



EMPLOYMENT TRIBUNALS

Claimant: Miss A Wilson

Respondent: Met Office

Heard at: Exeter **On:** 1 December 2016

Before: Employment Judge A Goraj

Representation

Claimant: did not attend

Respondent: Ms S Hornblower, Counsel

JUDGMENT

(RESERVED JUDGMENT IN RESPECT OF PARAGRAPH 4)

The judgment of the Tribunal is that:-

- 1.** The claimant's application for the Employment Judge to recuse herself from the determination of the respondent's application for costs is refused.
- 2.** The claimant's application for the respondent's application for costs to be struck out/ dismissed is dismissed.
- 3.** The claimant's application for a further reconsideration of the Judgment which was sent to the parties on 7 December 2015 ("the Judgment") is refused as (a) the application was not presented to the Tribunal within the time limit prescribed by Rule 71 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Regulations") and further as (b) there is no reasonable prospect of the Judgment being varied or revoked.
- 4.** The respondent is entitled to an order for costs pursuant to Rule 76 (1) (a) of the Regulations in respect of the costs of the proceedings in an amount to be determined.

5. The matter is adjourned for the provision of the further representations referred to below.

REASONS

BACKGROUND

1. This hearing was listed to consider the respondent's application for costs dated 14 December 2015 which arises from the striking out of the claimant's claims. The Tribunal gave an oral Judgment at the hearing in respect of the matters at paragraphs 1-3 above and now gives a reserved judgment in respect of issue 4 above.
2. This is a long-standing matter. In summary:-
 - (1) The Tribunal determined by a reserved judgment dated 3 December 2015 (which was sent to the parties on 7 December 2015 ("the Judgment")) that (a) the Tribunal's previous judgment, which was sent to the parties on 16 June 2015 ("the Judgment dated 16 June 2015"), in which the Tribunal determined that the claimant was a disabled person for the purposes of the Equality Act 2010 ("the 2010 Act") should be revoked and (b) the claimant's remaining claims should be struck out pursuant to Rule 37(1)(b)(c) and (e) of the Regulations.
 - (2) The Tribunal acknowledged at paragraph 95 of the Judgment that the respondent had previously indicated that it wished to pursue an application for costs and directed the respondent to provide a breakdown of any such claim within 28 days so that further directions could be given.
 - (3) The claimant subsequently applied to the Tribunal for a reconsideration and revocation of the Judgment relating to (a) the revocation of the finding that the claimant was a disabled person for the purposes of the 2010 Act and (b) the striking out of the claimant's remaining claims. The claimant's reconsideration application was refused by the Tribunal by a judgment dated 12 January 2016 (which was sent to the parties on 22 January 2016) ("the reconsideration Judgment") on the grounds that there was no reasonable prospect of such decisions being varied or revoked.
 - (4) The claimant subsequently pursued an appeal to the Employment Appeal Tribunal ("the EAT") in respect of the matters referred to at paragraph (3) above. The Claimant's appeal was rejected on the initial sift but the claimant exercised her right for an oral hearing.
 - (5) The claimant's appeal was dismissed by the EAT following

an oral hearing pursuant to Rule 3(10) of the EAT's Rules of Procedure on 25 August 2015. A sealed copy of the judgment of the EAT dismissing the claimant's appeal was sent to the parties on 30 September 2016 ("the Judgment of the EAT").

- (6) In summary, the Judgment of the EAT held that this Tribunal had been entitled to (a) conclude that the claimant had deliberately misrepresented the position concerning the effects of any medical impairment on her day-to-day activities and accordingly that the claimant had conducted the proceedings vexatiously and unreasonably (paragraph 18 thereof)(b) revoke its previous finding that the claimant was a disabled person for the purposes of the 2010 Act (paragraphs 19-21 thereof) in view of the further matters which had come to light and (c) strike out the claimant's remaining claims including on the grounds that a fair hearing was no longer possible (paragraphs 24 -26 thereof). The EAT also rejected the claimant's contention that she had not received a fair hearing at the reconsideration hearing on 10 November 2015 including that there had been any breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (paragraphs 22-23 thereof).
- (7) Following the rejection of the claimant's appeal to the EAT the matter was listed on 21 October 2016 for an oral hearing to determine the outstanding costs application by the respondent. The Tribunal subsequently rejected the claimant's application for the matter to be dealt with by way of written representations only.

