EMPLOYMENT TRIBUNALS

Claimant: **(1) Mr Shaun Gadsby and**
(2) Ms Nicola Craig

Respondent: **Valley Hill Wholesale Carpet Limited**

Heard at: Birmingham **On: 22, 23, 24 and 25 August 2016**
(reserved) costs Hearing 13 and
14 October 2016

Before: Employment Judge Dean

Representation
Claimant: Mr K Ali, of counsel
Respondent: Ms N Braganza, of counsel

(RESERVED) JUDGMENT ON A COSTS HEARING

The decision of the Tribunal upon the cost application is that:

1 The respondent's application for costs incurred following the preliminary hearing on 4 July 2016 as a result of the claimant's unreasonable behavior in the bringing, conducting and pursuing of the proceedings in a claim which had no reasonable prospect of success to be paid by the claimants succeeds.

2 The claimants are each ordered to pay to the respondent the sum of £15,156.40 a contribution towards the costs of the respondent in respect of defending the complaint as I have assessed them to be for the relevant period.

REASONS

Background

1. The application for an award of costs to be made against the claimants was made on 25 August 2016 and my judgment was reserved. I apologise to the parties

in this case for the length of time that has passed since the application was made and the delay in producing the judgment on this application for cost. I regret that for a variety of reasons, including a lengthy period of absence because of ill health and other judicial commitments, this judgment is sent to the parties after a significant delay. I would assure the parties that the decision was made on full consideration of both the written and oral evidence and submissions made by the parties and the notes of evidence and submissions made at the hearing.

2 The claims brought by the two claimants in this case have been subject to a significant amount of case management before proceeding to a trial before me which ran from 22 to 25 August 2016.

3 These are 2 claims that were presented on 12 February 2016 by Mr Gadsby and on 24 February 2016 by Ms. Craig. It is common ground that the claims to agreed by the parties to emanate out of the same causes of action and were therefore with the agreement of the parties were consolidated and were to be heard together.

4 Mr Gadsby brought a complaint of breach of contract, constructive unfair dismissal and victimisation. Ms. Craig brought complaints of breach of contract, constructive unfair dismissal, harassment and victimisation. At a Case Management Preliminary Hearing held on 5 April 2016 ('the April hearing'), Employment Judge Perry (EJ Perry) summarised the case to confirm that it was common ground that the complaints of breach of contract and constructive unfair dismissal for both of the claimants stood or fall together and the respondents deny that the claimants were dismissed and denied that they were entitled to treat themselves as harassed and/or vicitmised or dismissed and having to resign and claim constructive dismissal. At the April 2016 Case Management Discussion the complaints continued against all the three then named respondents. Ms. Craig's complaint was that her complaints of harassment that were brought on the protected characteristics of her age and sex and Mr Gadsby that his complaint of victimisation was because he had given a supportive account during the course of investigations into Ms Craig's grievance including complaints that she had been harassed for reasons related to the protected characteristics of age and sex. The respondents do not rely upon the statutory defence and accept , subject to the facts of determinations if they were found by the Employment Tribunal to sustain the complaints of harassment and victimisation; the first respondent is vicariously liable for any of the acts of the then 2nd and 3rd respondents. In his case summary, E J Perry reminded the parties of the legal authorities to which the tribunal had regard in relation to the determination of whether there is a fundamental breach of contract of employment and constructive dismissal [I p91-96]. EJ Perry at the April Hearing confirmed at the April case management discussion that:-

"5.10 The claimant's representative accepted that any historic matters that pre-date the grievance process and its outcome were thus waived.

5.11 The respondent's accept that if it is found that viewed objectively it determined not investigate the claimants' grievance properly or at all likely to constitute an intention by it to no longer be bound. But denies this is so."

5. Dealing with the harassment and victimisation complaints, EJ Perry in reference to the last acts relied on by the claimants which were of the month of October by Mr Gadsby which led him to resign on 15 October and 4 November by Ms. Craig when she was orally informed of the grievance outcome – she resigned on 13 November 2015. In effect the claimants each complain that the respondent had determined not to investigate their grievance either properly or at all.

6. The parties were reminded that if the last matters did not constitute harassment under the Equality Act and no linkage could be shown to the earlier acts, the last of which was in April 2015, that those were perpetrated by different individuals they may be determined as out of time. The claimant's representative accepted at the April Hearing that EJ Perry's analysis was an accurate one of the likely consequences and given that will extend the length of time of the Hearing will give consideration to all of those matters [I 93 @para 5.15] in particular he says:

> "5.15 *As to the harassment complaints I raised with the claimants representative that if the last matters did not constitute harassment under the Act and no linkage could be shown to the earlier acts the last of which was in April 2015 and these were perpetrated by different individual they would may be determined as out of time. The claimant's representative accepted that was a likely consequence and given that will extend the length of the hearing will give consideration to those matters."*

EJ Perry goes on to state:-

> *"5.16 As to the victimisation complaints the respondent accepts that Ms. Craig raised a grievance on 11 August 2015, but denies this made any reference to any protected characteristics or any matters that are capable of constituting the claimant of the Equality Act.*
>
> *5.17 As to Mr Gadsby, his victimisation complaint is put upon the fact that he supported Ms. Craig's complaints; Thus, his claim is put on the alternative base sees [sic] that:*
>
> *(1) Ms. Craig made a protected act; or*
>
> *(2) Mr Gadsby made an allegation during the investigation of the grievance which constituted a protected act.*
>
> *5.18 It thus follows based on a review of the allegations made by both as to the acts of detriment that in relation to Ms. Craig's complaint. The acts of detriment were the way that her grievance was investigated (or not, as the case may be) and its outcome, and in Mr Craig's case, the way his allegations were investigated (or not, as the case may be) but also the way he was treated in the period between 24 August and 9 October 2015.*
>
> *5.19 With regard to Ms. Craig's complaint of harassment as I state above, the respondents assert given this relates to historic matters. They are out of time. The last complaint that proceeds those that form part of a series of complaints concerned in the grievance on the close examination was in April*

2015. That related to Mr Mitchell, the investigator of the claimants' grievance, the complaints about the grievance concerned. Mr Miller the alleged perpetrator of the act of harassment."

7. During the course of the April case management, having heard EJ Perry's case summary and in particular his reference to the Court of Appeal ratio in Omilaju at [21] the claimants representative, Mrs. A Halcarz, (solicitor) made a concession recorded by EJ Perry:
"5.10 The claimants representative accepted that any historic matters that predate the grievance process and its outcome were thus waived."
The Preliminary Hearing made the Case Management Orders by consent [I, p94 to 97].

8. Subsequently, a further Case Management Preliminary Hearing was held on 4 July 2016 before EJ Perry [I, p98 to 100] at which, inter alia, the claimant representative sought to withdraw the concession previously made. The July hearing lasted approximately 3 hours and the respondent sought to pursue an application for Strike out and deposit and for costs. The claimants had by that time withdrawn the complaints of harassment and victimisation as they applied to each of them. The hearing before EJ Perry was scheduled for 3 hours. However, as the claimant sought to withdraw the concession previously made to Judge Perry a very substantial part of the hearing was spent listening to argument about at the early concession and the claimants wish to withdraw it. Although standard case management was completed there did not remain sufficient time for the respondents various applications for strike out, deposit and for costs to be considered.

9. The complaint proceeded to a hearing of the merits of the complaints before me on 22- 24 August 2016. I heard evidence from the second claimant and at the end of her evidence the respondent submitted there was no case to answer. The second claimant withdrew her remaining complaints and thereafter so too did the first claimant Mr Gadsby.

10. Upon the withdrawal of both claimant complaints, Ms. Braganza on behalf of the respondent made an application for costs against the claimants, in terms of the applications that EJ Perry had had insufficient time to consider on 4 July and in respect of the further preparation of and attendance at the final hearing and for costs incurred in making the application.

Issues

11. The respondents in this case have made a number of applications for costs to be awarded against the claimants. The first 2 applications for costs by the respondents were made against each of the claimants:

11.1. Costs incurred as a result of the claimant subsequently abandoned and withdrawn harassment and victimisation claims – " the Equality Act claims"

The first application related to the costs incurred by the respondent (and previously the individual named 2nd and 3rd respondents) in relation to both claimants claims for

harassment and victimisation under the Equality Act 2010 which were withdrawn on 25 April 2015.

The application is made on the basis that the Equality Act claims are wholly misconceived and unreasonable and both claimants withdrew the claims after the first preliminary hearing. The respondent asserts that they incurred significant costs addressing the specific claims. The Equality Act claims were predicated upon the basis that the 2nd claimant's complaint of harassment related to historic harassment claims that predated the grievance process initiated by Ms Craig. The complaints of victimisation relying upon the respondent's treatment of each of the claimants as a result of Ms Craig's grievance presented on 11 August 2015. I do not repeat here the detail of the case summary provided by EJ Perry [Tab I p91-96].

