EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Noblemunn	**v**	**Ms H**

Heard at: Watford **On**: Monday 17 December 2018

Before: Regional Employment Judge Byrne

Representation

For the Claimant: In person

For the Respondent: Mr Tom Coghlin - QC

RESERVED JUDGMENT

The claimant is ordered to pay to the respondent cost in the sum of £14,354.00

REASONS

At the start of the hearing I considered an application by the claimant for an anonymity order. Paragraphs 1 to 6 that follow are in essence the oral reasons given to the parties when I determined the application for an anonymity order at the start of the hearing.

Claimant's application for an anonymity order

1. The application I have to consider this morning is an application for an award of costs made by the respondent in these proceedings, Ms H against the claimant. The background to the application is that proceedings were presented by the claimant on the 24 August 2018. The response was served on the 19 September 2018 and on the 20 September 2018 the claimant withdrew the proceedings.

2. I indicated to the parties that I would determine the claimant's anonymity application at the start of the hearing today. The matter falls to be

considered under the provisions of Rule 50. In summary the approach to be taken in the context of applications/orders under Rule 50 requires consideration of the following:

2.1 Open justice: as set out in Rule 50(2) the principle of open justice and Article 10 rights must be given full weight. The default position is that hearings are in public and that full decisions with the names of the parties are published and may be reported. This is not a right specifically of the media but reflects the public interest generally. It applies irrespective of the subject-matter of the case, it does not matter that a particular individual employment dispute does not "raise issues of public interest in the wider sense".

2.2 Derogations from the principle of open justice will only be justified in exceptional circumstances, if and to the extent the court or tribunal is satisfied that they are the minimum strictly necessary to ensure justice is done. The burden of establishing that a derogation is necessary is on the person seeking it.

2.3 A balancing exercise: a fact-specific proportionality exercise must be carried out, with an intense focus on the importance of each of the specific rights being claimed and the justifications for interfering with or restricting each right. Clear and cogent evidence is required. Finally, the proportionality test must be applied. The question to be considered is whether harm will be done by reporting to the privacy rights of a person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice.

3. The claimant tells me that he believes his standing in the community will be irreparably damaged if his name is not anonymised and that also it will impact on his professional career and his integrity. He does not believe it will be in the public interest that he is identified in these proceedings.

4. For the respondent they say it is a matter of significant public interest that a non-legal member of an Employment Tribunal such as the claimant has chosen to sue a barrister in the Employment Tribunal. They make the point that if there are findings that are critical of the claimant then it is in the public interest that that they be known. If there is no criticism of the claimant, then to keep his name unanonymised is a proper reporting of the proceedings.

5. The claimant made a further point which is that although he accepted he had instituted the proceedings he withdrew them promptly on receipt of the response. He said he did not expect to be at a hearing as he withdrew them before there was any substantive hearing in relation to his claim.

6. What I must consider are the Article 6 rights to a fair and public hearing, the Article 8 rights of privacy of the claimant and the Article 10 rights of a freedom of expression. I have considered these carefully and the balancing exercise here is specifically between the claimant's right to privacy and the principles of open justice. In coming to my decision I take

account of the fact that the claimant as a non-legal member of an Employment Tribunal sitting on Employment Tribunal proceedings and would have known the Employment Tribunal proceedings which he commenced are public. The fact that he withdrew them promptly on considering the response does not in my view amount to exceptional circumstances which would justify an anonymity order. From what I have already seen of this matter with reference to the claim form and the response form it seems to me the principle of open justice and Article 10 rights must be given full weight and the default position that proceedings should be in public should not be departed from in this case. It is in the public interest that proceedings involving a party who sits in a judicial capacity in this jurisdiction should be publicly and fully reported. Accordingly, I reject the claimant's application for an anonymity order and will now go on to hear the costs application.

RESERVED REASONS

in relation to the Costs Application

Findings of fact in relation to the proceedings and the resulting costs application

7. References that follow in these reasons are to page numbers in the bundle made available to the Tribunal at the hearing of the costs application. The claimant gave evidence on oath before the Tribunal and was cross-examined by the respondent's counsel. The respondent is a member of the bar of England and Wales and a specialist in (among other fields) employment and discrimination law. A significant part of her practice is acting for claimants in discrimination cases.