The claimant's applications and associated matters

- 3.** The claimant raised for the first time in an email to the Tribunal dated 28 October 2016 the contention that there could be no fair determination of the respondent's costs application, whether at a hearing or in writing, because the Tribunal had decided in the Judgment (including in particular at paragraph 89 thereof) that it was not possible to have a fair trial in this case. The claimant contended that this also extended to any determination of costs (whether on paper or in person). The claimant did not however, include in this e-mail any application for the Employment Judge (who had dealt with the proceedings previously) to recuse herself from any further involvement in the proceedings.
- 4.** A colleague of the Employment Judge directed, by an e-mail dated 19 November 2016, that having considered the claimant's emails dated 28 October 2016 and 2 November 2016 (in which the claimant reiterated her contention that no fair determination of the respondent's cost application was possible because the Tribunal had decided that fairness was unachievable) together with the respondent's representations, that the

respondent's application for costs should remain listed for hearing on 1 December 2016.

5. The Tribunal heard nothing further from the claimant regarding such matter until receipt of an e-mail dated 30 November 2016, which was not seen by the Tribunal until 1 December 2016. In that e-mail the Claimant made/repeated a number of applications including to strike out the respondent's claim for costs and a further application for a reconsideration of the Judgment.
6. In summary, the claimant repeated her application for the respondent's costs application to be struck out on the grounds that any costs determination in this case was a breach of her Human Rights (specifically Article 6 of the Human Rights Act) which provided that a claimant was entitled to a fair trial by an impartial Tribunal.
7. The claimant further contended that in the light of the Tribunal's conclusion in the Judgment that neither the claimant's word nor her documentary evidence in the case could be relied upon as truthful and/or complete the Tribunal had therefore diminished the claimant's opportunity to have a fair trial by an impartial Tribunal. The claimant further stated that she would not be attending the costs hearing as she was concerned that if she attended she could be considered to be accepting "the breach" albeit that she was providing further documentation and associated information in case the Tribunal went on to determine the respondent's costs application.
8. The claimant also made a further application for the Tribunal to reconsider the Judgment.

Documents and submissions

9. The claimant submitted a number of documents in support of her applications as listed at the conclusion of her e-mail dated 30 November 2016. The claimant also provided the Tribunal with detailed written submissions in response to the respondent's application for costs and with an unsigned statement of means and circumstances.
10. The respondent submitted a skeleton argument together with copy authorities, a signed bill of costs and other correspondence.

THE DETERMINATION OF THE CLAIMANT'S PRELIMINARY APPLICATIONS

11. The Tribunal decided, in the light of the contents of the claimant's e-mails dated 28 October / 2 November 2016 and 30 November 2016 in which she contended that a fair trial was no longer possible in view of the findings of the Tribunal in the Judgment (and notwithstanding that there was no formal application as such by the claimant), whether Employment Judge Goraj should recuse herself from the costs application in view of her previous involvement in the matter and in particular the findings in the Judgment concerning the conduct of the claimant.

