Appeal No. UKEAT/0246/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 23 July 2019
Judgment handed down on 17 October 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR J BROOKS — APPELLANT

NOTTINGHAM UNIVERSITY HOSPITALS NHS TRUST — RESPONDENT

JUDGMENT

Revised 18 October 2019

APPEARANCES

For the Appellant	Mr Sam Neaman (Of Counsel) Instructed by: Boyes Turner LLP Abbots House Abbey Street Reading Berkshire RG1 3BD
For the Respondent	Mr Tom Coghlin (One of Her Majesty's Counsel) Instructed by: Browne Jacobson LLP Victoria Square House Victoria Square Birmingham B2 4BU

SUMMARY

COSTS

The Respondent made a successful application for costs following the Tribunal's dismissal of the Claimant's complaints of whistleblowing detriment. The Claimant appealed against the Tribunal's Costs Judgment, arguing that its conclusions were perverse. In particular, it was said to be perverse to award costs on the basis that the claim had been unreasonably pursued in light of the Tribunal's own findings that there had been protected disclosures and detriments and that "*many*" of his claims had no reasonable prospects of success, thereby implying that at least some of them did.

Held: Appeal dismissed. The Claimant had failed to demonstrate that the matters relied upon crossed the high threshold of perversity. On a proper reading of the Costs Judgment with the Liability Judgment, it was apparent that the Tribunal was entitled to reach the conclusion that the Claimant's claim had no reasonable prospect of success.

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THE HONOURABLE MR JUSTICE CHOUDHURY

1. I shall refer to the parties as they were below. The Claimant appeals against a decision of the Nottingham Employment Tribunal (“the Tribunal”) ordering the Claimant to pay the Respondent its costs having dismissed his complaint of whistleblowing detriment. Those costs are estimated to be in the region of £170,000.

Background

2. The Claimant is employed by the Respondent NHS Trust as a Consultant plastic surgeon. Between about April 2011 and October 2014, the Claimant raised a number of concerns with the Respondent about staffing levels in the children’s burns unit and other matters relating to that department, which in his view had consequences for the health and safety of patients. The Claimant claimed to have made a total of 18 protected disclosures within the meaning of the **Employment Rights Act 1996** (“ERA”). He contended that, as a result of having made those disclosures he was subjected to a number of detriments by the Respondent. There were 40 such alleged detriments in total (although, in the event, the Tribunal was only required to adjudicate on 37 of them).

3. The Claimant’s claims were considered by the Tribunal over the course of a 27-day hearing before Employment Judge Solomons and members between November 2015 and February 2016. By a judgment dated 7 September 2016 and sent to the parties on 16 December 2016 (“the Liability Judgment”), the Claimant’s claims were dismissed.

4. Although the Tribunal found that the Claimant had made several protected disclosures and had suffered a number of detriments, it concluded that the Claimant had not established that any of those detriments were because he had made those disclosures. In coming to that

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conclusion, the Tribunal was influenced, in particular, by draft correspondence which the Claimant had written before the first of his alleged protected disclosures. That correspondence suggested that the matters of which he was complaining were very similar to issues he had raised previously, thereby undermining his suggestion that those matters were attributable to the making of protected disclosures. At paragraph 39 of the Liability Judgment, the Tribunal said as follows, having reviewed the content of the earlier pre-disclosure correspondence:

> **“39… Many of the matters referred to in that letter by way of complaint by the Claimant are very similar to the matters which the Claimant raises in his claim as alleged detriments and which he seeks to attribute to his whistleblowing, for instance fabricated allegations, his managers seeking written complaints about him, complaints against him not being properly investigated, meeting being organised at times which she couldn’t make, not being paid outstanding backpay, experienced repetitive and extended harassment, being subjected since his arrival to chronic undermining, marginalisation and harassment, being isolated, harassed, undermined and subjected to fabricated allegations. This document shows very clearly that the Claimant, from his standpoint, long before he made any protected disclosures and even further before the first of the alleged detriments in this case, was being subjected to the type of behaviour which he complains about in his list of alleged detriments and contradicts his account advanced in his evidence that before he started making protected disclosures he suffered nothing worse than resistance to his desire to change which was expected and manageable and that there had been a sea change after he started making protected disclosures when things suddenly became personalised and hostile. The document shows clearly that well before he started making protected disclosures he perceived precisely the same sorts of issue. This evidence in the view of the Tribunal points to 2 important facts:-**
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> > **(i) It casts considerable doubt over the reliability of the Claimant’s evidence and indicates that he has been shown to be distorting the truth in relation to a central theme of his evidence and;**
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> > **(ii) It clearly calls into question the Claimant’s case on causation because if he was perceiving the same sorts of behaviour against him before he started making protected disclosures as he did afterwards then it would indicate that’s what he perceived later was unlikely to be caused by his whistleblowing.**
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> **In the view of the Tribunal the case which the Claimant has advanced, namely that his perceived treatment deteriorated after and because he started making protected disclosures from April 2011 onwards is a case which is contradicted by the documentation referred to above.”**