8. This is in my experience a novel and unique set of circumstances. The costs application that I must determine arises out of the institution, and subsequent withdrawal, of proceedings claiming race discrimination against the respondent, a barrister practicing in the field of employment law following her making an application that the claimant be recused from the panel hearing a race discrimination claim at a hearing before the London Central Employment Tribunal in March 2018. The claimant is a lay member at London Central Employment Tribunal and has been an Employment Tribunal member for almost 24 years and a specialist employment race panel member for 20 years.

9. At the hearing in March the respondent was counsel for the Institute of Directors, the respondent to those proceedings. During those proceedings she made an application on behalf of her client for the claimant to recuse himself from the case based on alleged conduct on the part of the claimant giving rise to the appearance of bias. The application was supported by evidence in the form of written statements from 3 witnesses from the Institute of Directors. In essence, the thrust of the recusal application was that the claimant should recuse himself from continuing to hear the case on the grounds of apparent bias in the form of apparent favouritism and

pre-judgment of essential issues in the case. One of the witness statements was from a witness yet to give evidence.

10. The application was considered by the Tribunal and in Case Management Orders sent to the parties on 25 April 2018 the Tribunal, Employment Judge Professor AC Neal, Mr P M Secher and Mr J Noblemunn the claimant confirmed the outcome of the application. The relevant parts of the orders sent to the parties read as follows:

    10.1 *"On the morning of day 4 of the hearing an "Application to Recuse" was made in writing (with supporting witness statements) on behalf of the respondent relying upon matters raised orally before the Tribunal on the afternoon of day 3 of the hearing (16 March 2018). Recusal was sought in relation to Mr J F Noblemunn."*

    10.2 *After initial consideration of the application and having invited comments from the claimant the Employment Judge formed the view that there was insufficient at that stage to warrant recusal of Mr J F Noblemunn. The view was also taken that further enquiry into the circumstances of the allegations given rise to the respondent's application would require a potentially lengthy investigative process, including involvement by counsel for the respondent as a witness.*

    10.3 After discussion with the parties the Employment Judge further came to the conclusion that it was no longer possible to continue the hearing of this case before the same panel. The Employment Judge formed that view having regard to the overriding objective set out in ***Rule 2 of Schedule 1 to the Employment Tribunals Rules of Procedure 2013****, and in particular, considered that the perception of the presently constituted panel was in a position to deal with this case fairly and justly had been severely undermined by a combination of the strongly worded manner in which the application had been phrased, the content of the witness statements (including, most significantly, that produced on behalf of a witness yet to give evidence in the main proceedings), and the manifest lack of trust expressed by the respondent on the record in respect of Mr J F Noblemunn.*

    The Orders concluded with confirmation that following further discussion with the parties the case was listed for hearing before a differently constituted Tribunal.

11. On 15 June 2018 the claimant commenced early conciliation with ACAS having given the respondent's details as the prospective respondent to these proceedings. The ACAS certificate was subsequently issued on 6 July 2018.

12. On the 15 June 2018 the claimant lodged a complaint against the respondent with the Bar Standards Board ("**BSB"**).

13. In the context of determining this costs application it is relevant to set out some of the details of the complaints raised with the BSB. In Part A of the form under the heading "Details of your complaint or complaints" (170) the claimant set out in great detail the sequence of events in relation to the recusal application and of the basis on which the recusal application was made. Under Part B (171) under the heading "Please list and number, as clearly as you can, the specific points you are complaining about", the claimant set out:

> *"Barrister Ms H of Counsel has:*
> 1. *Caused the Court to attempt to believe something that wasn't true.*
> 2. *Intended to call witnesses to give evidence knowing they would say something that wasn't true.*
> 3. *Made unnecessary or uncalled for accusations against me in the course of my work as an Employment Tribunal Lay Member.*
> 4. *Used the fact she is a Barrister to gain advantage.*
> 5. *Discriminated against me unlawfully on the grounds of my race*
>
> *The complaints are clearly identified in the text in Part A of this complaint.*
> *Barrister Ms H has cost extra financial burden to the Employment Tribunal system by her actions in that the Tribunal had to abort a 5 day ET Hearing after 3 days of evidence and set a new 5 day Employment Tribunal Hearing at great cost to the Judiciary".*

14. Part C of the form (172) contained details of witnesses who could provide relevant information namely Employment Tribunal Judge Professor Neal and Employment Tribunal Lay Member Paul Secher, although the claimant did accept in cross-examination that he had not contacted either of them to check they would be willing to give information to the BSB. Part D of the form (173) required the claimant to list the evidence he had to support the complaint and he listed documents and witness statements provided in connection with the recusal application together with, "Judge Professor Neal Employment Tribunal file note."