12. The respondent was given an opportunity to make representations which the Tribunal has also taken into account. In summary it was the respondent's case that it was not necessary for Employment Judge Goraj to recuse herself as the conditions for recusal had not been satisfied by the claimant.
13. When considering this matter the Tribunal has had regard in particular to the Court of Appeal's Judgment in ***Locabail (UK) Limited and Bayfield Properties Ltd 2000 IRLR 96, CA*** and also to the Judgment of ***Harada Ltd trading as Chequepoint Ltd –v- Turner 2001 EWCA Civ 599 CA***.
14. The Tribunal reminded itself in particular that it was required to consider whether, viewing the matter objectively, a fair minded and informed observer would have concluded that there was a real danger of bias if Employment Judge Goraj had continued to deal with the case in the light of her previous involvement in the matter including in particular the findings contained in the Judgment regarding the conduct of the claimant.
15. Having given the matter very careful consideration, including the contents of the claimant's e-mails referred to above together with the claimant's accompanying written application dated 29 November 2016, the representations from the respondent, the authorities referred to above and Article 6 of the Human Rights Act 1998, the Tribunal was satisfied that it was not necessary for Employment Judge Goraj to recuse herself from the matter.
16. When reaching this conclusion the Tribunal took into account in particular the following matters:-
 - (1) This is a cost application. Employment Judge Goraj has dealt with the matter over a number of years and is accordingly best placed to deal with such application. Further, it is normal, given the requirements for the award of costs, for there to have been previous adverse findings concerning the conduct of a party.
 - (2) The EAT held that there was no substance whatever in the claimant's allegations concerning the conduct of the hearing on 10 November 2015 by Employment Judge Goraj (including that there had been no breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms) (paragraphs 22-23 of the Judgment of the EAT). Further, the claimant had not contended in her appeal to the EAT that Employment Judge Goraj had been guilty of bias.
 - (3) The Tribunal was further satisfied that a fair hearing of the respondent's costs application was possible in this case (including by Employment Judge Goraj) notwithstanding the findings in the Judgment that a fair trial of the substantive issues was no longer possible in the light of the claimant's conduct as a clear distinction could be drawn between the matters of fact which a Tribunal would

have had to have determined at a substantive hearing and the limited matters which this Tribunal was required to determine in respect of the question of costs.

- (4) Further the issues which the Tribunal was required to determine in respect of the respondent's application for costs related to matters which (apart from the question of the claimant's means) had already been considered by the Tribunal in the Judgment/ in the Judgment of the EAT.

- 17.** In all the circumstances the Tribunal was satisfied that it was appropriate for the Tribunal/ Employment Judge Goraj to continue to deal with the costs hearing.

The claimant's application to strike out the respondent's claim for costs

- 18.** The Tribunal also determined, as a separate, but related matter, the application by the claimant to strike out/ dismiss /refuse the respondent's application for costs on the grounds set out in her application dated 29 November 2016 which was attached to the claimant's e-mail dated 30 November 2016. The grounds for such application were essentially the same as those referred to previously above namely, that the application must be struck out as the Tribunal had previously determined in the Judgment that it was no longer possible to have a fair trial in this case.

- 19.** When considering this application the Tribunal took into account the representations from the respondent including that there was no power under Rule 37 of the Regulations for the Tribunal to strike out such an application and, in any event, that even the Tribunal was allowed to so as part of its general case management powers, there were no grounds in the circumstances of this case for striking out or refusing the respondent's application for costs without determining it on its merits. The reasons given by the respondent included that (a) it was a properly made application and (b) the claimant had failed to differentiate between the possibility of a fair trial for the purposes of the merits of the substantive case and a costs application (which were clearly still possible for the purposes of the latter).

- 20.** Having given careful consideration to the matters raised in the claimant's application dated 29 November 2016 together with the respondent's representations and the other matters referred to above, the Tribunal was satisfied that (a) there was no power to strike out the application pursuant to Rule 37 of the Regulations as it does not relate to the striking out of all or parts of a claim or response and (b) in any event, the Tribunal was satisfied that there were no grounds for refusing to determine the respondent's costs application without considering the merits of the application for the reasons set out below.