5. The Tribunal in the Liability Judgment then went through each of the 40 alleged detriments to determine whether any of them were the result of the Claimant’s protected disclosures. The Tribunal rejected the Claimant’s case in respect of all of them. In doing so, the Tribunal was critical of the Claimant as a witness, stating as follows:

> **“42… The Tribunal did not find the Claimant to be an impressive witness. In particular it appears to be the Claimant’s case that everything that happened to him in this case was part of a conspiracy against him brought about by his making of protected disclosures. That is a contention which we cannot accept and indicates that the Claimant was seeking to embellish his evidence during the course of his**

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> **witness statement and cross examination. It is notable that throughout his cross examination he lapsed into speechmaking at many points and at times refused to accept that which was patently obvious. For instance his denial that his reference (page 1191) in a letter of 7 February 2014 to "extremely toxic and vindictive characters" was a reference to Mr Perks. On the other hand we found Mr Perks to be a reliable and truthful witness whose evidence was consistent with the contemporaneous documentation, who sought to answer questions directly rather than lapsing into speech making and who on a number of occasions was prepared to accept criticisms where they were reasonably made…."**

6. Accordingly, the Claimant's case was dismissed. The Claimant's appeal against the Liability Judgment was rejected on the sift by Simler J (President) (as she then was) and then subsequently at a Rule 3(10) Hearing before HHJ David Richardson on 23 August 2017.

7. The Respondent made an application for costs on three grounds:

   a. The first was that the Claimant had advanced a case which he knew or ought to have known had no foundation and gave untruthful evidence in support of central themes of that case, and that he had thereby acted unreasonably in bringing and/or conducting the proceedings;

   b. The second ground was that the allegations as to detriment made by the Claimant (or a number of them) were so weak as to have no reasonable prospects of success and the Claimant acted unreasonably pursuing them; and

   c. The third was that the Claimant produced a witness statement that was unreasonably long and repetitive and that he thereby acted unreasonably once again in conducting proceedings.

8. The Claimant resisted that application for costs on the grounds that his claim was arguable and not one which had no reasonable prospects of success; it was not unreasonable to bring and continue proceedings; and that the Claimant's witness statement was not in breach of the Tribunal's order in relation to the provision of the same.

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9. The application was considered by the Tribunal at a costs hearing held on 11 and 21 May 2018. The Claimant was represented at that hearing by his then solicitor, Mr L Davies. The Respondent was represented, as it is before me, by Mr T Coghlin QC.

10. In its conclusions, set out in a reserved judgment sent to the parties in June 2018 (“the Costs Judgment”), the Tribunal found as follows:

> **“Conclusions**
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> **9. As we found a central theme of the Claimant’s case was the assertion that his treatment or perceived treatment at the hands of the Respondent dramatically worsened after the point when he made protected disclosures. This was central because unless the Claimant could show a deterioration of his treatment or perceived treatment after the point at which he made protected disclosures, his claim that his treatment was influenced by the making of those protected disclosures was fatally weakened.**
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> **10. We rejected the Claimant’s case on this central theme since it was squarely contradicted by the contemporaneous documentation including in particular the letter drafted by the Claimant himself between March 2010 – January 2011 (see Judgment paragraphs 37 to 39, 61 and 143). We found (paragraph 39) that the Claimant has been shown to be distorting the truth in relation to a central theme of his evidence. Furthermore (paragraph 42) the Judgment indicates that the Tribunal did not find the Claimant to be an impressive witness and found that he had sought to embellish his evidence in both his witness statement and in cross examination. We made that finding in the context of a second key theme of the Claimant’s case, which was that everything that happened to him in this case was part of a conspiracy against him brought about by his making protected disclosures (paragraph 42).**
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> **11. A third key plank of the Claimant’s claim was that in a meeting on 19 December 2011 Mr Perks had threatened to “finish him” and certainly wanted to remove the Claimant from his department. The Tribunal found that on the balance of probabilities that remark was not made.**
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> **12. Our conclusion is that the Claimant, although not being deliberately untruthful or dishonest with the Tribunal, had a distorted perception about what in fact happened to him and the reasons for it which led him to conclude that he had a case which was eminently arguable before the Tribunal. However, we are satisfied that any reasonable and objective person looking at the evidence which was available to the Claimant at the time of the commencement of the proceedings would not have so concluded.**
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> **13. It is clear in the view of the Tribunal that many of the allegations of detriment on the grounds of public interest disclosure made by the Claimant were so weak as to have had no reasonable prospect of success. Examples are as follows …”**

11. The Tribunal then proceeded to set out 17 examples of detriments which were considered in the Liability Judgment and which it concluded had no reasonable prospect of success. It then went on to say as follows:

> **“14. The above are but examples of which more are to be found in the Judgment, of allegations made by the Claimant which in our conclusion had no reasonable prospect of success in the light of the documentation and material available to the Claimant prior to the commencement of his proceedings, and the pursuing of those allegations during the Hearing amounts to unreasonable conduct of the proceedings.**

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15. The Respondent also contends that the Claimant was guilty of unreasonable conduct and that he was in breach of a Tribunal Order by reason of producing a witness statement which was unreasonably long and repetitive and contained large amounts of argument, hypothesis and irrelevant material. The Order for the witness statement, made by Employment Judge Heap, had been to serve a witness statement which is full but not repetitive which sets out all the facts about which a witness intends to tell the Tribunal relevant to the issues as identified above (at the case management discussion), but must not include generalisations, argument, hypothesis or irrelevant material.

16. The witness statement which ran to over 1,000 paragraphs and 214 pages was to an extent repetitive, and contained a number of generalisations and some argument and arguably some irrelevant material. However, the Tribunal has concluded that there were so many allegations which were made in this case, and such a large amount of evidence, that it was inevitable that the Claimant would have to produce a very lengthy witness statement, and inevitable also as is common that he would seek to argue certain parts of his case through the evidence that he was giving in the witness statement. In those circumstances the Tribunal does not accept the Respondent's contention that the Claimant was in breach, and certainly not deliberate breach of the witness statement order or that the production of such a witness statement could be said to amount to unreasonable conduct of the proceedings. Although it took some time to read the Claimant's witness statement and for him to be cross examined upon it, we are not satisfied that the excision from that witness statement of matters which were said to be irrelevant or repetitious would have made any substantial difference to the length of the Claimant's evidence, and of course there was no application made by the Respondent to excise any parts of the witness statement during the course of the Hearing.

17. Accordingly, for the reasons set out above, the Tribunal concludes that the Claimant presented a case which had no reasonable prospect of success and acted unreasonably in pursuing such a case over a very lengthy Hearing. In those circumstances, and being so satisfied, we have the discretion to make a Costs Order against the Claimant."

12. In exercising its discretion, the Tribunal took into account various matters, including the fact that the Claimant was advised, the absence of dishonesty on his part and his means, and decided that the Claimant should be liable for the Respondent's costs, such costs to be assessed if not agreed.

13. It is against that judgment that the Claimant now appeals.

Legal Framework

14. Rule 76 of the *Employment Tribunal Rules of Procedure 2013* ("the ET Rules") govern the awarding of costs by the Tribunal. So far as relevant, it provides:

"76. Where a costs order or preparation time order may or shall be made

(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

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

15. Rule 84 of the ET Rules deals with the ability to pay. It provides:

“84. Ability to pay

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.”

16. It is well-established that the structure of these provisions dictates a three-stage approach: the Tribunal must first consider the threshold question of whether any of the circumstances identified in Rule 76 (1) applies, and, if so, it must then consider separately as a matter of discretion whether to make an award. If it is decided that an award of costs should be made, the final stage (treated by some of the authorities as part of the second stage) is to decide what amount of costs to award: see **Vaughan v London Borough of Lewisham (number 2)** [2013] IRLR 713; and **Haydar v Penine Acute NHS Trust** UKEAT/0141/17/BA, 12 December 2017 at [25].

17. It is also well-established that as a decision on costs involves the exercise of discretion by the Tribunal, the EAT will rarely interfere with the Tribunal’s decision. In **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] ICR 420, [2012] IRLR 78. Mummery LJ held as follows:

“6. The tribunals below did not agree about the exercise of the discretion. That is not surprising. A familiar feature of all litigation is that experienced judges may sensibly differ on how, in the particular circumstances of the individual case, a costs discretion should be exercised. Parties and prudent advisers should take account of that factor when considering whether a costs order is worth appealing.

7. As costs are in the discretion of the employment tribunal, appeals on costs alone rarely succeed in the Employment Appeal Tribunal or in this court. The employment tribunal's power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the employment tribunal's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The employment tribunal manages, hears and decides the case and is normally the best judge of how to exercise its discretion.

8. There is therefore a strong, soundly based disinclination in the appellate tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. I have noticed a recent tendency to seek permission more frequently. That trend

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is probably a consequence of the comparatively large amounts of legal costs now incurred in the employment tribunals.

9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The employment tribunal spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The employment tribunal is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties."