15. By letter dated 1 August 2018 (176) the BSB dismissed the claimant's complaints. The summary in that letter confirming the decision reads as follows.

> *"While I have not been referred to each individual aspect of your complaint, I have considered all that you have said in your complaint to us and all of the information you have provided to us in support. On the basis of this assessment, I have decided that your complaint should not be pursued.*
>
> *As you may be aware, when a person complains to us about a barrister, the onus lies with the complainant to provide the evidence necessary to support their allegations. It is not for the Bar Standards Board to seek information to substantiate a*

complaint. While I note that you have listed evidence in Part D of the complaint form, none of the evidence has been provided. Conversely, I note from your complaint form that Ms H's submissions as to why you should be recused was considered by the Tribunal, and a decision was made to recuse the whole panel from the case. While I appreciate the significant distress you have been caused by the events in the Employment Tribunal, in the absence of firm evidence to corroborate the allegations, this complaint is dismissed pursuant to rE31.1 of the BSB Handbook.

Furthermore, as you have advised that Judge Professor Neal and the Tribunal Panel recused the whole panel from the case based on Ms H's submissions, it is my assessment that to look further into this complaint would be reconsidering a matter that has already been determine before the courts. As such, it would not be appropriate for the Bar Standards Board to investigate the complaint as it is not apt for consideration. I would therefore dismiss this complaint under rE32.4 of the Handbook."

16. On the 6 August 2018 the claimant issued employment proceedings against the respondent in the London Central Employment Tribunal and they were transferred to the Watford Employment Tribunal. Given that he sits at London Central as a non-legal member it was clearly inappropriate in all the circumstances that the claim be considered in the Region in which he sits.

17. Relatively brief details are given in the claim as presented in Section 8.2 and they read as follows

"The claimant is a lay member at London Central Employment Tribunal Regional Offices having been appointed by the Ministry of Justice (formerly the Department of Trade & Industry). The claimant has been an ET member for almost 24 years and has been a specialist ET race panel member for 20 years.

Whilst sitting on a 5 (day) ET case on the 16th and 26th March 2018. Ms H requested that the claimant be recused from a race discrimination case. Her application cited a number of untrue, spurious and outrageous allegations against the claimant in an attempt to have a remaining ET panel of 2 white males with the claimant as the only black person being removed. The effect of Ms H's actions created an intimidating hostile, degrading, humiliating and offensive environment for the claimant."

The claimant sought a declaration that he had been subjected to race discrimination and for an award of injury to feelings, *"At the top of the lower band under Vento guidelines i.e.£6000."*

18. The response served on the 19 September 2018 robustly defended the proceedings. The response stated the claim was misconceived, vexatious

and an abuse of process and stated at Paragraph 2 of the grounds of resistance:

> *(1) the Tribunal lacks jurisdiction to hear the claim, given the absence of any (actual or alleged) employment relationship between the parties or other relationship such as could engage the provisions of Part V of the Equality Act 2010 (see paragraph 11 below);*
>
> *(2) the respondent, as a barrister acting as an advocate in Tribunal, has absolute immunity from suit (see paragraphs 12 and 13 below);*
>
> *(3) the claim is an attempt to challenge the propriety of a recusal application which was unanimously upheld by a Tribunal (of which the claimant himself was a member), and it therefore represents a collateral attack on that Tribunal decision and is an abuse of process (see paragraph 14 to 16 below);*
>
> *(4) any Tribunal which heard the current case would be unable properly to reach any conclusions as to the respondent's motivation other than that she was acting on the basis of her client's instructions (a presumption which the Tribunal cannot properly go behind given that all relevant communications between the respondent and her clients are subject to legal professional privilege) (see paragraphs 17 to 18 below); and*
>
> *(5) the claimant has no real prospect of proving that, as a judicial office holder who was the subject of a recusal application, he was exposed to an environment which was intimidating, hostile, degrading, humiliating or offensive (or if, which is not clear, he seeks to claim direct discrimination, that he was subjected to a detriment) (see paragraphs 20 and 22 below).*
>
> The respondent also sought an order striking out the claim pursuant to Rules 26 and 27 of the Employment Tribunal Rules of Procedure 2013; an order that the claimant pay the respondent's costs pursuant to Rule 76(1)(a) and/or (b) of the Employment Tribunal rules of Procedure 2013, on the ground that the claim was vexatious and an abuse of process and had no reasonable prospect of success and that the claimant had acted unreasonably in bringing and pursuing it; and finally an application for a restricted reporting order and/or an order that the respondent be anonymised in any report of the proceedings and any judgment and/or reasons of the Tribunal, " So as to mitigate the harm to her professional and personal reputation which these proceedings have been calculated to inflict."