- 21.** When reaching such conclusions the Tribunal took into account in particular that (a) it was satisfied that the application had been properly brought and (b) it accepted the respondent's argument that

the claimant had failed to appreciate the distinction to be drawn between a situation where a fair trial was no longer possible for the determination of the substantive merits of the case and the question of costs. Further as far as the question of costs was concerned, it was quite likely at such stage that there would be allegations regarding the credibility/ conduct of a party because the question of costs did not normally arise unless the conduct of a party had allegedly been in some way unreasonable. Accordingly, in all the circumstances, the Tribunal was satisfied that it was appropriate to proceed with the determination of the respondent's application for costs on its merits and the claimant's application was therefore refused.

The claimant's further application for the reconsideration of the Judgment

- 22.** Finally, the claimant made a further application for the Tribunal to reconsider and revoke parts of the Judgment. In summary, the Tribunal was requested to reconsider the Tribunal's conclusions regarding the disability issue and also the decision to strike out the claimant's remaining claims.
- 23.** This application is contained in the claimant's email dated 30 November 2016 and in the claimant's written submissions in relation to the costs hearing. The claimant requested the Tribunal to reconsider the Judgment in accordance with its own powers and in the interests of justice. The claimant also relied on the contents of her previous application dated 20 December 2015 (which appears to be a further copy of the document which was attached to an email dated 21 December 2015 in which she made her original application for reconsideration of the Judgment which was refused by the reconsideration Judgment). The claimant has further submitted what appears to be a new piece of evidence which is potentially relevant to the reconsideration application namely a purported transcript of the claimant's recording of her consultation with Dr Steele –Perkins on 5 December 2013.
- 24.** This application for a further reconsideration of the Judgment was opposed by the respondent including in summary, on the following grounds namely (a) that the claimant had not followed the procedural rules contained in Rule 70 onwards of the Regulations including with regard to time and format and (b) that the application was, in any event, a reiteration of what had already been put before and had previously been rejected by the Tribunal in the reconsideration Judgment and should therefore also be refused on the basis that there was no reasonable prospect of the Judgment being revoked pursuant to Rule 72 of the Regulations
- 25.** Having given careful consideration to all of the above the Tribunal was satisfied that it was appropriate to reject the claimant's further application for reconsideration of the Judgment on the grounds set out below.
- 26.** Firstly it was not brought within the relevant time limit pursuant to Rule 71 of the Regulations and there was no explanation from

the claimant as to why it was not possible to bring such further reconsideration application earlier.

- 27.** Secondly, the Tribunal was satisfied that there was no reasonable prospect of the original decision being revoked or varied including as the claimant's application appeared to consist largely of a further reiteration of the claimant's previous reconsideration application which was rejected by the Tribunal in the reconsideration Judgment / which contentions were further rejected by the EAT.
- 28.** For the avoidance of doubt the Tribunal was not satisfied that what appeared to be a potentially new piece of evidence namely, the purported record of the interview of the claimant's consultation with Dr Steel-Perkins on 5 December 2013, which was included in the claimant's documents, justified any further re-examination of the disability or strike out issues.
- 29.** Moreover the Tribunal was satisfied that (a) in so far as any of the issues now raised by the claimant had not been raised by the claimant previously they could have been so raised and (b) there was nothing, in any event, in which the claimant had now produced which justified any further reconsideration/suggested that any such application had any reasonable prospects of success. This application was therefore dismissed pursuant to Rules 71 and 72 of the Regulations.