Grounds of Appeal

18. The Claimant sought leave to appeal in respect of seven grounds of appeal. Leave was granted by Laing J on the sift in respect of all of them. However, Mr Neaman, who appeared for the Claimant, confirmed that only grounds 1 to 5 and 7 are being pursued. These are as follows:

a. Ground 1 - the Tribunal's conclusion that the Claimant's claim had no reasonable prospect of success was perverse;

b. Ground 2 - the Tribunal's conclusion that the Claimant acted unreasonably in pursuing that claim was perverse;

c. Ground 3 - the Tribunal's decision to award costs was perverse in circumstances where it was found that the Claimant did not act in a deliberately dishonest manner;

d. Ground 4 – the Tribunal erred in failing to take into account relevant public policy considerations applicable to NHS whistleblowers and the need to avoid deterring such whistleblowers from coming forward by the making of large costs orders when those claims fail;

e. Ground 5 – the Tribunal took irrelevant matters into account;

f. Ground 7 – the Tribunal's judgment was not, when taken as a whole, '**Meek**-compliant' (**Meek v Birmingham City Council** [1987] IRLR 250) in that it is not clear why the Tribunal concluded that his claim had no reasonable prospect of success

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in circumstances where the Tribunal did not expressly state that each and every one of his allegations was misconceived.

19. At the hearing before me, Mr Neaman on behalf of the Claimant, very sensibly, took Grounds 1 to 5, which are all aspects of an overarching challenge on perversity grounds, together.

Submissions

20. Mr Neaman, who did not appear below, submitted that the Tribunal's conclusion at paragraph 13 of the Costs Judgement that "*many*" of the allegations of detriment on the grounds of disclosure had no reasonable prospect of success, necessarily meant that *some* of those allegations *did* have a reasonable prospect of success. As such, it was perverse to conclude that the entirety of the Claimant's claim had no reasonable prospects of success. It is further submitted that, in any case, in respect of those detriments which the Tribunal expressly considered in the Costs Judgment, the Tribunal's conclusion that there were no reasonable prospects of success was based solely on the failure to establish causation, given that the protected disclosure in each case was established. The fact that the Claimant's claim succeeded in respect of two out of the three main planks of a whistleblowing complaint, namely the making of protected disclosures and the suffering of detriment, meant that it was not open to the Tribunal to conclude that the entirety of the Claimant's case had no reasonable prospects of success.

21. Even if the Tribunal had been correct to find that the threshold condition for the making of a costs order was met, it was submitted that the Tribunal erred in the exercise of its discretion at the second stage of the analysis in no fewer than six respects:

a. The **Reynolds** Point - The Tribunal erred in its approach to causation as it failed to take into account that whilst the Tribunal was bound by the Court of Appeal's decision

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in **Reynolds v CLFIS UK Ltd** [2014] ICR 907 (and therefore constrained to consider only the motivation and thought processes of the alleged decision-makers) there was, at the time of the full merits hearing, scope for uncertainty as to whether the principle in **Reynolds** (which was a discrimination case) applied also to protected disclosure cases. He submits, that given that there is some academic debate about this issue it was an error of law to consider that the Claimant's claim in this regard had no reasonable prospect of success at all.

b. Legal Advice - The Tribunal wrongly concluded, in effect, that the Claimant had ignored proper and careful legal advice that his claim had no reasonable prospects of success.

c. Means - The Tribunal did not have sufficient evidence on which to base a conclusion that the Claimant had the means to pay a costs award, particularly one which would be in excess of £150,000, and the Tribunal erred in making reference to the "stretched resources" of the Respondent. In referring to the latter, the Tribunal took into account an irrelevant factor given that, since the decision in **Kovacs v Queen Mary and Westfield College** [2002] ICR 919, it is clear that the receiving party's means are not to be considered.

d. Public Policy - The Tribunal should have considered the public policy interest in encouraging, rather than deterring, those within the NHS from making protected disclosures in good faith and from having recourse to an Employment Tribunal. A large costs award against the Claimant would necessarily deter others within the NHS from coming forward.

e. No dishonesty - The Tribunal failed to take account of the absence of dishonesty on the Claimant's part in making the claims.

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f. Entire Claim - Given the Tribunal’s express finding that “many” of the Claimant’s claims had no reasonable prospects of success, thereby implying that some of the claims did, the Tribunal impermissibly exercised its discretion on the basis that the entirety of the Claimant’s case had no reasonable prospects of success.

22. A further point taken in Mr Neaman’s skeleton argument (but not pursued orally) arises out of the absence of any assessment of the costs payable. Mr Neaman submitted that even if it were permissible to make a costs award, the Tribunal erred in simply moving directly to an award of the entirety of the Respondent’s costs without giving due consideration to whether an award for a proportion of its costs would be more appropriate.