11.2. Costs incurred at the preliminary hearing on 4 July 2016 before EJge Perry and incurred solely because of the claimants wholly unreasonable conduct – "4 July hearing".

Respondents assert that the hearing [56-58] was wholly unnecessary and caused because of the claimants unreasonable conduct and breaches the previous order of 5 April 2016 [8-11]. At the hearing claimants counsel endeavoured to withdraw a concession previously given to EJ Perry and the respondents assert that 3 hours of the hearing was spent endeavouring to revisit the determination of the 5th April.

11.3. Costs incurred following the preliminary hearing on 4 July 2016 as a result of the claimants unreasonable behaviour in the bringing, conducting and pursuing of the proceedings in a claim which had no reasonable prospect of success.

In particular the respondents bring their application for costs as follows:

a) viewed objectively, in the conduct of the proceedings the claimants have behaved unreasonably.

b) on the basis of the issues as agreed the claims were misconceived and had no reasonable prospect of success. That is borne out by the second claimant agreeing in the midst of her cross-examination her acknowledgement that her grievances had been investigated properly and that viewed objectively the respondents conclusions were ones that were open to it to reach. In addition the first claimant withdrew his claim without giving evidence.

c) the claimants have been unreasonable in correspondence.

d) they have been warned in terms that could not been stronger.

e) they have refused to consider settlement or any negotiations.

f) they have not heeded the concerns raised by the respondent regarding their conduct and poor prospects despite, in without prejudice correspondence being put on notice that the correspondence should be referred to the partner in charge of the employment law department.

g) to succeed the claimants had point to the evidence to answer the issues identified by EJ Perry and agreed by the parties at the hearing on 4 July 2016 [99].

12. The issues to be determined by me are to consider:

12.1. Whether:

i) the claimants or either of them have acted unreasonably in ether bringing of the proceedings or in the way that the proceedings(or part) have been conducted, and or

ii) any claim(s) have no reasonable prospect of success, and or

iii) a party has been in breach of any order.

12.2 If I am satisfied that there has been unreasonable or other relevant conduct I am then required to consider making an order for costs but have a discretion whether or not to do so.

12.3 I may have regard to the paying party's ability to pay any award of costs.

Law

13 The power to make a costs order derives from the **Employment Tribunal Rules of Procedure**, which are Schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**. Three of the Rules are relevant for consideration of this application for costs.

14. Rule 76 provides the legal foundation for the Employment Tribunal's order. It states:

"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that -

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success;

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

15. Rule 78 provides the legal foundation for detailed assessment by an Employment Judge. It states that a costs order may be made in a specified amount not exceeding £20,000; or it may be made for the whole or a specified part of the costs of the receiving party, those costs to be the subject of a detailed assessment either by an Employment Judge or by the civil courts.

16. Rule 84 provides the Employment Tribunal with a discretion relating to ability pay. It states:

"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

17. In considering means the tribunal is mindful of the observation of [Rimer LJ] in **Arrowsmith v Nottingham Trent University** [2011] EWCA Civ 797 para 37,

> **"we are of the view the claimant's circumstances may well improve and, exercising our discretion, we award costs of the respondents and each of them to be paid by the claimant."**

The EAT explained in **Vaughan v London Borough of Lewisham and others** [2013] IRLR 713 at paragraph 14(1), there are sound reasons why a Respondent may choose not to apply for orders such as strike out and/ or deposit.

18. In the event a tribunal decides to take account of the paying party's ability to pay, its task will be to make an assessment of the paying party's means and reflect those means in its assessment of the amount the paying party should pay: see **Arrowsmith v Nottingham Trent University** [2012] ICR 159 at paragraph 38. It is, however, not limited to an assessment of the paying party's current means; it may have regard to the prospect that these means may improve: **Arrowsmith** at paragraphs 38 and 39.

The nature of the task to be undertaken by an Employment Tribunal was explained more fully in **Vaughan**. In that case the successful Respondent made a very substantial claim for costs. The Claimant had been earning £30,000 but was presently off sick. The ET made an Order against her for one-third of the costs, to be the subject of detailed assessment. It took into account her means; but found that she would be able to return to work and said that it would be unjust if she walked away from the litigation with no financial repercussions. The EAT, which proceeded on the basis that the Claimant's liability under the Order would be about £60,000, dismissed the appeal. On the question of ability to pay, Underhill P said:

> **"28. The starting point is that even though the tribunal thought it right to 'have regard to' the appellant's means that did not require it to make a firm finding as to the maximum that it believed she could pay, either forthwith or within some specified timescale, and to limit the award to that amount. That is not what the rule says (and it would be particularly surprising if it were the case, given that there is no absolute obligation to have regard to means at all). If there was a realistic prospect that the appellant might at some point in the future be able to afford to pay a substantial amount it was legitimate to make a costs order in that amount so that the respondents would be able to make some recovery when and if that occurred. That seems to us right in principle: there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made. And it is in any event the basis on which the Court of Appeal proceeded in *Arrowsmith*, albeit that the relevant reasoning is extremely shortly expressed. It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the appellant's means from time-to-time in deciding whether to require payment by instalments, and if so in what amount.**
>
> **29. On that basis the question for the tribunal - given, we repeat, that it thought it right to have regard to the appellant's means - was essentially whether there was indeed a reasonable prospect of her being able in due course to return to well-paid employment and thus to be in a position to make a payment of costs; and, if so, what limit ought nevertheless be placed on her liability to take account of her means in that scenario and, more generally, to take account of proportionality. As to the former question, views might legitimately differ as to the probabilities, but the tribunal was well-placed - better than we are - to form a view that there was indeed a realistic prospect, and we see no basis on which that judgment can be said to be perverse. As to the latter, we see the force of the argument that it would be pointless, and therefore not a proper exercise of discretion, to require the appellant to pay more, even in the optimistic scenario envisaged, than she could realistically pay over a reasonable period; and we have been concerned whether the cap was simply set too high. But those questions of what is realistic or reasonable**

> **are very open-ended, and we see nothing wrong in principle in the tribunal setting the cap at a level which gives the respondents the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly a nice estimate of what can be afforded is not essential. Approached in that way, we cannot in the end say that the limit of one-third of the respondents' costs - whether that comes to £60,000 or some other figure in the range - was perverse. It was of course rough-and-ready, but there is in truth no means of arriving at a more precise figure. We cannot conscientiously say that a proportion of, say, a quarter would have been right while a third was wrong. The respondents are the injured parties, and even if the order does indeed turn out to be recoverable in full at some point in the future, they will be out-of-pocket to the tune of two-thirds of their assessed costs: it is difficult to say in those circumstances that the award is disproportionate. …"**

19. I am referred by Mr Ali on behalf of the claimant to the case of **Oni v Unison** [2015] ICR D17 (EAT) in which the EAT confirmed that even where unreasonable conduct has been found a tribunal has a discretion as to whether costs should be awarded, and if so, in what amount, and must consider all relevant circumstances in exercising that discretion. I am reminded by the EAT para 14 of the two-stage exercise that is contained in Rule 76:

> **"at the first stage the tribunal must determine whether the paying party has acted unreasonably or in any other way such as to invoke the jurisdiction to make an order for costs. If satisfied that there has been unreasonable or other relevant conduct that stage, the second stage is engaged. At the second stage the tribunal is required to consider making an order for costs but has a discretion whether or not to do so."**

Findings of fact

20. This application for costs comes before me evidence having been heard under oath from only one claimant and a considerable volume of documentation having been considered by me in reading all of the witness statements and documents that they referred to before I heard sworn evidence. In undertaking my reading of the witness statements I have been referred to the transcripts of a number of meetings that were held by Mr Mitchell, the respondents witness with each of the claimants [Part III 1-930] to parts of which the second claimant has specifically been taken.

21. The application has been presented to me in large part by reference to very detailed correspondence much of which is "without prejudice save as to costs". To enable me to determine the costs application, having regard to the overriding objective and the merits of the case, I set out below my findings of fact based upon the documents and also the relatively limited amount of evidence that has been heard. Although I have not heard from Mr Gadsby in relation to the merits of his claim which was withdrawn by him before that evidence could be heard, having heard submissions from counsel for all parties I have subsequently heard evidence as to means of both Ms Craig and Mr Gadsby in the event, following my deliberations as to the threshold test I consider it appropriate to exercise my discretion to award costs and wish to consider parties means before making a determination as to any award of costs that may be made.