19. Having considered the response of the 19th September the claimant sent two emails on the 20 September 2018, one to the respondent's solicitors and one to the Tribunal. The email to the respondent's solicitors acknowledged receipt of the response and the various applications. In that email the claimant states:

> *"Taking into account all the above (referring to the response), I will in due course (after sending you this email) be withdrawing my ET1 claim against the respondent.*
>
> *May I place on record that I did not take the decision to submit this ET1 lightly. I had an honest and genuine belief that I had an arguable case that I could rely on facts that a Tribunal would find in my favour on the balance of probabilities. I refute that I abused due ET process.*
>
> *It is evident from your ET3 – grounds of resistance that the legal "hurdles" that I would have to overcome raised the bar too high and based on what I would say was an excellent ET3 response to my claim I agree that my case "does not have reasonable prospects of success".*
>
> *The Case Law you set out in the ET3 is compelling in my decision to withdraw my claim. I had not realised as a non-legal person that there was evidence that I would not be able to deduce due to "privilege" and jurisdiction.*
>
> *In 45 years of employment in Local Government, the Trade Union and the Employment Tribunal I have never accused anyone of discrimination.*
>
> The email also stated; May *I please have a breakdown of the respondent's costs incurred. I would also ask if you would want an income and expenditure breakdown regarding my ability to pay your clients costs. I will also copy you into a request to the Tribunal that no costs are awarded against setting out my reasoning."*

20. By email (72) dated 20 September 2018 timed at 10:57 addressed to me and copied to the respondent the claimant stated in the opening paragraph:

> *"I wish to withdraw my ET1 claim against the respondent Ms H with immediate effect."*
>
> He opposed the costs application, saying:
>
> *"I submitted the ET1 claim based on the fact that I had an honest and genuine belief that my case was arguable and that on the*

balance of probabilities a Tribunal would deduce facts on the balance of probabilities that would find in my favour.

I did not intentionally or knowingly abuse the ET process.

The ET1 was not submitting in an unreasonable or vexatious manner.

Notwithstanding the Mardner v Gardner EAT/0483/13 case, I submit there is no actual financial loss to the claimant who the respondents state is covered under the Bar Mutual Indemnity Fund.

There was no malice intended and I have subsequently put on record a written apology to the respondent Ms H.

I have limited disposal means to meet the respondent's costs."

21. On 13 November I made an anonymity order regarding the identity of the respondent, which order was agreed to by the claimant and was therefore a consent order. I then issued a judgment dismissing the claim on withdrawal and directed the costs application be determined at an attended hearing on 17 December 2018.

22. The claimant is employed as a Regional Trade Union representative by Unison. His evidence to the Tribunal was that he had the benefit of legal representation form his union but only in relation to any employment matters arising within his employment. He was taken in cross examination to a recent "person specification" for a regional organiser of Unison prepared in May 2017. It was pointed out to him that (156) under the heading "Thinking" it included the requirement to conduct research to which he replied, "No, not really" and at section 7.2 (157) that another requirement was "A detailed knowledge of the key areas of employment law including developing case law" to which he replied "There was more general knowledge than detailed knowledge". He was asked if he received training as a part of his role as an Employment Tribunal Member and he said yes that was provided once a year. It was put to him that he would have covered the general principles of discrimination in employment law and he responded that there had not been training on the Equality Act for some time, that the annual training included a number of different areas but he "Couldn't remember exactly". He accepted that he had conducted a hearing as an advocate in the Employment Appeal Tribunal in 2000.

23. He was asked at some length in cross-examination as to what his considerations had been before embarking on these Employment Tribunal proceedings against the respondent. He said, "I brought my claim because I had a genuine belief that as a Tribunal Member I had been treated differently."

24. It was put to him “Did you not give consideration to the fact that you were suing someone who was working within the Employment Tribunal as an advocate?” to which he replied, “I gave that no thought, I felt I had a genuine belief that I had been treated differently.”