23. Mr Coghlin submits that it is clear on a fair reading of the Costs Judgment that the Tribunal identified certain overarching reasons for concluding that the claim had no reasonable prospects of success, and the fact that the Tribunal identified some illustrative examples of the deficiencies in the Claimant’s case did not mean that parts of his case did have merit. As to the exercise of the discretion, Mr Coghlin submits that:

a. The Claimant’s case based on **Reynolds** is misconceived in that the law was clear and unarguable at the time;

b. The Tribunal’s approach to the question of legal advice is unimpeachable, especially in light of the Claimant’s failure to provide disclosure in relation to the same. In relation to the exercise of discretion, the Tribunal was correct to assume that the Claimant had been properly and competently advised, and that, in any event, the Tribunal’s findings were that it ought to have been clear to *him* that his claim was unsustainable. His attempt to rely upon an email after the event from the Claimant’s trial counsel, Mr Lachlan Wilson, suggesting that the Claimant had been advised that

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he had good prospects of success should be rejected as this was material that clearly could have been put before the Tribunal earlier and does not in any event affect the outcome;

c. The Claimant did not raise any issue as to means below, but in any event, the Tribunal was entitled to take the Respondent’s position into account as a matter of discretion;

d. The policy of encouraging and not deterring whistleblowers in the NHS does not confer on such persons any special protection against a costs award where the threshold requirements for such an award are met;

e. The absence of dishonesty did not preclude a costs award;

f. The Tribunal was correct to state that the Claimant’s entire case was flawed, and on that basis an award for the whole of the Respondent’s costs was justified.

Discussion and conclusions on Grounds 1 to 5

24. Mr Neaman very fairly acknowledges the high threshold that has to be crossed in order to establish his contention that the Tribunal’s decisions were perverse: see for example **Yeboah v Crofton** [2002] EWCA Civ 794, [2002] IRLR 634, CA. In my judgment, forcefully as his submissions were put, none of the matters upon which he relies takes the Claimant close to crossing that high hurdle.

25. Much of Mr Neaman’s argument as to perversity was based on the finding at paragraph 13 of the Costs Judgment that “*many*” of the Claimant’s claims as to detriment had no reasonable prospect of success, thereby implying that some of them did. However, on a fair reading of the Costs Judgments, it quickly becomes apparent the matters set out in paragraph 13 were not the only ones relied upon by the Tribunal in coming to the conclusion, at paragraph 17, that the Claimant had “*presented a case which had no reasonable prospect of success and acted*

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unreasonably in pursuing such a case over a very lengthy Hearing”. The Tribunal indicates at the start of paragraph 17 that its conclusion was “*for the reasons set out above*”. That would naturally include all of the matters set out at paragraphs 9 to 16; there is nothing to indicate that its conclusion was based on paragraph 13 alone.

26. The structure of the Costs Judgment closely follows the three grounds pursued by the Respondent in its application for costs. I have referred to these above at paragraph 7. It is apparent that the conclusions in paragraphs 9 to 12 of the Costs Judgment seek to address Ground 1 of the costs application, which was that the Claimant had advanced a case which he knew or ought to have known had no foundation and that he had thereby acted unreasonably in bringing and/or conducting proceedings. As to that ground, the Tribunal reached clear conclusions as to the inherent weaknesses in respect of the three “key planks” of the Claimant’s case, namely that there had been a “sea change” in his treatment following the making of disclosures, that everything that happened to him was part of a conspiracy against him brought about by his making protected disclosures, and that at a meeting on 19 December 2011, Mr Perks had threatened to “finish him”. The first of these planks was “squarely contradicted” by contemporaneous documentation, including a draft letter written by the Clamant himself, suggesting that the matters of which he was complaining had occurred even before making any disclosures; in relation to the second, he was found to have distorted the truth and embellished his evidence; and in relation to the third, the Tribunal found against him on the balance of probabilities. These matters led the Tribunal to conclude that the Claimant had a “distorted perception” of what happened to him and that that had led him to believe he had an arguable case when he did not. It was on the basis of these matters (i.e. the shortcomings in relation to the main planks of his case) that the Tribunal concluded that “*any reasonable and objective person looking at the evidence which was available to the Claimant at the time of the commencement of the proceedings would not have [concluded*

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that there was an arguable case]” (paragraph 12). That was, in effect, a conclusion that the Claimant had, for those reasons, acted unreasonably in bringing the claim. Mr Neaman does not challenge any of those findings as being perverse.

27. Paragraphs 13 and 14 of the Costs Judgment, which Mr Neaman does challenge, deal with Ground 2 of the costs application, which was that the Claimant had also made a number of specific allegations that were so demonstrably weak as to have no reasonable prospect of success. In my judgment, the Tribunal had already, even before getting to the specific detriments in paragraph 13, reached the conclusion that the Claimant had acted unreasonably in bringing the claim because of the critical flaws in relation to the main planks of his overall claim. That was a conclusion that the Tribunal was entitled to reach. The fact that it then goes on to refer to “many” specific allegations of detriment as having no reasonable prospect of success does not undermine that conclusion. The weaknesses in the many specific allegations of detriment give rise to further reasons as to why it was unreasonable to bring the claim.