22. At the hearing of the merits of the applications the 2nd claimant Ms. Craig gave evidence first. Ms. Craig gave evidence on 22nd and 23rd of August 2016. The hearing of Ms. Craig's evidence was marked by an unusual demonstration by a witness showing total disregard for the usual judicial direction that during the period while the witness is giving sworn evidence she should not communicate with anyone

about the evidence that she is giving or the case. In particular she was not to discuss the evidence that she was giving with her representative, Mr Gadsby or anyone or to communicate with anyone to discuss the case, the evidence and how it was going including about the questions and answers given in examination. When attending the hearing on 23 August counsel for the parties sought to address me without the presence of the parties. Ms. Braganza expressed concern that the previous evening she had seen Ms Craig in discussion with her counsel, Mr Ali and with her former colleague and fellow claimant Mr Gadsby. Ms. Braganza had knocked at the door and reminded those present and addressed Mr Ali to remind Mr Ali in clear terms that Ms. Craig should not be there and she should not be speaking about the case.

23. At the start of the day on 24 August Mr Ali informed me that overnight an issue had arisen whereby Ms. Craig had sent an email to her instructing solicitors, he reported that his instructing solicitors had not opened the email and had informed Ms. Craig that they were not able to discuss the contents of her email until after she had completed her evidence. Mr Ali expressed a concern that he may not have made the warning sufficiently clear to the Ms. Craig, I reminded Mr Ali that my own warning, given in my usual terms was clear and unequivocal and I confirmed my intention when the parties returned to ask the witness to confirm, as I would usually do, that she had not broken my direction of the previous day.

24. The parties were invited into the hearing room and, as agreed with counsel, I asked the claimant Ms. Craig to confirm that, since my reminder to her the previous day, she had not breached my direction. Ms. Craig informed me that she had not had any communications about the case since I gave her the warning the previous afternoon. When challenged by Ms. Braganza the claimant denied that she had had communications and denied when it was put to her that "*last night you communicated with your solicitor by email".* Ms. Craig stated that was incorrect and when challenged and informed that Mr Ali had confirmed that an email had been sent she said *"I did it this morning".*

25. The event was exceptional behavior in a hearing by a witness who was giving evidence under the usual warning. Ms. Craig explained that she had understood the word "communication" used to mean only spoken communication and that in the event the email had not been responded to.

26. Ms Braganza put to Ms. Craig that she was selective with the truth and told a barefaced lie to the tribunal. Ms. Craig denied that was the case and after brief further cross examination Ms. Braganza concluded her cross examination.

27. In answer to questions in cross examination Ms. Craig had, when taken to the transcription of a number of meetings with Mr Mitchell who investigated her grievance, confirmed that:

i) she agreed that Mr Mitchell carried out a thorough investigation into her grievance
ii) she agreed that having obtained her permission to give Kevin [Scott] a copy of her email Mr Mitchell could not have been fairer.
iii) Mr Mitchell had answered, by referring to all of her paragraphs in her grievance, all of the points of grievance.

iv) Mr Mitchell perused all of her lines of complaint by enquiring about them.
v) recorded transcript of the meetings contained nothing to suggest that the investigation was predetermined.
vi) the investigation meeting was done in a fair and cooperative manner.
vii) the investigation would be long and that the grievance would not be sorted out overnight.
vii) the investigation would need to investigate her allegation that Kim Sessions was being bullied.
viii) if her witness statement said that Simon Miller was constantly bullying her that it would be wrong.
ix) Mr Mitchell was meticulous in carrying out his investigation
x) she could not point out anything in the transcript of the meeting to suggest that Mr Mitchel had predetermined the investigation.
xi) she appreciated what Mr Mitchell was doing to help her.
xii) she had approved a letter Mr Mitchell wrote to her GP to ensure she was fit to return to work.
xiii) Mr Mitchell reached a series of conclusions investigating her grievance that were open to him
xiv) Mr Mitchell replying to her grievance adopted the same structure setting out her complaints in reaching his conclusions and setting out the reasons why.
xv) the conclusions/findings were ones open to Mr Mitchell to reach
xvi) the respondent investigated her grievance and the investigation was proper.

28. Ms Braganza concluded her examination of Ms. Craig's evidence and submitted there was no case to answer. There were no further questions in clarification or re-examination and after a 20 minute adjournment during which Mr Ali was able to take instructions of his client, Mr Ali on the claimants behalf confirmed that Ms. Craig wished to withdraw her complaint.

29. After a further break of almost an hour Mr Ali, having taken instructions from Mr Gadsby, confirmed that Mr Gadsby wished to withdraw his complaints also.

30. What is evident to me, having heard the evidence given by Ms. Craig and having considered the written witness statements of her and of Mr Gadsby's evidence and having had the opportunity to read the correspondence to which they refer and the transcripts of meetings held with each of them by Mr Mitchell, is that both claimants would seem to have taken from their various meetings with Mr Mitchell an impression of those meetings that is entirely undermined by the objective recorded and transcribed notes of the meeting. It is accepted that the transcripts of the meetings were provided to the claimants by Mr Mitchell in November 2015. I am informed by the respondent and it is not disputed by Mr Ali on behalf the claimants that those same transcripts were disclosed to solicitors acting on behalf the claimants on 26 April 2016 Ms. Craig in answer to questions in cross examination has made the acknowledgements that I have referred to above.

31. The claims identified by each claimant relate closely to the grievance raised in the first instance by the second claimant, Miss Craig. Her grievance, [Tab 2 p 33- 36] refers to her sense of grievance about bad treatment that she says has affected her mentally and physically and is against Simon Miller. It describes a history of events from 23 December 2014 up to and including 10 July 2015. I have considered the

grievance document carefully and unable to find any suggestion within the grievance that the 2nd claimant asserts that Mr Miller's treatment of her was because of any protected characteristic is identified in the Equality Act. Mr Ali on her behalf has suggested that the reference to the Equality Act claim might be the fact that in her grievance [35] she says it was reported to her on 10 July 2015 that Simon Miller constantly refers to the claimant as "she" is sufficient to refer to an allegation that aspect of his treatment of her was less favourable treatment because of her sex.

32. I find that, Mr Miller referring another person who knows Ms Craig in the work place by the use of the subject pronoun "she" does not, without more, suggest to anyone on a reasonable and objective reading of the grievance letter the conclusion that the grievance is a complaint of unlawful discrimination because of sex.

33. Both Mr Gadsby and Ms Craig suggest that as a result of Ms Craig's grievance they were victimised in the manner in which the grievance was. In particular in Mr Gadsby's case he claim to have been victimised by the manner in which his own subsequent grievance was investigated and also the way he was treated my Mr Mitchell during the course of the interviews with him investigating Ms. Craig's complaints.

34. Having considered the pleadings and Ms Craig's grievance letter I found that the observations made by EJ Perry in the April case management summary relating to time and the discrimination complaints were pertinent. It is evident that the respondent does not accept that Ms Craig's grievance letter suggested a complaint of unlawful discrimination nor does the objective evidence contained within the detailed transcripts of meetings make such an assertion that amounts to a protected act.

35. What is evident to me is that Ms Craig, looking at a history of her relationship with work colleagues including Simon Miller and for that matter Mr Gadsby himself, had not always been a happy and harmonious working relationship. Considered in retrospect through the lens of her resignation letter Ms. Craig [Tab IIp127-131] refers to her belief at p126 that she has:

"been subject to bullying, sexual harassment, harassment on the grounds of sex and age discrimination".

Ms Craig had referred at para 1g) [124]

> *"at page 14 of your report you conclude that I have not suffered sexual harassment from Simon Miller as I did not suggest that I found the remarks offensive and have never complained about this.'*

36. I find that Ms.Crag's observation was made only after Mr Gadsby in his resignation letter suggested [82] that Mr Miller had behaved in an inappropriate way towards Nicky Craig.

37. The application that the respondents makes for costs asserts that the complaints that have been made have, from the very start, been unreasonable and misconceived. At the time of hearing the substantive claim that came before me I

have heard evidence only in relation to the complaint that Ms. Craig had been constructively and unfairly dismissed. It was not necessary for me to hear evidence about the original complaints that were withdrawn in respect of unlawful discrimination because of protected characteristics of sex in particular harassment and victimisation because Miss Craig had raised a complaint and the Equality Act and Mr Gadsby had supported her.

38. Having been asked at the start of the hearing to read witness statements and the documents to which they referred I have therefore read the claimants grievance letters, Miss Craig's 11 August [33-36], Mr Gadsby's grievance 5th October [74] , Mr Gadsby's resignation letter 15th October [82-89], the investigation of grievance report and findings re Ms Craig [99-115], appeal against grievance outcome 13 November 2015 [123-126] and letter of resignation of the same date [127-131]. I have also considered the transcripts of the grievance investigation meetings and the report into the investigation of the grievance produced by Mr Mitchell [99-115].

39. During the course of the investigation, as a result of Miss Craig introducing evidence against Mr Miller and in particular allegation that he had mistreated another employee Kimberly Sessions, a former administration accounts assistant Mr Mitchell had conducted in interviews with Miss Sessions. In the interviews Ms. Sessions had confirmed that she had been persuaded by Mr Miller to make a complaint of bullying and sexual harassment against Mr Gadsby and subsequently that she had been mistreated by Mr Miller. Mr Mitchell was reasonable in interviewing Ms. Sessions and then Mr Gadsby and Ms. Craig about the information that Ms. Sessions provided to the investigation.