25. He was asked “Did you give any thought to the impact this would have on the respondent?” to which he replied “No”.

26. It was put to him “Did you think it was reasonable before you brought a claim to establish in your own mind that there was a legal basis on which to bring that claim?” to which he replied, “I did try and establish in my own mind”. He accepted that he had never heard of a situation where a Judge or judicial officer holder had sued an advocate following their appearing in front of that Judge or judicial officer holder in proceedings and it was put to him “So your case was unique?” to which he replied, “I didn’t think of it in that way”.

27. He was asked whether that had given him “Any cause for thought” to which he replied, “Yes which is why I tried to find out from ACAS what my jurisdiction was”.

28. It was pointed out to him in cross examination that the Employment Tribunal dealt with claims relating to an employment relationship to which his reply was, “Yes I thought we had a relationship, I was working that day in the Employment Tribunal and she (the respondent) was an advocate”. He was asked whether he had researched that point. His evidence, and this was referred to in his witness statement prepared for the costs hearing, was that he had checked with ACAS on the telephone before the 15 June and had asked whether as an Employment Tribunal Member he could bring a claim against a barrister. He said that he had telephoned ACAS and that the person he spoke to at ACAS (he did not keep a note of their name) asked him to “Hold on a minute” and when they came back they said, “Yes you could bring those proceedings”. He was asked whether he was given any explanation as to the basis on which he could bring those proceedings to which he replied, “No”.

29. In cross-examination the claimant was taken to his complaint to the BSB and asked what thought processes on the part of Ms H he relied on in supporting his allegation of race discrimination. It was pointed out that she was acting on instructions in making the recusal application and therefore how could he ever establish that her actions were on the grounds of race when she was acting on instructions and those instructions were privileged. He said he was not aware of the full extent of privilege but accepted that he was aware of the concept of privilege.

30. He was asked in cross-examination about the allegation in his complaint to the BSB that Ms H coerced false statements from witnesses and was asked what evidence he had to show that Ms H had played a part in preparing those statements. He replied “She was the advocate for the Institute for Directors. Three witnesses made a statement.” He accepted in cross-examination that solicitors were acting for the IoD and were

instructing Ms H. He said he had not known that at the time. He was asked to accept that he had no evidence that Ms H had coerced any evidence from witnesses to which he replied, "Not now". It was put to him that he did not have any evidence to that effect at the time the proceedings against Ms H were presented to which he replied, "I have the assertion". It was put to him that his assertion was made without substance to which he replied, "Yes". It was put to him that at the centre of his complaint was an allegation that would never had succeeded to which he replied, "I have got to concede that". It was put to him that was not a reasonable basis on which to embark on litigation to which he replied, "No". It was put to him that he could have "sat down and thought about that prior to issuing proceedings" to which he replied, "I did sit down and think about it but I didn't consider that". He was asked if he was aware that it was not simply enough to believe in a case, there needed to be an objective basis for that belief to which he replied, "I did have an objective basis".

31. It was put to him that on receiving the rejection from the BSB of his complaint against Ms H that should have given him pause for thought before taking any further action and it was specifically put to him that the purpose of his proceeding was to "Get back at her (Ms H)" to which specifically said, "No sir".

32. He was asked about his knowledge of costs and the Tribunals ability to award costs in accordance with the Rules. He was taken to a judgment of the London Central Tribunal in case numbers 2201725/2015, 2201884/2015, 2200045/2016 and 2200046/2016. This was a Tribunal of which he was a member and which had made awards of costs of £10,000.00 payable by each of the two claimants to each respondent. He said that case was not comparable with the current proceedings. He was taken to proceedings in the Central London Employment Tribunal under case number 2206122/2016, judgment sent to the parties on 27 July 2017. He was a member of the Tribunal which made a costs award of £5,000.00 was against an unsuccessful claimant. He was asked if he remembered the case to which he replied, "No". He was taken to a decision of the London Central Employment Tribunal in case number 2200853/2017 sent to the parties on 12 April 2018. He was a member of that Tribunal which had made a costs award in that case because the Tribunal found the claims of sex discrimination had no reasonable prospect of success. I am entirely satisfied having considered those cases on which the claimant had sat as a Tribunal member that the claimant was well aware of the Tribunals' powers to make awards of costs in cases where parties had conducted proceedings unreasonably and where claims had no reasonable prospect of success.