28. Even if it were appropriate to focus mainly or solely on the content of paragraph 13, I do not consider that The Tribunal’s conclusion that “many” of the detriments relied upon had no reasonable prospect of success can, in context, be read as necessarily implying that *some* of them *did* have a reasonable prospect of success. The Tribunal made it clear that by referring to 18 specific detriments, it was doing so only by way of “example”, the implication being that most, if not all, of the remaining allegations were equally weak. Any reasonable reading of the Liability Judgment in respect of the remaining detriments clearly indicates that the Tribunal’s view was that those claims were equally weak. For example, in relation to detriment 2 (which is not specifically addressed in the Costs Judgment), the Tribunal concluded (at paragraph 44 of the Liability Judgment) that there was:

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> **“…simply no evidence to show that Mr Perks raised the matters that he did with the Claimant in this meeting on the ground that the Claimant had made protected disclosures. In relation to allegation 2 not only are we not satisfied that the the Claimant has established that he was subjected to a detriment in the form alleged but also we are entirely satisfied that the reason for Mr Perks speaking to the Claimant in the way he did had no connection whatsoever with the protected disclosures that the claimant had made prior to 19 December 2017.”**

29. Similar conclusions, based on the complete lack of evidence or lack of factual foundation in support of the causal connection relied upon, are expressed in the Liability Judgment in respect of detriments 4, 8, 16, 17, 18, 19, 20, 21, 24, 27, and 33. None of these are separately addressed in the Costs Judgment. Other allegations failed because they had been withdrawn or did not contain any separate allegations: see detriments 34 and 35. It is difficult in these circumstances to discern any support in the Liability Judgment for the contention that the allegations not specifically addressed in the Costs Judgment had any more substance than those that were.

30. Whilst the Tribunal is required to deal with the application for costs in a way which expressly addresses any reasonably arguable point put forward, it is not required to reiterate each and every aspect of the Liability Judgment relevant to the Costs Judgment where such aspect could be conveniently summarised by way of examples properly reflective of the overall conclusion reached by the Tribunal.

31. In the present case, it is reasonably clear, in my judgment, that the Tribunal, in using the term “many”, did not thereby seek to suggest that *some* of the Claimant’s claims did have a reasonable prospect of success. In the Costs Judgment, as well as expressly stating that the claims being addressed were “but examples”, the Tribunal went on to say (at paragraph 18) that this is:

> **“... not a case where the Claimant has committed one or two relatively isolated and minor acts of unreasonable conduct. In fact, his entire case was founded on his unreasonable conduct in distorting and embellishing evidence in relation to the 3 central pillars of his case, and his case was in large part misconceived even though he had made a number of protected disclosures.”**

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The Tribunal thereby acknowledged that certain elements of the protected disclosure claim had been established. However, where it ought to have been clear to the Claimant that the critical causation element of the claim - the establishment of which was necessary in order to succeed - could not be established, it was open to the Tribunal to conclude that the Claimant had proceeded with his claim unreasonably. In my judgment, given the content of the Liability Judgment, there is nothing remotely perverse or surprising about that conclusion.

Exercise of discretion

The Reynolds Point

32. The Claimant’s submission here - which was also relied upon to demonstrate that the Tribunal had erred in finding that the threshold at stage one of the analysis had been crossed - is that the Tribunal ought to have considered that it was at least arguable at the time of the hearing that, notwithstanding the Court of Appeal’s decision in **Reynolds**, the decision-maker in respect of some of the detriments relied upon had been provided with “tainted information” for which the Respondent should be liable. I consider this argument to be misconceived. That is because the relevant law, based on the decision in **Reynolds**, was unarguably clear at the time in that it was the motivation and thought processes of the relevant decision-maker that were relevant. Where there was no evidence to support a case that the relevant decision-maker was personally influenced by a protected disclosure or had knowledge of it (as was the case here in respect of detriments 10, 11, 23, 25, 26, 36 and 37), then it was open to the Tribunal to conclude that a claim that the relevant detriment was because of a protected disclosure had no reasonable prospect of success.

33. Insofar as the Claimant’s arguments were based on the case of **Royal Mail v Jhuti** [2017] EWCA Civ 1632, that was misconceived for the simple reason that that case dealt with unfair

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dismissal (for which the employer alone would be liable) and not the particular considerations applicable to discrimination and protected disclosure detriment cases where the thought processes of the relevant decision-maker are key. Mr Neaman did refer me to a passage in “Whistleblowing at Work”, IDS Brief, December 2018, in support of his contention that, notwithstanding **Reynolds**, there remained some room for debate:

> **“There is therefore no clear answer to the question of whether knowledge of a protected disclosure can be imputed to an innocent decision maker who subjects the whistleblower to a detriment”.**