40. Mr Gadsby was reluctant to answer questions raised of him by Mr Mitchell in relation to complaints that Ms Sessions had raised about him conduct. In particular at the investigation meeting with him on 2 October 2015 [Part III transcripts 541-583] the meeting was cut short when Mr Gadsby indicated he wanted to take legal advice before providing answers to Mr Mitchell about concerns about his behaviour had been raised by Ms. Sessions. Mr Mitchell considered the questions he asked were relevant to the investigation into Ms. Craig's grievance and a meeting was arranged for Mr Gadsby and Mr Mitchell to meet again on 9 October [part III p584-752] that meeting was long one and lasted in excess of 2 hours. Mr Gadsby confirmed that he had taken legal advice before agreeing to meet with Mr Mitchell and provide answers to questions. By the time that the meeting took place on 9 October Mr Gadsby had himself raised a formal grievance under cover of an email sent to Mr Mitchell on 6 October 2015 [74] [w/spara45]. The grievance referred to a complaint that Mr Gadsby had made to Mr Mitchell over the telephone on 21 September where he alleged he had been verbally threatened by Simon Miller. Mr Gadsby had understood Mr Mitchell was going to respond to the complaint he made the next day 22nd September. However Mr Mitchell intended to speak to Mr Miller first to get his account and to discuss the complaint with Mr Gadsby when they met on 2 October, the meeting which had ended prematurely when Mr Gadsby had wanted to take legal advice. While no ideal to wait until a meeting with Mr. Gadsby on 2 October UI find that the wat was not as a result of an act of victimisation not least because netiher Mr Gadsby nor Ms. Craig had done a protected act.

41. Having identified a complaint was raised on the telephone with Mr Mitchell, Mr Gadsby subsequently writes on 6 October 2015 to inform Mr Mitchell that he would like to *"follow the formal grievance procedure".* I find that prior to the email of 6 October Mr Gadsby had raised an earlier concern on the telephone that had been described by him as a complaint, not a formal grievance, and indeed at the meeting on 9th October Mr Mitchell give every indication that he was intending to investigate the complaint as Mr Gadsby put it. At the earlier meeting on 2 October which Mr Gadsby had caused to end prematurely. I find that before steps could be taken to investigate Mr Gadsby's complaint he resigned from his employment at in his letter 15 October [82-89].

42. In his resignation letter Mr Gadsby refers to the fact that at the meeting held on 2nd October Mr Mitchell had not referred to his grievance regarding Mr Miller's behavior. I find the investigation meeting was primarily concerning the investigation of matters arising from Ms Craig's grievance and before that part of the meeting could progress to its conclusion the meeting prematurely was called to an end by Mr Gadsby so that he could take legal advice. On the face of the objective evidence provided in the transcripts of the meeting on 9 October, Mr Mitchell having received Mr Gadsby's grievance email [74], just asked pertinent questions of the content of the grievance and indicated that he would conduct an investigation. The claimant's letter of resignation 15th October was submitted before conclusion of that investigation. Mr Mitchell did then meet with Mr Miller and asked questions about Mr Gadsby's grievance complaint.

43. On 23 October 2015 Mr Mitchell wrote accepting Mr Gadsby's resignation [94-96]. I have read the transcribed record of the interview held between Mr Gadsby and Mr Mitchell on 9 October. I have found that nowhere within that meeting nor those meetings held on previous occasions does Mr Mitchell inform Mr Gadsby that he was being subject to disciplinary nor does he make a threat that Mr Gadsby would be subject to disciplinary action. On the contrary Mr Mitchell informed Mr Gadsby that if a decision was to be taken to take any disciplinary action in can action with the complaints raised by Miss Session that the disciplinary procedures would be complied with.

44. I find on the objective evidence and records before me Mr Mitchell began an objective investigation into the detail of Mr Gadsby's grievance. The objective record of the grievance investigations that I have been referred to leads me only to conclude the conclusion that viewed objectively, as accepted by Ms. Craig the 2nd claimant that the respondents investigated her grievances extensively and properly in accordance with good industrial practice. As acknowledged by Ms Craig the respondent reached conclusions on her grievances that were open to Mr Mitchell to reach. In the context of the investigations conducted by Mr Mitchel the investigation he began into Mr Gadsby's grievance was in the same formatas that undertaken in respect of Ms. Craig.

45. Turning to the manner in which the respondent treated Mr Gadsby, the first claimant in their investigation of Ms Craig's grievance viewed objectively the manner in which Mr Gadsby was treated in that investigation was one which was open to the respondents and complied with good industrial practice. Subject to any evidence to supplement his written witness statement and the transcripts of the investigation that

may have otherwise been brought to my attention, it is far from evident that the respondent determined not to investigate the grievances that Mr Gadsby raised in writing on 6 October following his telephone complaint to Mr Mitchell of 21 September.

46. Mr Gadsby's circumstances are of course to be distinguished to some degree from those of Ms Craig. Ms Craig having raised her grievance in August was certified unfit for work and while she remained unfit for work and her grievance was outstanding the respondent determined that she should remain on leave until matters were resolved. On 9 October Mr Gadsby, following his meeting with Mr Mitchell informed him that he was feeling unwell and at 4:30p.m. asked if he could leave work early. Mr Gadsby had previously informed Mr Mitchell during the course of their meeting that he was suffering with chest pains and that, as confirmed in his resignation letter he had informed Mr Mitchell that he could deal with the pain as he knew they were stress-related. Mr Gadsby at Mr Mitchell's direction asked Mr Miller if he could leave early and after completing 2 tasks for Mr Miller, Mr Gadsby left the yard around 5 PM.

47. Mr Gadsby's complaint is that he had been bullied harassed and victimised by Mr Miller as result of supporting Ms. Craig's grievance and raising his own. The issues to be determined at the substantive hearing were identified by EJ Perry in general terms as early as the April case management preliminary hearing. In light of the concessions given in April and the withdrawal by both claimants of the relevant harassment and victimisation complaints by 4 July 2006 [99 para 1.1-1.3] the remaining issues were further defined in respect of each of their constructive unfair dismissal claims. Whilst at the case management discussion 4 July 2016 [Tab I, p98-100] at the Preliminary hearing the parties were represented by counsel, albeit the claimants by counsel other than Mr Ali, during an adjournment the parties were required to agree the issues to be determined. That list of issues were typed by EJ Perry, confirmed to be correct and included in his minute of the hearing. Notwithstanding that consent to the agreed issues, clarity was sought of EJ Perry on 22 August of the case management summary he had provided of the 4 July hearing. A revised note of the list of issues was produced that has been considered at this hearing for the reasons identified by EJ Perry and the case management summary of his hearing was produced to this hearing by Judge Perry on 22 August.

48. Mr Mitchell's grievance investigation report dated 27 October 2015 sets out the chronology of the investigation into Ms Craig's grievance and steps taken to investigate the grievances as they developed. It is evident that during the course of the investigations further information came to light which required further investigation. In particular the letter of resignation submitted by Mr Gadsby on 15 October 2015 brought to Mr Mitchell's attention for the first time the allegation that:

> *"it is common knowledge among staff that summer behaved inappropriately towards Nicky. Specifically, it is common knowledge that someone frequently makes comments on Nicky about her figure, saying things like – she has a nice bum, nice legs, looks good fair age et cetera these comments that I, and others, frequently victors over a long period of time and which continue to this day."*

It was as a result of that comment that, at a further investigation meeting with Ms. Craig on 21 October 2015 that Ms Craig was asked for her comments about that alleged behaviour by Mr Miller and the extract from the transcript of the meeting is referred to in the grievance investigation report[111-112] and led to Mr Mitchell's conclusion that Ms Craig had not complained about any of the comments herself even within her own grievance and the allegations were found not to amount to sexual harassment of Ms. Craig.

49. I find that it is only in response to the grievance outcome report that in her letter of appeal [126] that Ms Craig asserts that she *"has been subject to bullying, sexual harassment, arrest on the grounds of sex and age discrimination."*

50. I have been referred to the verbatim transcripts of the grievance investigation meetings, they run to over 930 pages and occupy two lever arch files. In light of the concessions that Ms Craig has given in her evidence in answer to questions in cross examination I find that Mr Mitchell's investigation into her grievances were full and he objectively and thoroughly investigated the grievances with an open mind and the conclusions reached by Mr Mitchell were not predetermined. The investigation developed and followed appropriate further lines of enquiry and was not oppressive of either Ms. Craig or Mr Gadsby in the questions that were asked.