The respondent's application for costs

- 30.** The respondent notified the Tribunal on 14 December 2015 that it intended to pursue an application for costs against the claimant following the receipt of the Judgment which dismissed the claimant's disability discrimination claims and struck out the claimant's remaining claims. The respondent provided a detailed costs schedule on 4 January 2016. The respondent confirmed in that e-mail that although the accompanying costs schedule included a claim for VAT it understood that the VAT could be reclaimed as a tax input and would not therefore be recoverable from the claimant.
- 31.** The respondent's application for costs was stayed pending the outcome of the EAT proceedings.
- 32.** The respondent provided an updated signed bill of costs for the purposes of the costs hearing. The respondent is claiming a total sum of £58,470.41 (including VAT) which includes (a) profit costs of £40,420.77 (with VAT of £8,084.14) (b) Counsel's fees of £6,370 (with VAT of £1,274) and other disbursements of £2,022.50 (with VAT of £299).
- 33.** The matter was listed on 21 October 2016 for a costs hearing to determine whether (a) it was appropriate to make an order for costs in respect of all or part of the costs sought by the respondent and (b) the claimant's means and ability to pay any such costs. It was envisaged at that time that if the Tribunal considered that it was appropriate to make an order for costs the matter would thereafter be referred to an

Employment Judge with specialist training in costs taxation to carry out a detailed assessment of the amounts claimed as the respondent's claim exceeded £20,000. The claimant was notified at that time that she would be given an opportunity to make representations (either at the hearing or in writing) with regard to such matters. The claimant subsequently applied for the matter to be dealt with by way of written representations only but following objections from the respondent, and having regard to the circumstances of the case, the Tribunal directed that the matter should proceed by way of an oral hearing.

34. The claimant did not attend the costs hearing as previous referred to above.

35. During the course of the costs hearing the respondent confirmed that:-

- (1) It was limiting its application for costs to an application pursuant to Rule 76 (1) (a) of the Regulations namely, that the claimant had acted vexatious, abusively, disruptively or otherwise unreasonably in the bringing/conduct of proceedings. The respondent was no longer relying on the contention that the claimant's claims had no real prospect of success pursuant to Rule 76 (1) (b) of the Regulations.
- (2) Although it was pursuing its claim for costs in respect of the entire proceedings it was prepared, adopting a pragmatic approach, to limit its claim for costs to £20,000 so that a detailed assessment of any award was no longer required.
- (3) As the respondent was registered for VAT that element of the claim should be disregarded as indicated previously.
- (4) It acknowledged that the claimant should, if the tribunal decided that it was appropriate to award costs, be given an opportunity to comment on the amounts claimed in the bill of costs as a separate detailed assessment would no longer be required.

The respondent's submissions in support of its application for costs

36. The tribunal gave careful consideration to be respondent's oral and written submissions.

37. In summary the respondent contended as follows:-

- (1) The claimant's conduct/the way in which she had conducted the litigation had been scandalous, vexatious and unreasonable (including as set out at paragraphs 7-8 and 11 of the respondent's skeleton argument) including in particular in respect of the deliberate concealment of the claimant's employment with N & B Foods which amounted to a deliberate misrepresentation of the situation by wilful lying from the outset of the proceedings.

- (2) In the light of the overwhelming evidence of the claimant's dishonest behaviour the Tribunal must conclude that the claimant's behaviour had been scandalous and vexatious and that it would therefore be perverse not to award costs.
- (3) The respondent further pursued the application on the basis that the way in which the claimant had conducted the litigation had caused the proceedings to become lengthy leading to an escalation of costs. The respondent relied in particular on the examples identified in paragraph 9 of the skeleton argument including with regard to the claimant's cross application in response to the respondent's application to strike out the proceedings.
- (4) When considering the claimant's ability to pay any award of costs the tribunal should take into account (a) the salary received by the claimant from N & B Foods between 25 November 2013 and 31 January 2014 (b) the compensation received by the claimant from N & B Foods as a result of those proceedings in the employment tribunal and (c) the sick pay received by the claimant from the respondent prior to the termination of her employment (paragraphs 29, 41 and 44 of the Judgment).

38. The respondent relied in particular on Rule 76(1) (a) of the Regulations together with the following authorities which were referred to in the skeleton argument:-

Monaghan v Close Thornton EAT/0003/01
Barnsley Metropolitan Borough Council v Yerrakalva (2011) EWCA Civ 1255.
Lodwick v London Borough of Southwark (2004) EWCA Civ 306
Dr M EL Mansi v Napier University at Edinburgh ET case number S/106063/08.
Daleside Nursing Home Limited V Mathew EAT/0519/08.