34. That passage must be read in the context of the preceding paragraph, which provides:

> **“… The fact that the decision-maker can be personally liable for a detriment under the EqA led the court in Reynolds v CLFIS (UK) Ltd and ors (above) to conclude that it would be unjust to attribute the discriminatory motivation of another to that decision-maker – and that same consideration surely applies just as much to detriment under S.47B [of ERA]. As for Royal Mail Group Ltd v Jhuti (above), Choudhury J in Malik [v Cenkos Securities plc UKEAT/0100/17] was no doubt right to say that the principles it decides cannot be transplanted wholesale into the unlawful detriment context because Jhuti was an unfair dismissal case and only employers (and not individual workers can be liable for unfair dismissal). However, it should be noted that individual workers can be liable for the detriment of dismissal, i.e. termination of a contract on the ground of a protected disclosure, under S.47B(1A) as confirmed by the Court of Appeal in Timis and anor v Osipov (Protect intervening) 2018 EWCA Civ 2321, CA…” (Emphasis added)**

35. It is apparent from that the underlined passage that the writers of IDS regarded the general proposition, namely that the knowledge of a protected disclosure cannot be imputed to an innocent decision-maker who subjects the whistleblower to a detriment, as correct. Insofar as the writers of IDS considered that there is “no clear answer” that would appear to be in relation to the limited circumstances where a person with knowledge of a disclosure procures, through an innocent actor, the dismissal of the whistleblower. The passage relied upon does not therefore appear to provide Mr Neaman with the support which he seeks to derive from it. Even if it did, I agree with Mr Coghlin that as at the date of the Tribunal’s decision in the Costs Judgment, by which stage both Simler J (President) (as she then was) and HHJ David Richardson had dismissed this argument (which was also relied upon in the appeal against the Liability Judgment) as being “not arguable” and “plainly wrong” respectively, this argument was one which had no reasonable

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prospect of success. It was certainly open to the Tribunal to so conclude and the conclusion can hardly be said to be perverse.

Legal advice

36. A party that is represented may not be afforded the same degree of latitude by the Tribunal in the assessment of whether the claim had reasonable prospects of success as would be afforded to a litigant in person: see **AQ Ltd v Holden** [2012] IRLR 648 at [41] (cited in **Vaughan** at [25]). Reliance upon advice is a factor that may be taken into account by the Tribunal but positive professional advice will not necessarily insulate a Claimant against an award for costs. There may be many reasons for the advisers reaching a different view as to the prospects of success from the Tribunal: these may include the fact that the advice was based on more limited material than that which is considered by the Tribunal, the advice being based on the Claimant coming up to proof, or the advice being negligent. In the absence of any evidence to the contrary, the Tribunal is entitled to proceed on the assumption that a represented party has been properly and appropriately advised as to the merits.

37. In the present case, the Tribunal was faced with little more than a bare assertion that the Claimant had been advised that he had a good case. The Respondent, not surprisingly, had sought disclosure of such advice on the assumption that the Claimant had waived privilege in this regard. Notwithstanding that apparent waiver no evidence was disclosed to the Tribunal or to the Respondent setting out the terms of any advice received. An assertion in submissions falls short of evidence as to the advice. Such evidence would ordinarily set out the context in which the advice was given, the particular instructions which led to the advice and the evidence taken into account in coming to that conclusion. Without such contextual material, the Tribunal will have little to warrant departing from the normal starting assumption that a represented party has been

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properly advised. The difficulty for the Claimant in this regard is that not only did he not provide any evidence of the advice that he received, it is far from clear whether the critical document, namely the draft letter, which led the Tribunal to conclude that the Claimant ought to have known that his claim did not stand a reasonable prospect of success, was in fact taken into account when the advice was given. Furthermore, the Tribunal reached its conclusions based on its view as to what the Claimant himself ought to have known because it was his own pre-disclosure correspondence which undermined the suggestion that there had been a ‘sea change’ in the Trust’s attitude towards him once he made the disclosures.

38. This was not a case, as Mr Neaman sought to put it, of the Tribunal disbelieving a solicitor or indeed of assuming that the advice given by the representatives was negative and that the Claimant must have deliberately flouted that advice. The Tribunal does not make any reference to such conclusions in its decision. It merely states that it can be assumed that the Claimant had been properly and carefully advised as to the risks and weaknesses in this case and of the potential for an adverse costs order. That, as I have said, was an entirely reasonable assumption to make in the circumstances, particularly in the absence of any evidence as to the actual advice given and the basis on which that advice was provided.

39. The EAT has before it an email from Mr Wilson which was not before the Tribunal. The email adds some flesh to the bare bones of the assertion that the Claimant had been told he had a good case. However, it is brief and does not contain much in the way of contextual material referred to above. In the Claimant’s skeleton argument, it is said to have been produced merely for the EAT’s information lest it be said that the adviser’s assertion was not truthful. Mr Neaman did not seek to place much reliance on this email in oral submissions. Given that the email was not considered by the Tribunal, that was an eminently sensible approach to take.