51. Mr Mitchell, in compiling his report, refers to the transcripts of the investigation meetings. Sadly it is not clear when such transcripts were sent to the individual claimants in 2015. It is apparent that the transcripts were disclosed as part of the disclosure exercise in this litigation when they were disclosed to the claimant solicitors on 21 April 2016. Without the benefit of reading those transcripts with an objective eye, an exercise which I fear for a subjective claimant is extremely testing when considering 930 pages, I can only conclude that the individual claimants recall of the investigation and the detail on it was distorted and flawed.

52. Although Mr Gadsby's letter of resignation 15 October 2015 refers to what he considers to be treatment that amounts to bullying and harassment and victimisation as a result of his supporting Nicky Craig's grievance against Simon Mille,r I have been unable to identify any act that is a protected act as defined in the Equality Act 2010 having been done until, albeit obliquely, reference is made by Mr Gadsby in his own letter of resignation to inappropriate behaviour by Simon Miller towards Nicky Craig.

53. Mr Gadsby originally presented a complaint that he been subject to unlawful victimisation because of the support he gave to Ms. Craig in the investigation of her grievance. My findings of fact set out above that determine that neither Ms Craig nor Mr Gadsby did a protected act at a time prior to Mr Gadsby's resignation. The treatment that Mr Gadsby relies upon are set out in his letter of resignation within his conclusion paragraphs [87-89].

54. When considering the issues in relation to the constructive unfair dismissal claims that each of the claimant brings I consider those issues confirmed precisely by EJ Perry in the order given 22 August 2016. By withdrawing his claim before giving evidence Mr Gadsby has not sought to present evidence that could be tested and cross examination to persuade me of the merits of his claim. Based upon the

objective evidence in correspondence and in witness statements and in the transcripts of investigation meetings viewed objectively the way in which the respondents treated the claimants and each of them is not that the behaviour as described paragraph 1.1 of the Issues.

55. In the circumstances I consider there not to be a reasonable likelihood that a tribunal would find in favour of each of the claimant(s) claims that the claimant were entitled to treat themselves as discharged from any further performance of their contract of employment.

56. In making the findings of fact that I have I have invested a considerable length of time reminding myself of the detail contained in each of the witnesses statements, the documents to which they refer including at the documents that have been referred to evidence in the investigation interview is undertaken by Mr Mitchell. That exercise on the initial statement of costs submitted by the respondent suggested that Mr Pope the solicitor having conduct of this case had spent an initial 4 hours on 28 April 2016 perusing the transcripts and subsequently spent a further 1.5 hours further considering those transcripts on 3 August. It is evident that **if** the individual claimants had read the transcripts with objective eyes the concessions that Ms Craig finally gave in her answer to questions in cross examination would have been reached by each of them sooner. When the bare dialogue contained in the transcripts were read to her in cross examination, Ms Craig appeared to realise the reality of what had been the truth of the investigation meetings dawned upon her.

57. Without question the relationship that each of the claimants had with their respondent employer was complex and highly charged and have been so since at least 14 November 2014 when Mr Mitchell's own account [w/spara9] he had a morning long meeting to address the poor working atmosphere at the Marchington branch at which the claimants worked [25-26]. Despite Mr Mitchell's impression that matters had settled down and that members of the senior management team, which included the 2 claimants and Mr Miller, were working together in a satisfactory way, that impression was a mistaken one. The fact that the working relationship has continued to be dysfunctional in a number of respects has perhaps distorted the recollections that each of the claimants had about the content of investigation meetings and discussions that they each had with Mr Mitchell. I have no doubt that the claimants who became allies in their complaints against the respondent do not have a clear and objective recollection of events. Their recollection of events seen in retrospect through the lens of discontent and prospective litigation has, if I am generous to them, led them to a false memory of events and what they have said and done and what others have said and done to them.

58. Mr Gadsby at least has confirmed that as early as 5 October 2015 he was taking legal advice however I am unable to find that either claimant had taken advice upon the detailed transcripts of their various meetings before they were disclosed in this litigation. I find that after the April case management preliminary hearing documents relevant to the issues that were the subject of the complaint were exchanged in accordance with the tribunal's orders and in particular the transcripts were exchanged and served on the claimants solicitors on 21 April 2016.

59. I find that in light of the direction given by EJ Perry at the hearing on 5 April 2016 and objective consideration of the transcripts of the investigation meetings together with all relevant documentation, would demonstrate to an objective reader, as it did to me in considering the merits of the cost application, that the complaints of unlawful discrimination of harassment because of a protected characteristic of sex and victimisation contrary to the Equality Act 2010 that have been brought had no reasonable prospect of success. Indeed I find that the claimants complaints of unlawful discrimination by harassment and vicitimsation in breach of the Equality Act were withdrawn on 26 April 2016. Sadly the same objectivity does not seem to have been folled when considering the issues that related to the remaining complaints of constructive unfair dismissal.

60. In hearing the respondent's application that costs should be awarded in their favour to be paid by each of the claimants as paying parties in equal share I have had my attention drawn to a 6 significant volumes of correspondence and transcripts. One bundle of such correspondence has been marked 'without prejudice save as to costs'. I have also been taken to a chronology of correspondence and applications that have been made before the tribunal in case management. I make relevant findings in respect of that correspondence below.

Evidence and findings of fact of means

61. I turn next to the evidence that the claimants have produced as to their means. The claimants have produced a bundle containing documents relating to their means together with a statement of their means as was ordered by EJ Perry at the 4 July hearing. At the conclusion of the hearing on 23 August the claimants were reminded that they were required to make full disclosure of all evidence relevant to their earnings and income and in particular any income received since they resigned from employment. Mr Braganza observes that the claimants have not provided full disclosure and have not provided evidence of their efforts to mitigate their loss after termination of their employment.

62. Mr Gadsby, the first claimant, whilst employed by the respondent as a transport manager earnt a monthly salary of £4,583 gross. In his claim form he indicated that from 19.10.15 he was earning £300 per week as a self employed HGV driver and his company paid him a monthly dividend of £500. From his wmeans witness statement he asserts that he now receives income, a salary of £671 per month and a dividned of £300. The claimant says that he has an overdraft that he has to service and his monthly outgoings are £1450. Mr Gadsby says that he has insufficient means to pay the respondents costs if ordered. The claimant confirms that he does have household insurance which is funding the litigation in this case and his legal fees paid tp date at 11 August were in the region of £13,500 plus VAT.

63. Under cross examination Mr Gadsby confirmed that his company pays his wife a salary and her income into the household, together with earnings from her other job is £11,00 a year. Mr Gadsby confirmed that the information in relation to his dividend payments and payslips [1] had been provided by his brother, Martin Gadsby who is the accountant to the business that trades as SJ Gadsby Transport. It was conceded that the schedule of loss was misleading as income was in fact approximately £2600 per month as the profit of the transport company went to Mr

Gadsby as the owner. The schedule of loss identifies that personal outgoings of Mr Gadsby were £2120.27 per month and in addition to any income from his wife Mr Gadsby is seen to have a disposable income of over £500 per month.

64. Having regard to the means of Mr Gadsby and in addition his confirmation that the cost of his litigation against the respondents is borne by his insurers who had been advised that the prospects of success in litigation were more than 50% I consider that should an award of costs be made against him Mr Gadsby has the means to pay them.

65. I have heard also from Ms. Craig the second claimant in relation to her means and ability to pay an award of costs if one was made. Mrs Craig confirmed that she has thus far paid £10,000 plus VAT in costs to her solicitor, paid having cashed in some investments and expects that a further £7000 plus VAT has yet to be incurred in her legal fees. Ms Craig had been made aware that the respondents had issued cost waning letters against her and Mr Gadsby that the respondents cost may be in the region of £30,000 - £40,000 however she was confident in her belief that despite the warnings she had a very good case.

66. The evidence that Ms Craig has produced of her income and any investments is limited. She is currently working as an agent for Heatseam, where taken at its highest on the claimant's account she earns approximately £2,000 a month. The claimant has given evidence that she has been told that within a year or two her income will be at the same level or higher than she earnt with the respondent company and Ms Craig accepts that her income is highly likely to go up and that she would hope to be able to pay any costs award in installments. While in employment Ms Craig earnt £2,600 a month. Ms Craig has confirmed that Heatseam have advanced her money when required and they may provide further advances by way of a loan if required.

67. Ms Craig has provided a schedule of income and expenditure, her outgoings (which includes her paying her daughters car insurance in the sum of £508.73 a month and £181.64 for mobile telephone and broadband fees) amount to £3078.76 against the Ms Craigs income of £2230.71 amount to a deficit of £848.05. Ms Craig has not identified the amount of any income brought into the family home provided to her by her 17 year old daughter. Ms Craig confirmed that she paid her daughters car insurance so that she could get to work, her daughter at present is earning minimum wage.