33. The claimant gave evidence of his means. I record that he has not been open and frank about disclosing details of his financial circumstances. The respondent has had to chase him to disclose information. On the 6 December 2018 the respondent's solicitor wrote to him by email requesting that no later than the 13 December he provided disclosure of all documentary evidence relevant to his ability to pay, including but not

limited to evidence of all income, capital assets owned/received by him, evidence of any liabilities and evidence of dependents (if any) reliant upon him and fill out a means questionnaire and County Court form EX140. He did not provide the information requested.

34. He provided on 10 December 2018 a witness statement which included brief details of his financial circumstances. He stated, "My assets are that I am a joint house owner which is in fact the family home consisting of my wife and three adult children". In his evidence before the Tribunal he accepted that his adult children did not live at home permanently but came home from time to time. He confirmed in his witness statement that he paid the mortgage but gave no details of the amount outstanding. At the hearing he stated that the outstanding sum due was £40,000.00 capital and that he made mortgage payments on a monthly basis of £575.00 each month. He said he earned on average £2,600.00 to £3,100.00 per month net and provided financial statements from a bank account he has with Santander ending in account number 2974 which showed a negative balance of £646.73. At the hearing he produced details of another Santander account, account number ending in 1185 which showed a balance at close of business of 15 September 2018 for £200.61. He did not provide any bank statements to show payments in and payments out but account summaries showing opening and closing balances on a monthly basis for the last three months. He also produced at the hearing pay slips from his employer which accorded with a net monthly income in the order £2,600.00 to £3,100.00. At the hearing he also provided details of the fees he was paid for his Employment Tribunal sittings which for the first eight months of the financial year showed a total figure of £5,755.00 gross. It was put to him that his property was worth in the order of £372,000.00 a search having been undertaken on the property website Zoopla. He did not dispute this figure. He confirmed the property he lived in is jointly owned.

35. I find that the claimant's evidence that he checked the position with ACAS lacks credibility given all the facts of this case. I do not find it credible that ACAS would have told him that there was a legal basis on which he could take proceedings had he explained that he was an Employment Tribunal member and that the proceedings he was wanting to pursue were against a barrister who appeared in front of the Tribunal on which he sat and made a recusal application against him. I do not find it credible that ACAS would not have pointed out there was no employment relationship between the claimant and Ms H. Finally, I do not find it credible that if the claimant had been given advice by ACAS that there was a basis on which he could pursue the proceedings he did not raise that as soon as he had seen the respondent's ET3 and the challenge to jurisdiction that was raised. Had he been assured by ACAS that there was jurisdiction, as he now says, surely he would have raised that in answer to the jurisdiction point raised in the response? The fact he raised no such argument but immediately conceded the point, and the unlikelihood that had the position been fully explained to ACAS, as he suggests it was, would have led to ACAS advising him there was a basis on which he could bring a claim leads me

to conclude that he had not checked to position with ACAS prior to issuing proceedings.

36. Rule 76 provides that 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 has no reasonable prospect of success.

Rule 84 provides that in deciding whether to make a costs order if so in what amount the Tribunal may have regard to the paying party's ability to pay.

37. I can deal as a short point with the claimant's argument that there is no financial loss to the respondent as she is covered by the Mutual Indemnity Fund. Under the terms of that cover the respondent is required pay to the MIF any sums recovered by way of a costs order and the fact that the respondent has insurance cover is irrelevant to consideration to the purposes of this application, see **Mardner v Gardner UKEAT/0483/13 at 35-36.**

38. The respondent referred me to the following authorities in considering the costs application:

> ***Betsi Cadwaladr University Health Board v Hughes*** **UKEAT/0179/13** with reference to the seriousness of the test for harassment; the definition of the term vexatious as defined in ***E T Marler Ltd v Robertson*** **[1974] NIRC 76E**, the definition of vexatious given by Lord Bingham LCJ in ***AG v Barker*** **[2000] 1 FLR 759** as adopted by the Court of Appeal in ***Scott v Russell*** **[2013] EWCA Civ 1432** and finally the correct approach in considering ability to pay in costs application as summarised by Simler J in ***Chadburn v Doncaster and Bassetlaw Hospital Foundation Trust*** **UKEAT/0259/14.** I have taken account of all those authorities in coming to my decision in this case.

39. The respondent's case is that the Tribunal has discretion to award costs on each of the three grounds namely that the claim had no reasonable prospect of success, that the claimant acted unreasonably in bringing the proceedings and finally that the claim was vexatious.

