those days when he was present to take notes and why he and a trainee solicitor were therefore required to be present at the same time. I have therefore disallowed costs for trainee solicitor attendance on that basis on 27th October (£560.01), 10th November (£448.01) and again on 17th November (£343.01).

94. Those reductions are set out in the revised Bill of Costs submitted by the Respondent at my direction after the conclusion of the Detailed Assessment hearing and which is annexed to this Judgment.

Costs of the Detailed Assessment

95. The Respondent also submitted a bill of costs relating to the detailed assessment. The Claimant had stated only that he considered those to be "manifestly excessive". He did not set out any other specific objection or area of challenge to the costs set out in that bill. The Claimant did, however, elect to leave the hearing before the conclusion of the same and before there was an opportunity to ask him to address those matters. Therefore, I have nothing from him to substantiate his contentions that those costs were excessive.

96. That being the case, I have made no reduction in relation to that particular bill of costs for the Detailed Assessment hearing.

Proportionality

97. Overall, I need to say a word as to proportionality in relation to this matter given the amount of costs which I have allowed following this Detailed Assessment. I have had the question of proportionality in mind throughout this hearing and in the decisions that I have made on the Detailed Assessment of the Bill of Costs.

98. I observe, however, in relation to the issue of proportionality what was at stake in this case. At one stage of the proceedings, the Claimant was claiming in excess of £2 million. The Claimant sought in the Detailed Assessment to downplay that position and that this was not, as he termed it, "a million dollar claim" but it is clear from the documents before me that that was not a matter that the Claimant recognised at the time as he continued during the course of the proceedings to submit updated schedules of loss in excess of £2 million. These were complex proceedings, with vast numbers of documents, where the Claimant was making his position abundantly clear that if he was to succeed he intended to ask the Tribunal to award very substantial compensation indeed.

99. It is also necessary to take account of the volume of correspondence and other communications which this matter generated. This ran to some 27 lever arch files of correspondence, all of which I had before me for the purposes of the Detailed Assessment hearing. Although that is a surprising number of solicitor's files for one case, it is perhaps in keeping with the fact that the Tribunal's own files in respect of this case runs to three large files of papers in addition to the volumes of hearing bundles. That of itself is a rare occurrence for such a vast amount of correspondence to have been generated simply on the Tribunal file itself (and when considering that the Tribunal will have had significantly less correspondence to deal with that the Respondent) and I consider that indicative of the amount of paperwork generated by this matter.

100. I also take into account in dealing with the question of proportionality the complexity of these proceedings. As can be seen by the judgment of

Employment Judge Ahmed and members, the Claimant had made a number of allegations of detriment and alleged that he had made a considerable number of protected disclosures. All of those matters had to be dealt with in the context of the Whistleblowing claim. They were matters which the Respondent was perfectly entitled to divest resources into dealing with and, indeed, given what was at stake which it was necessary for them to do.

Reduced Bill of Costs

101. I have therefore reduced the Bill of Costs as originally drawn in the sums set out above. Those reductions are reflected in the Judgment sent to the parties on 11th April 2017 and in the revised Bill of Costs submitted by the Respondent at my direction on 7th April 2017 and which is annexed to this Judgment.

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Employment Judge Heap

Date: 5th July 2017
REASONS SENT TO THE PARTIES ON

.....13 July 2017.....

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