The claimant's written submissions and accompanying evidence

39. As indicated previously above, the claimant submitted detailed written submissions together with an unsigned statement of the claimant's means and circumstances to be taken into account in the event that the tribunal decided to proceed with the costs hearing.

40. The claimant also provided copies of the following documentary evidence namely: - (a) notification from the DVLA concerning the disposal of the claimant's motor vehicle (b) a blank P46 and (c) Statements from the Coventry Building Society and the Co-operative Bank. These documents were however of limited assistance to the Tribunal particularly as the P46 was completely blank and as the financial statements both contained single entries showing balances on 21 November 2016 for £0.66 (the Coventry Building Society) and on 22 November 2016 for £345.99 (the Co-operative Bank).

41. In summary, the claimant contended in her written submissions/ her statement of means and circumstances as follows:-

- (1) The Tribunal is required to consider all the circumstances of the case including that the claimant's disability discrimination claim was only one aspect of the proceedings and that there were separate claims relating to victimisation/detriment for making a protected disclosure, victimisation/detriment and unfair dismissal relating to the raising of health and safety concerns and victimisation in respect of the withholding of a compensatory payment, none of which depended upon a finding of disability. Further, none of the information which the claimant was alleged to have deliberately misrepresented/withheld had any relevance to the further claims (paragraph 2 of the claimant's written submissions).
- (2) The effect of any relevant unreasonable conduct was limited to the claimant's disability discrimination claim and there was no relevant costs effect connected with the remaining claims. There was therefore no basis for any costs award in respect of any work undertaken by the respondent in defending the remaining claims (paragraph 2 of the claimant's written submissions).
- (3) Further, in respect of the claimant's disability discrimination claim, the earliest possible time that any alleged unreasonable conduct of the claimant could have had any effect on the proceedings in relation to the respondent's costs was the point at which the claimant was obliged to have completed her disclosure of evidence and/or made any relevant amendments in determining whether the adverse effects upon which she relied met the criteria for disability under the 2010 Act (paragraph 7 of the claimant's written submissions).
- (4) The tribunal should have regard to the unreasonable conduct of the respondents regarding both (a) the way in which it dealt with/failed to address the claimant's concerns during her employment with the respondent and (b) of the conduct of the litigation/associated matters (including in respect of the respondent's refusal to respond properly to the claimant statutory questionnaire/its refusal to engage in mediation and/or ACAS conciliation (paragraphs 25 and 26 of the claimant's written submissions).
- (5) The Court emphasised the case of **Lodwick** (upon which the respondent relied) that cost awards are only made in exceptional circumstances and further that they are meant to be compensation for the party who has won the case. In this case however the respondent had not "won" any of the claims other than in respect of a preliminary matter. The substantive merits of the claims had not been heard (paragraph 27 of the claimant's written submissions).
- (6) Further, the claimant had very limited resources. In summary (a) the claimant suffered from depression, anxiety, stress and

agoraphobia which meant that the claimant had been unable to find suitable alternative work (b) the claimant was hoping in due course to undertake an online course in art and photography to help her find alternative work and (c) the claimant shared a home with her invalid father to whom she provided care in exchange for food and board and (d) the claimant did not own any property or assets and had no income (and was not in receipt of any benefits) as was demonstrated by the statements from the claimant's bank/building society.

- (7) The monies which the claimant had received by way of sick pay from the respondent and by way of compensation from N& B Foods had been greatly exaggerated by the respondent and had, in any event, been spent on living expenses, debts and tribunal fees.

THE LAW

42. The Tribunal has had regard in particular to the following statutory provisions :-

- (1) Rule 76 (1) (a) of the Regulations provides that:-

“ (1) A Tribunal may make a costs order or 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”.