40. The claimant opposes the cost application. He relies on a prompt withdrawal of the claim. He states in his witness statement, "Whilst acknowledging that I am a judicial office holder I submit that I am a lay member with no legal training and remain a litigant in person on this case. As an ET Lay Member I would give advice on the industrial aspects of a

Tribunal Hearing not the legal framework. He also submitted "I have limited means to meet the respondent's costs".

CONCLUSIONS

41. The claimant accepted on receipt of the response that the claim had no reasonable prospect of success and withdrew the claim. That was inevitable because absent an employment relationship between the claimant and the respondent there was simply no jurisdictional basis on which the Tribunal could consider any such claim as was brought in these proceedings.

42. The claim brought in these proceedings was based on a bare assertion of discrimination. The claimant could not have been able to prove that the respondent's motivation was discriminatory because the respondent would always be acting on instructions which are protected by professional privilege and cannot be disclosed.

43. The claim had no reasonable prospect of success on any proper legal analysis and the claimant did not undertake any proper legal analysis before embarking on the proceedings. The claimant accepts that the claim had no reasonable prospect of success because and it was withdrawn once he had considered the response.

44. Turning to unreasonable conduct in bringing the claim the claimant's evidence to me is that he genuinely believed in the claim and that he was entitled to bring it. Accepting for the moment what he says was that belief reasonably founded? The claimant has sat on employment law and particularly discrimination cases for many years. He is a specialist race panel member. He has 18 years experience as a full-time Trade Union Officer and is Union Regional Organiser. That role includes representation of members both individually and collectively, identifying training requirements, and managing others who provide representation for Union members. Key requirements of his role include a detailed knowledge of the key areas of employment law and an ability to research. When many of those points were put to him he was equivocal in his responses as to his knowledge of them and ability to deal with them, but I accept on the evidence I have heard that they were an expected part of his function in his job role and that he was required to meet those requirements and possess that knowledge.

45. In my view for him to suggest, as he has done in this hearing, that he did not have the necessary knowledge of the relevant legal principles in relation to discrimination law is fanciful. He has sat on many discrimination cases over many years. He will have attended annual non-legal members' training over many years. I am aware as a Regional Employment Judge that the non-legal members' annual training which is centrally prepared and takes place in all Employment Tribunal Regions annually, has frequently considered the area of discrimination law. I also find that he was somewhat reckless in embarking on proceedings without specifically

checking, because I do not accept his evidence regarding his contacting ACAS, on what legal basis he could bring a discrimination claim against Ms H. He was unable to provide a satisfactory answer as to why he did not consider the position more carefully before presenting his claim, not least after the rejection of his complaint by the BSB. He could have discussed the matter of his intended action with Professor Employment Judge Neal, he could have discussed the matter with his Regional Employment Judge, he could have taken independent legal advice. He did nothing other than rely on himself, in circumstances which he should have regarded very seriously given his own knowledge of and judicial involvement in Employment Tribunal proceedings. His assertion in his witness statement, "Whilst acknowledging that I am a judicial office holder I submit that I am a lay member with no legal training and remain a litigant in person in this case" does not bear close scrutiny or ring with credibility. I am entirely satisfied that the claimant acted unreasonably in bringing the proceedings.

46. The third aspect I must consider is whether the claim was vexatious. The respondent's suggestion is that it was an act of retaliation to harass Ms H and that the claimant ought reasonably to have known that the claim would have that effect. The term vexatious was defined in ***E T Marler Ltd v Robertson*** and revisited by Lord Justice Beatson in the Court of Appeal in ***Scott v Russell.*** At 30. Beatson LJ quotes the definition of vexatious given by Lord Bingham LCJ in ***AG v Barker 2000 1 FLR 759 at (19)***

> *"The hallmark of a vexatious proceeding is…… that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."(emphasis added)*

47. The respondent's primary case is that the claimant's claim was brought for an improper purpose namely to retaliate against the respondent and punish and/or extract money from her for having made a recusal application against him. In that regard they rely on the terms of the detailed complaint to the BSB on which the claimant alleges that the respondent had "coerced" false evidence from witnesses. The claimant denies that was he was motivated by retaliation against Ms H but given that the BSB had rejected his complaint against Ms H, which was exactly the same contextual basis on which he very soon afterwards launched these proceedings, that must raise the question as to his motive, and whether I am satisfied on the balance of probabilities that his motive was retaliation and therefore vexatious.