68. Ms Craig confirmed that she has no additional savings and although she has diamond rings and crosses the jeweler has sentimental value having been bought by her now deceased ex-husband that her daughter will inherit.

69. In addition to her income Ms Craig has no additional ISAs however she has significant equity of in her home on which she has an outstanding mortgage of £69,000. The house was bought for £140,000 and the value of a neighbouring house recently sold for £248,000.

70. Although the claimant does not seem to have liquid means available immediately to pay the respindents cost or a part of them I find that the claimant

does have means available to her to pay a contribution to an award of costs should I consider it appropriate to make such an order.

Argument and Conclusions

71. The claimants each having withdrawn their complaints their complaints have been dismissed and counsel for the respondent made an application for costs to be awarded in favour of the respondents to be paid by each of the claimants. The complaints of each claimant are slightly different however for the sake of the tribunal's convenience and having regard to the overriding objective the complaints are heard together. All correspondence between the parties that I have been referred to has dealt with the two complaints together.

72. Ms Braganza, counsel for the respondent made the application based upon the original application for costs raised at the July hearing before EJ Perry and that was directed by him to be considered at the end of the final hearing. In addition the respondents made an application for costs further to the claimant's claim is being dismissed upon their withdrawal on 23 August 2016.

73. In light of the respondents intention to apply for costs I directed that the previous detailed cost applications would be read by me and that submissions on the applications and the most recent application would be heard on 24 August the third day originally scheduled for the hearing of the substantive case.

74. I was reminded that the respondent on 5 May 2016 made an application for a deposit application to be considered. That application was scheduled to be heard on 4th July. In the event the time allocated for the hearing on 4 July was very substantially occupied by a dispute relating to the claimants dispute concerning EJ Perry's note of the April hearing in respect of the concession made by the claimant's representative. By the 4th July hearing the claimants had abandoned their victimisation and harassment claims which had sought to rely upon the grievance of the 11 August 2015 raised by Ms Craig is being protected act. By way of housekeeping for the proposed consideration of the cost application it was agreed that the respondents were present their application first. I heard submissions on the application from Ms Braganza which supplemented the 3 submission documents that she presented, the first dated 1 August 2016 extending over 12 pages, the second dated 24 August 2016 which includes a chronology of the conduct of the proceedings extending over 11 pages and finally a third supplementary submission for costs dated 24 August 2016 over 4 pages. Mr Ali's the claimant has submitted his reply to the various costs applications dated 23 August 2016 and both counsel have made extensive oral submissions on the merits of and resistance to the cost application Ms Braganza 11:55 to 13:45 on 24 August and Mr Ali after lunch from 14:45 to 15:30.

75. I deal with each of the costs applications as they are identified by Ms Braganza on behalf of the respondents in turn.

75.1. Costs incurred as a result of the claimant subsequently abandoned and withdrawn harassment and victimisation claims – " the Equality Act claims"

75.1.1 The first application is on the basis that the costs incurred by the respondent and previously the 2nd and 3rd respondent in relation to the claimant's claims for harassment and victimisation are made on the basis that the claims are wholly misconceived and unreasonable in respect of both the claimants abandoning those claims after the first preliminary hearing. It is argued that those claims were bound to fail, without any reasonable prospect of success and that significant costs were incurred by the respondents in specifically addressing those claims in the grounds of resistance.

75.1.2 I refer to my findings of fact above in particular in relation to the fact that within her grievance dated 11 August 2015, Ms Craig, whose grievance is identified as the 'protected act', does not articulate to what extent the grievance raises a claim or anything in connection with it in respect of a claim amounting to a protected act under s27(2) Equality Act. I remind myself however that the provisions of section 27(2) do not require that the giving of evidence information in connection with proceedings under the act or doing anything for the purposes of or in connection with the act or making any allegation brackets (whether or not express) is not limited to written communications.

75.1.3 I have found that the transcripts of the various grievance investigation interviews are extensive, an overwhelming 930 typed pages which, read by the subjective eye of a prospective litigant, may not unreasonably and unwittingly be distorted by the subjective personal recollections of aggrieved individuals.

75.1.4 Mr Ali in his submissions reminds the tribunal that in employment tribunal proceedings costs are generally the exception and not the norm and the costs do not follow the event in employment tribunals. Mr Ali reminds me that it would be undesirable and contrary to the overriding objective to penalise parties for taking stock of their case, allowing parties in light of observation of learned judges with regard to withdrawing or narrowing their claims, and to allow them do precisely that without penalty. I am reminded that in **McPherson v BNP Paribas (London Branch)** [2004] EWCA Civ 569 at paragraphs 28 – 30 the mere act of withdrawal is not of itself to be equated with unreasonableness and it is wrong for tribunal to adopt practices which have the effect of deterring claimants from making sensible litigation decisions with fear of having costs orders made against them.

75.1.5 Ms Braganza for the respondent refers me to the fact that the written grievance of the second claimant does not refer to any Equality Act claim and that had genuinely she sought to rely on events dating back to November 2008 her grievance would have referred specifically to complaints relating to a protected characteristic. I remind myself that I have found, in the context of the somewhat dysfunctional relationships between the senior management staff at the respondents Marchington branch, both claimants have a heightened sense of grievance and emotion relating to the respondent's treatment of them particularly through their employee Mr Simon Miller.

75.1.6 I am mindful too that the claimants complain that they have been constructively and unfairly dismissed. Prior to the clarity applied to their arguments by EJ Perry in the April preliminary hearing and the concession given in relation to the issues to be considered in any claims for constructive unfair dismissal, there is

no doubt that the claimants considered the background of events in the working relationship between the claimants, each of them and the senior managers within the respondents was relevant to the merits of their complaint.

75.1.7 In the circumstances I note that the transcripts of the grievance investigation meetings were not disclosed to the claimant's legal advisers until 21 April 2016 when objective consideration of those meeting notes confirms that there is no evidence of any protected act being done verbally at meetings as it had not otherwise been done in writing. It is evident from the case management summary that during the course of the April hearing the claimants were asked to identify the protected act and it was then referred to as being the grievance letter dated 11 August 2016. As a consequence of the hearing, I have been referred to the respondent's letter to the claimant's representative 21 April 2016 [Without Prejudice save as to costs bundle "WP" p2] requiring the claimants to withdraw the claims of victimisation harassment unconditionally and asserting that the complaints are constructive unfair dismissal and no reasonable prospect of success. I considered also the without prejudice letter sent from the claimant solicitors to the respondents on 28 April 2016[WP 3-4] which indicated the claimant's intention to withdraw at the complaints of victimisation and harassment setting out the basis upon which the complaints of constructive unfair dismissal would continue as having reasonable prospect of success.

75.1.8 It is evident that the complaints of harassment and victimisation bought by the claimants were in fact withdrawn by a letter of the 29 April 2016 when a formal notification of withdrawal of the Equality Act aspects of each of the claimant's claims were withdrawn and an amended particulars of claim to reflect the withdrawal was served.

75.1.9 The respondent argues that the Equality Act claims are wholly misconceived and unreasonable and that in respect of both those matters the claimant's abandonment of the claims after the first preliminary hearing came after the respondents had incurred significant costs in addressing the specific claims in providing instructions the grounds of resistance in preparing and attending the preliminary hearings. Whilst I have some sympathy with the respondents concern, I conclude however it was only after the objectivity of the preliminary hearing held on 5 April and the subsequent disclosure of the transcript notes that the evidential difficulties facing the claimants in respect of the Equality Act claims became clear and apparent for an objective eye to see.

75.1.10 Having regard to the entirety of the evidence that has been placed before me and submissions I conclude application in respect of costs incurred in relation to the Equality Act claims does not succeed. The presentation of the Equality Act claims was not wholly misconceived and unreasonable based upon the claimant subjective view and recollection of events. The fact that the Equality Act complaints were bound to fail and were without any reasonable prospect of success and plainly bound to fail was not evident to an objective reader until the transcripts of the investigation into the grievance of the second claimant were disclosed on 21 April 2016.

75.1.11 The claimant application for costs incurred as a result of the claimant subsequent abandonment and withdrawn harassment and victimisation claims does not succeed.

75.2. Costs incurred at the preliminary hearing on 4 July 2016 before Employment Judge Perry and incurred solely because of the claimants wholly unreasonable conduct – "4 July hearing".

75.2.1 The respondent makes an application that the costs of attending the 2nd preliminary hearing on 4 July 2016 before EJ Perry should be borne by the claimants because they were incurred solely because the claimants wholly unreasonable conduct leading to 4 July hearing. The application is made in respect of costs incurred by the respondent preparing for and attending the 2nd preliminary hearing caused by the claimants alleged unreasonable conduct and breaches of the previous order of 5 April. The claimants, attended by counsel at the 4th July hearing, sought to resile from the position taken at the first preliminary hearing in respect of concessions albeit unsuccessfully.