- (2) Rule 84 of the Regulations provides that:-

“ In deciding whether to make a costs, preparation time 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”.

43. The Tribunal has also had regard, in particular, to the authorities referred to previously above.

44. The Tribunal has reminded itself in particular of the following matters:-

- (1) When considering an application for costs the Tribunal is required to adopt a two stage process namely (a) has the costs threshold been triggered including was the conduct of the party against whom costs are sought unreasonable and if so in what way and (b) if the costs threshold is triggered ought the Tribunal to exercise its discretion in favour of the respondent having had regard to all of the circumstances.

(2) When exercising its discretion to award costs the Tribunal is required to consider the whole picture when deciding whether there has been unreasonable conduct by the claimant in bringing and/or conducting the case and further to identify such conduct including what was unreasonable about it and the effects thereof (**Yerrakalva**).

45. Cost awards are compensation for the successful party and not punishment for the loser. Costs awards in the employment tribunals are still the exception rather than the rule.

46. In order for conduct to be considered as vexatious there needs to be evidence of some spite or desire to harass the other side or the existence of some other improper motive.

47. A Tribunal is not obliged by Rule 84 of the Regulations to have regard to a party's ability to pay costs although it is permitted to do so. Where however a Tribunal has been asked to have regard to a party's means it shall state whether it has done so together with an explanation of its reasons for doing so/ declining to do so. The Tribunal is required to balance any consideration of a party's ability to pay costs against the need to compensate and the other party who has unreasonably been put to expense.

THE CONCLUSIONS OF THE TRIBUNAL

48. The Tribunal has considered first whether the costs threshold has been triggered for the purposes of Rule 76 (1) (a) of the Regulations.

49. Having given the matter very careful consideration the Tribunal is satisfied that the costs threshold has been triggered in this case as the claimant has acted vexatiously and/or unreasonably in the way in which she has conducted the proceedings.

50. When reaching this conclusion the Tribunal has had regard in particular to its findings at paragraphs 86- 87 and 90 (1) of the Judgment concerning the way in which the claimant failed to disclose to the respondent, Dr Steele – Perkins, the Joint Medical Expert, Dr Briscoe and the Tribunal the position regarding her employment with N& B Foods including that the claimant did not disclose such information as she appreciated that it was likely to undermine her disability discrimination claim and further that the claimant knowingly and deliberately misrepresented the position regarding the effect of any medical impairment upon her day-to-day activities.

51. The Tribunal has also taken into account the other matters of unreasonable conduct on the part of the claimant in respect of the conduct of the proceedings identified at paragraphs 90 (2), (3) and (4) of the Judgment.

- 52.** In all the circumstances, the Tribunal is satisfied that the threshold for the award of costs has been triggered for the purposes of Rule 76(1) (a) of the Regulations.
- 53.** Further, the Tribunal is satisfied that the threshold for the award of costs has been triggered in respect of all aspects of the proceedings and not just in relation to the disability discrimination claim/ limited aspects of that claim as contended by the claimant.
- 54.** When reaching this conclusion the Tribunal is satisfied that although the principal unreasonable conduct of the claimant related to the pursuit of the claimant's disability discrimination claim, and the withholding/misrepresentation of information/ the position relating to the claimant's alleged disability and associated matters, the effect of such conduct was to taint the remaining claims to the extent that a fair trial of any of the claims was no longer possible (for the reasons explained at paragraphs 89- 94 of the Judgment) and thereby resulted in the striking out of all of the claimant's claims.
- 55.** The Tribunal has therefore gone on to consider whether, in all the circumstances, it ought to exercise its discretion in favour of the respondent to award costs having regard to all the circumstances of the case including the nature of the conduct of the parties and the claimant's ability to pay any costs awarded.
- 56.** After giving careful consideration to such matters the Tribunal is satisfied that it is appropriate to exercise its discretion to award costs in favour of the respondent in respect of the proceedings having had regard to the serious nature and effects of the unreasonable conduct by the claimant as identified previously above.
- 57.** When reaching this conclusion the Tribunal also rejects the contentions of the claimant concerning the alleged unreasonable conduct of the proceedings by the respondent. The Tribunal is not satisfied that there has been any unreasonable conduct of the proceedings by the respondent including in respect of the matters raised in the claimant's application stated 12 and 22 October 2015 which was addressed at paragraphs 79-82 of the Judgment and/or in respect of any additional matters referred to by the claimant above.
- 58.** The Tribunal has therefore gone on to consider the amount of any award of costs. The Tribunal considers that it is appropriate to have regard to the claimant's ability to pay when determining the amount of any award of costs. The Tribunal has reminded itself that it is required in such circumstances to balance the claimant's ability to pay costs with the need to compensate the respondent who has unreasonably been put to expense.
- 59.** The Tribunal is satisfied in the light of the matters raised in the claimant's statement of means and circumstances and accompanying documents that there is an issue as to the extent to which the claimant