48. The claim could be seen as an attempt by the claimant to revive the consideration of the allegations made against him in the original recusal application to give him an opportunity to challenge what was alleged about

his behaviour in the course of the earlier hearing, which resulted in the Tribunal recusing itself. That would be to go behind the decision made on that recusal application, a decision made by a Tribunal of which the claimant was a member. It is very clear to me that the claimant reacted very strongly to the allegations about his behaviour made in the recusal application.

49. In weighing this aspect evidentially, I take into account my earlier finding that he did not take advice from ACAS, or indeed from anyone, as to the legal basis on which he could pursue the claim he subsequently brought. Was that simply reckless or was it that he simply wanted to cause the maximum disruption that he could to Ms H? I have found this the most difficult aspect of this case on which to come to a decision but on balance I am satisfied that the claimant's proceedings were brought for an improper purpose namely to retaliate against Ms H. Had the claimant paused for reflection, and had he taken advice, he would have been informed there was no legal basis on which he could bring proceedings. That must raise the question why did he do as he did and issued proceedings, very shortly after the rejection of his complaint by the BSB, notwithstanding his own experience and knowledge as a lay member of Employment Tribunals, taking no advice and embarking on what he must have known from his own experience was a course of action which held risks to him as to costs. The only logical conclusion I can come to is it was because he was still feeling aggrieved over Ms H's recusal application and this was the way he chose to make that point to her.

50. Applying the definition of vexatious set out above the claimant's actions fall within that definition. The proceedings had no basis in law. The effect of the proceedings was to subject the respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant (none in this case) and it is the use of the Tribunal process for a purpose which is significantly different to the ordinary and proper use of Employment Tribunal proceedings. The impact of these proceedings against Ms H is quite clear from the content of her letter to the Tribunal (page 109-112) where she sets out in some detail the very real and adverse effect the proceedings have had upon her and the upset and disruption it has caused her. The allegation of discrimination against her has gone very deep and to quote, "It was, frankly, humiliating and in my ET3 I had to "prove" my anti-discrimination credentials in answer to the claimant's misconceived claim. Indeed, my work history and my commitment to the elimination of discrimination can readily be found on the internet, both from my CV and by reference to publications which I have authored."

51. For all those reasons I find that the respondent has succeeded in establishing that the basis under which a cost order may be made has been established under Rule 76(1) (a) and (b) namely no reasonable prospect of success, unreasonable conduct of the proceedings and vexatious conduct of the proceedings. In all the circumstances of this case I consider it is appropriate to exercise my discretion and to make an award

of costs in favour of the respondent given that these proceedings should never have been brought.

52. The claimant has not been fully open or frank in giving details of his financial position and what has been provided to the respondent and the Tribunal is limited. I may have regard to his means when deciding whether to award costs. I take into account the guidance of Simler J in ***Chadburn v Doncaster and Bassetlaw Hospital NHS Foundation Trust***. I am not required to limit the amount of costs order to a sum that can be paid at either the time of the order or within some specified timescale but there must be "a realistic prospect the appellant might at some point in the future be able to afford". I am satisfied that there is a realistic prospect the claimant will at some point be able to afford to pay the costs order that follows.

53. The costs order sought is £14,354.00. I accept the full breakdown of those costs that has been provided (32-34). The claimant is critical of that sum on the basis that the respondent indicated to him on 19 September 2018 that the respondent's costs were likely to be in the order of £10,000.00 including the hearing listed for 5 December 2018 (a preliminary hearing to identify claims and issues, not the current costs hearing). Having reviewed the details of the work undertaken and the basis of the calculation of the costs I am not persuaded that they are excessive. The facts of the case and the background to it were not at all straightforward. The case was very sensitive given the respondent occupation and the actual impact of these proceedings on her and the potential impact upon her professional career. As to the use of leading counsel in all the circumstances of this unusual case it is in my view appropriate that it was leading counsel, someone whom Ms H considered to be a good professional friend bearing in mind the sensitivity of the matter. That is of importance to her. That is understandable in all the unusual circumstances of this case and in my view is justified. In all the circumstances I make an award that the claimant pay to the respondent costs in the amount of £14,354.00.

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Regional Employment Judge Byrne

Date: …18.01.19……..

Sent to the parties on: ....18.01.19....

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For the Tribunal Office