75.2.2 At the April hearing EJ Perry recorded [Tab I 91-96]:

"5.10 the claimant's representative in accepts that any historic matters that predate the grievance process and its outcome are thus waived."
Notwithstanding the concession made by the claimant's representative at the April hearing the claimant's representatives contended that the concession was made by the claimant solicitor on 4 April was of the acceptance that any historic matters that predate the grievance process and its outcome of this waived was in the context of the cases being presented by the judge and not as an acceptance of the claimant's case and the issues to be determined. It was asserted that no clear concession was made.

75.2.3 A further preliminary hearing was listed at be heard on 4 July to identify the issues and make case management orders including orders relating to the conduct of the final hearing. The preliminary hearing was initially listed to consider a number of applications made on behalf of the respondent in the letter of 5 May 2016 in which, amongst other things, they sought the dismissal of the claimants harassment claims, an Unless Order that the claimant file an amended Grounds of claim, that the claimant serve an amended index to the bundle of documents containing full and accurate information regarding the claimants loss, an application for the claimants to be ordered to pay a deposit in order to continue their claims and to consider an application for costs.

75.2.4 In the event it is evident that at the hearing on 4 July which was given a time allocation of 3 hours both parties were represented by counsel before EJ Perry. It is not disputed by the claimants that a large part of the time allocation was devoted to considering arguments relating to the claimants rationale for seeking the withdrawal of the concession that had been made on 5 April the hearing. Time did not permit the consideration of the respondents applications for costs or for the issue of an unless order or for a deposit to be paid by each of the claimants as a condition of bail is pursue their remaining complaints. The parties did agree the issues to be

considered by the tribunal hearing the merits of the final complaint [99] and further directions for the preparation of the case for final hearing were made.

75.2.5 I have no doubt that, but for the claimant having asserted at the 4th July hearing that they had not previously made the concession a hearing of the same length of time would have taken to consider the respondents various applications brought against the claimants. Ms Braganza has suggested that, but for the concession dispute, the hearing would have taken place by telephone, I do not accept that suggestion to be a realistic one. The time taken at the July hearing was no less than would have been taken had instead all of the respondents applications been considered on that day. They were not however costs incurred by the respondents in the attendance of counsel on that day were no greater than would in any event have been incurred had it been possible to hear all of the respondent's applications.

75.2.6 In the event EJ Perry issued a case management summary which included directions for the exchange of witness statements, further disclosure and indicated that if the respondent pursued an application for cost thrown away by the hearing on 4 July that a cost schedule and skeleton should be submitted no later than 1 August 2016 and any evidence the claimants intend to rely upon in relation to their means should be exchanged by 15 August.

75.2.7 Ms Braganza in her submissions on costs dated 1 August 2016 presented in compliance with EJ Perry's direction made on 4th July [99], suggests that para 4d) that the costs incurred was solely because of the claimants wholly unreasonable conduct and breaches of the previous orders of 5 April 2016. She suggests that previously the pre-trial readiness preliminary hearing had been scheduled to be heard by telephone and that, but for the claimant's unreasonable behavior, the preliminary hearing could have been dealt with by agreement or alternatively by a short telephone hearing saving substantial costs and time. Whilst I agree that had time not been allowed to revisit the question of the concession being made or not, about 2 hours might have been saved at the hearing. However I cannot agree with Ms. Branganza that the hearing could have been agreed or heard by telephone. The extent of the other applications made by the respondents as detailed in their letter to the tribunal of 5 May 2016 were extensive, given their nature, including applications for deposits to be ordered, were not applications to be considered by telephone and to that extent the respondents were not put to additional cost of attending a hearing rather than holding a telephone conference.

75.2.8 To the extent that following the April preliminary hearing there was any ambiguity remaining concerning the issues going forward it was proper that that ambiguity, if it existed, was resolved. It is evident by the time expended by EJ Perry on the issue, that it was a matter that was fully canvassed before him albeit resolved by EJ Perry to confirm the validity of the concession he had noted such that the claimants were not permitted to resile from the concession.

75.2.9 Orders made by EJ Perry at 4 July hearing were those that he considered to be reasonable and necessary for the proper preparation of the case for trial. The date of the final hearing was not postponed.

75.2.10 Were my analysis of the costs incurred as a result of the time spent considering the claimants efforts to withdraw concession not to be correct my assessment of the time spent on 4 July dealing with that discrete issue is that two hours of time of the three hour hearing was spent dealing with that issue. The fee for counsel's attendance at the tribunal in Birmingham would in any event have been incurred to deal with the issues of case management had the respondent's other applications also been heard on that day.

75.2.11 The conduct of the claimant's representatives in seeking to resile from a previous concession and compliance with orders is a matter that I will consider in respect of the final application for costs in so far as it goes to the conduct of the claimants in the pursuit of their complaints.

75.3. Costs incurred following the preliminary hearing on 4 July 2016 as a result of the claimants unreasonable behaviour in the bringing, conducting and pursuing of the proceedings in a claim which had no reasonable prospect of success.

75.3.1 The claims brought by the two claimants to a final hearing were that they had each been constructively and unfairly dismissed by the respondent. In particular the issues to be determined were agreed by the parties representatives and recorded by EJ Perry in his case management summary of the issues at paragraph 1. For the sake of completeness EJ Perry recorded two further issues, that of breach of contract and remedy, that would be considered if appropriate at the final hearing.

75.3.2 The respondents make an application for costs on the basis that:

a) Viewed objectively, in the conduct of these proceedings, the claimants have behaved unreasonably in pursuing a claim of unfair dismissal.

b) On the basis of the issues as agreed the claims were misconceived and had no reasonable prospects of success. Respondents refer to the second claimant, Ms. Craig, conceding issues relating to the respondents behaviour during the course of her cross examination, as referred to above, that led to the respondents submitting there was no case to answer and Ms. Craig withdrawing her complaint and the first claimant Mr Gadsby withdrawing his claim without giving evidence at all.

c) The claimants unreasonable conduct in correspondence.

d) The respondents having given costs warnings in terms that could not be stronger.

e) The claimants have refused to consider settlement or negotiation in correspondence without prejudice save as to costs

f) The respondents having exceptionally raise their concern as to the claimant's conduct and poor prospects by asking that without prejudice correspondence be brought to the attention of the partner responsible for the employment law department of the firm representing the claimants.

g) Based upon the issues identified consistently by the tribunal since 4 July 2016 and viewed objectively the claimants would have to call evidence to answer the following questions:

i) whether Stephen Mitchell investigated Nicola Craig's grievances properly or at all?

ii) whether the conclusions reached by Stephen Mitchell were ones open to him?
iii) was it open to Stephen Mitchell to ask Sean Gadsby questions that he did and treat him in the manner that he did?
iv) could it be said that Stephen Mitchell determined not to investigate Sean Gadsby's grievance properly or at all?

75.3.3. his is a case in which the claimants have been placed on notice in clear and unequivocal terms that the respondents will be making an application for costs against them and the basis upon which such applications would be made.

75.3.4. Without doubt since after the April case management hearing the claimants and their representatives in pursuing the proceedings have done so with their eyes wide open to the possible consequences they would face in respect of an application for costs against the claimants. EJ Perry has been at pains in his management of the case to ensure that the parties understood the issues that would have to be decided at were the complaints lastly of unfair dismissal to succeed. Any false memory that either of the claimants had of the grievance investigations held with Mr Mitchell were objectively dispelled on the disclosure to the claimant's representative of the typed transcripts on 25 April 2016 if not before.

75.3.5 Having been taken to the transcripts the second claimant, Miss Craig has confirmed that the investigation undertaken by Mr Mitchell was thorough, addressed all have the points of her grievance, pursued reasonable lines in enquiry and was not predetermined. Ms Craig accepted that the conclusions reached by Mr Mitchell were ones that were open to him and had been reached following a proper investigation. The concessions made by Ms Craig in answer to questions in cross-examination were ones that were plain and obvious on any objective reading of the evidence that was before Ms Craig and her advisers.

75.3.6. Although Mr Gadsby withdrew his claim before he could be asked questions in cross-examination it would be for him to lead the evidential basis upon which he suggested Mr Mitchell asked him questions and treated him in the investigation in a way that was not open to a reasonable employer to do. Mr Gadsby in his witness statement, his evidence taken at the highest, has not identified the way in which the investigation was conducted and Mr Gadsby was treated that was not a method open to the respondents if as a reasonable employer. On the basis of the evidence, such as it was presented to me although not tested in cross-examination, there is no objective evidence of the respondent treating the first claimant in the investigation of the second claimant's grievance in a way that was not open to the respondent.