could now, or in the foreseeable future, make payment of any award of costs.

- 60.** The Tribunal is not however satisfied that it has sufficient information to enable it to make a proper determination of this issue in the light of the non-attendance by the claimant at the costs hearing and the limited documentary information (particularly with regard to the contents of the claimant's bank/building society statements) which has been provided to the Tribunal. It is not possible for instance on the basis of the information presently provided to determine what has happened to any monies received by the claimant from the respondent and/or by way of compensation from N & B Foods. Further, the claimant has provided no evidence to the Tribunal (including as the P46 is entirely blank) to support her assertion that she is not in receipt of any income/benefits and/or regarding her current fitness to work).
- 61.** The Tribunal is mindful of the fact that the amount of costs sought by the respondent is significant (£20,000). In order to ensure a proper exercise of its discretion the Tribunal is therefore prepared, for the purposes only of the determination of the amount of any costs award, to allow the claimant an opportunity to provide further relevant documentary evidence to support her assertions regarding (a) the lack of any assets and income and (b) what has happened to any monies previously received from the respondent/N& B Foods.
- 62.** The claimant therefore has 21 days from the date of the issue of this judgment to provide such information to the Tribunal and the respondent which for the avoidance of doubt should include (a) statements from her bank / building society for the previous six-month period together with any other documentary evidence to show what has happened to any monies received from the respondent and N&B Foods (b) any correspondence or tax return/ other dealings with HMRC or any other documentary evidence relating to any income received during the tax year ended 5 April 2016 or subsequently.
- 63.** If such information is not received within the 21 day time limit the Tribunal will proceed on the basis of the limited information currently available without further notice to the claimant.
- 64.** The claimant is also invited to provide to the respondent and the Tribunal within 21 days of the date of the issue of this judgment any representations which she wishes to make regarding the contents and amount of the respondent's bill of costs. This invitation is being extended to the claimant as the Tribunal appreciates that it was originally envisaged that the amount of any award of costs would be determined subsequently at a detailed assessment in view of the fact that the respondent was originally claiming in excess of £20,000 (which is no longer the case). Again, if any such representations are not received within the 21 day time limit the Tribunal will proceed to determine the amount of any costs to be awarded to the respondent without further notice to the claimant.
- 65.** For the avoidance of doubt, the opportunity to make further

written representations is strictly limited to the matters identified at paragraphs 62 and 64 above.

66. The respondent is also at liberty to provide to the Tribunal and to the claimant within 14 days of the receipt of any written representations from the claimant regarding the matters identified at paragraphs 62 & 64 above any further representations which shall be strictly limited to any matters arising from the claimant's representations regarding such matters.

67. The Tribunal will issue a final judgment determining the amount of any costs to be awarded to the respondent following the consideration of the further representations referred to above.

Employment Judge A Goraj

Dated 16 February 2017

JUDGMENT SENT TO THE PARTIES ON

2nd March 2017

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FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.