75.3.7 In considering whether the respondent determined not to investigate the first claimant's grievance properly or at all I have found facts that Mr Gadsby did not formally raise a grievance until his email of the 6 October 2016. The typed transcript [Vol III p711 confirmed that in a meeting with the claimant Mr Gadsby asked:

> *"Right. Erm, you have made a further allegation against Simon, which you would like me to investigate. Your email states…."*

Mr Gadsby and his representatives had disclosed to them the transcript of the investigation Mr Mitchell and talk taking up Mr Gadsby's grievance at a meeting with Simon Miller when he says:

> *"Shaun Gadsby has complained to me that during the afternoon of 21st September…."*

Sadly Mr Gadsby, having had a discussion with Mr Mitchell at which his grievances against Mr Miller were also discussed, resigned before the end of either the first grievance investigation in respect of Ms Craig or until his own grievance had been fully investigated.

75.3.8 Having read both of the claimants written witness statements and having read the written evidence which those statements and that of Mr Mitchell refer to there is nothing contained within the evidence that I have considered before the claims were withdrawn that would suggest to any reasonable person objectively considering the documentation to conclude that the claimants claims could be made out.

75.3.9 Ms Braganza in her submission on costs further to the claimant's claim has been dismissed and further to their withdrawal on 23 August has provided a detailed chronology of events in particular the correspondence marked 'without prejudice save as to costs' contained within the WP bundle. I refer in particular to the respondents without prejudice correspondence of the 21st April [WP1] in which they referred to the extent of the issues as to the investigation, that the investigation had been described as "careful, thorough and diligent investigation," "17 page report" and referred to the transcripts and "findings based on evidence". The respondent indicated that pursuing the complaints for victimisation and harassment if not dropped would lead to a claim that the litigation was vexatious having a reasonable prospect of success and that:

> *"costs were likely to be in the region of £30-£40,000*."

In response to the respondents warning the claimant's representative referred to there being clear evidence to support their client's case and refer to a "complete failure to investigate Mr Gadsby's grievance" . The claimants have not referred in their witness statements nor in correspondence from their representatives to the clear evidence to support their case.

75.3.10 On 19th July the respondents wrote to the claimant solicitors with a schedule of loss [WP9-11] providing a warning in relation to the conduct of the case and asking for confirmation that the costs warnings had been passed to the claimant clients.

75.3.11 Furthermore the claimants were aware that it had been the respondent's intention to pursue an application that they each be required to pay a deposit of the condition of being permitted to pursue their complaints. But for tribunal time being occupied by resolution of whether or not a concession and been made by the claimant's representative at the April preliminary hearing that application for a

deposit to be made as a condition of pursuing the claims would have been heard. In light of the objective evidence contained within the typed transcripts that have not been disputed in any way it is difficult to see how on the facts of the case the complaints of constructive unfair dismissal on the limited issues that were agreed had anything other than no reasonable prospect of success.

75.3.12. Ms Craig in giving her evidence in answer to questions in cross-examination has confirmed that she made contact with Ms Sessions with a view to building a case against Mr Miller.

75.3.12 As well as her selective recollection of the grievance investigation Ms Craig has been selective in her recollection of the directions given to her at the end of day one of her evidence when, in the face of clear direction not to communicate with anyone about her evidence in the case, she did so. Moreover, when asked about communication she suggested that she had understood that term to mean only spoken communication so that her email to those instructing was not a communication at all.

75.3.13 Mindful though I am that consideration of awards of costs in an employment tribunal are the exception rather than the rule, the circumstances of this case are such that the complaints of constructive unfair dismissal which continued beyond disclosure of the transcripts are complaints that viewed objectively had no reasonable prospect of success. Furthermore, the way in which Ms. Craig has conducted herself in the proceedings has been unreasonable in her disregard for the directions of the tribunal as demonstrated on the 22 /23 August 2016.

75.3.14. This is a case where the claimants were issued with clear and unequivocal warnings that the respondents intended to make an application for the claimants to be ordered to bear the respondents costs of defending the claims. The reasons for the costs application and the possible extent of them were identified to the claimants and their representatives.

75.3.15 I am grateful to Mr Ali who on behalf the claimants has reminded me of the case of Oni v Unison and the two-stage exercise that is contained within Rule 76.

75.3.16 In light of my findings of fact and having listened to the arguments put to me in submissions I am led to conclude that the claimants in this case have acted unreasonably in the conduct of and pursuit of a claim of constructive unfair dismissal that had no reasonable prospect of success.

76. Circumstances of this case lead me to determine that this is a case which I consider it to be appropriate to exercise my discretion and consider making an award for costs. `

77. I have heard evidence from the claimants as to their means before hearing final submissions from the parties counsel on the assessment of costs set out in the respondents various schedules.

78. Mr Ali has urged that the claimant cases were properly arguable. For the reasons that I have set out above I do not agree that they were any time after the

disclosure of the transcript documents and in particular the issues as articulated and agreed by the parties on 4 July 2016. Although at the hearing on 22 August before EJ Perry he corrected the spelling mistakes and minor transposition he had made in his order the parties were themselves the authors of the substantive agreed issues in relation to the constructive dismissal claims and were well aware of the questions that were to be addressed before me.

79. That the claimants were aggrieved by the respondent's treatment of them is not in doubt, however their decisions to resign were not such as to establish that the respondent had been in breach of contract entitling them to resign and claim constructive dismissal. While I note that the second claimant in particular has not enjoyed good health I note that she and Mr Gadsby have both since before their employment terminated taken legal advice. Ms Craig had asked Ms Sessions if she would speak to Ms. Craigs solicitor and Mr Gadsby took advice before attending the meeting on 9 October.

80. Mr Ali suggests that the claims were not ones where the respondent asked for a strike out and refer to EJ Perry's observations at the April hearing when the respondent suggested they wished to apply to strike out the claim. Such remarks made by EJ Perry were clearly in relation to the challenges to success of strike out applications in discrimination complaints when usually the tribunal needs to hear evidence and make findings of fact. But for the time taken at the 4 July hearing to consider the claimant's wish to resile from the concession given, I have no doubt that the respondents application for a deposit to be ordered would have been made.

81. Although Mr Ali refers to the effect of the stressful and daunting nature of giving evidence and it's effect on Ms. Craig I note that she has throughout been given legal advice and that does not entitle her to put the respondent at cost of defending complaints that viewed objectively have no reasonable prospect of success.

82. I have had full regard to the claimant ability to pay any award for the whole or part of the respondents costs to be borne by them. Mr Gadsby who benefits from legal expense insurance is insured against any award for costs that may be made against him. While Ms. Craig may not presently have the immediately disposable means to pay costs I have found that within a short period by simmer 2018 if not before she will have increased her earnings and no doubt reduced her expenditure, moreover she has significant equity available in her home that could without significant difficulty be released. Ms Craig. has referred to the equity in her home being her pension, that may be the case however the respondent is not to be penalized for having had to defend the claims having been persued with not real prospect of success.

83. For the reasons that I have set out above I consider this to be a case in which the claimants have pursued a claim that had no reasonable prospect of success and furthermore in the conduct of the case at times has been unreasonable in the circumstances as I have described.

84. I reach the conclusion that the claimants are ordered to pay in equal share the costs incurred by the respondent in respect of costs incurred by then as a result of

the claimants unreasonable behavior in bringing, conducting and pursuing their claims of unfair dismissal which had no reasonable prospect of success.

85. I have assessed the respondent's costs in incurred above having regard to the schedule of the costs for that period handed in to the tribunal on 25 August 2016. Mr Ali in his written submissions has addresses costs insofar as they related to the period in respect of which I have determined that costs are not to be awarded.

86. The respondent has provided a statement of costs for the period 4 July until the claims were dismissed and then the final costs application was made. Costs incurred in respect of work undertaken by solicitor Mr Michael Pope of LawBridge Solicitors amount to the sum of £10,953.00. Mr Ali has suggested that the work need not have been undertaken by a solicitor admitted 1984 but by a more junior solicitor. This complaint is a longstanding one that began as two separate complaints, one of unlawful discrimination because of the protected characteristic of age and sex and victimisation and the second complaint of victimization both claimants claiming also that they had been constructively unfairly dismissed and breach of contract. The claims were complex and I consider that the respondent is entitled to instruct solicitors or their choice and the costs contained in the schedule are not unreasonable. The volume of papers that had to be organized and reviewed and the extensive correspondence necessary to deal with the many applications and preliminary hearings and detailed instructions to counsel are justified.

87. Mr Ali has referred to the disparity between the brief fee raised by him to the claimants and that of Ms Braganza to the respondent. I have considered the fee notes and brief fee and refresher rates and expenses claimed which are not unreasonable even though different to that claimed by Mr Ali. Counsels fees amount to the sum of £19,359.41.

88. The claimants are each ordered to pay to the respondent the sum of £15,156.40 a contribution towards the costs of the respondent as I have assessed them to be in the combined sum of £30,312.81.

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Employment Judge Dean

Date 29 November 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

30 November 2017

FOR THE TRIBUNAL OFFICE