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Means

40. There can be no real criticism of the Tribunal’s approach to the Claimant’s means. Rule 84 of the ET Rules expressly confers on the Tribunal a discretion to have regard to the paying party’s means; it is not obliged to do so. It was correct to state, as the Tribunal did, that the Claimant continued to be in receipt of his annual salary. It was also not incorrect to refer to Claimant’s own admission that he had been very successfully working in the private sector. The Tribunal’s assumption that he was no doubt earning substantial additional income through that means was also not unreasonable. The fact that the Tribunal did not have precise figures relating to that additional income did not mean that the Tribunal was not entitled to conclude that there were sufficient means to be able to discharge a substantial costs order of over £150,000 over a reasonable period of time. A conclusion that the paying party has the ability to discharge a costs order does not have to be based on evidence that the paying party has immediate access to the full sum payable. As Mr Justice Underhill (as he then was) stated in **Vaughan**:

> **“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.”**

41. Similarly, in the present case, there was no requirement to come to a concluded view that the Claimant had funds at his immediate disposal so as to be able to pay forthwith or within some specified timescale the full amount which might be assessed by the County Court in due course. The Tribunal’s conclusion was simply that, “*This is not a case in which it can be said that the Claimant’s means are such that he is not in a position to meet the costs order*”. That is another

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way of saying that there was a realistic prospect that the Claimant would be in a position to meet the costs order. Having regard to the Claimant’s earnings at the time, both actual and probable, that can hardly be said to be a perverse conclusion to reach.

42. As to the Tribunal’s reference to the Respondent’s “*notoriously stretched resources*”, Mr Neaman submits that the Tribunal erred in taking any account of the Respondent’s means. He relies upon the decision in **Kovacs**. In that case, Simon Brown LJ, applying the 1993 Employment Tribunal Rules[1] (“the Old ET Rules”), which were silent as to whether the Tribunal was required or entitled to take into account either the paying party’s or the receiving party’s means when considering whether to make a costs order, held as follows:

> **“11. I turn, therefore, to the central question arising: ought Tribunal is to take account of the respective parties’ means that when exercising the costs jurisdiction under rule 12?**
>
> **12.In my judgment the clear answer to this question is ‘No’.”**

43. Mr Neaman submits that as Rule 84 of the ET Rules expressly states that the Tribunal may have regard to the paying party’s means, the decision in **Kovacs** still applies as regards the receiving party’s means, that is to say that no account should be taken of the receiving party’s means.

44. I cannot accept that submission. What was said in **Kovacs** was in relation to the Old ET Rules and cannot readily be applied in interpreting the ET Rules. There is no automatic error of law in the Tribunal referring to the Respondent’s “*stretched resources*”. It is right to note that there are good policy reasons for the means of the receiving party generally not to be taken into account. It would be unconscionable if, for example, a party that had acted unreasonably in conducting proceedings were to avoid having to contribute towards the other party’s costs merely

[1] As contained in Schedule 1 to the Employment Tribunals (Constitution and Procedure) Regulations 1993 (SI 1993/2687).

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because that other party was well-off or had substantial means or had, prudently, taken out an insurance policy which meant that it would not be out of pocket if a costs order were not made in his favour: see the discussion in **Mardner v Gardner & ors** UKEAT/048/13/DA at [34] and [35]. However, as acknowledged by HHJ Eady QC (as she then was) in **Mardner**:

> **“34… there may be cases where the means of the receiving party will be relevant but this will be highly fact specific and examples do not immediately come to mind.”**

45. The real question for me is whether the Tribunal’s reference here to the Respondent’s stretched resources can be said to render the decision as to costs unsafe in that a wholly irrelevant consideration has been allowed to tip the balance against the Claimant. I do not think that it can. In the present case, the Tribunal was not stating that the Respondent was in need of a costs order in the sense that its current means were such that it would be placed in hardship if a costs order were not made; indeed it would be nonsensical to suggest that the Respondent was in such need. That factor was therefore highly unlikely to have persuaded the Tribunal to make a costs order which it would not otherwise have made. The reference to stretched resources in that context was therefore an unnecessary additional remark which was likely to have played little if any part in persuading the Tribunal to exercise its discretion to make an award of costs.

Absence of Dishonesty

46. Mr Neaman submits that there is a fundamental difference between the Claimant who gives deliberately untruthful evidence to a Tribunal and one whose evidence is affected by having a distorted perception of what happened to them and why. The latter state of mind is, in Mr Neaman’s submission, clearly considerably less culpable and therefore must be less unreasonable.

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47. There is no rule of law that the discretion to award costs may only be exercised where deliberately dishonest conduct is shown, although if there is such conduct then a costs order may be more likely. In the present case, the Tribunal expressly took into account the fact that there was no dishonest conduct. Nevertheless, it concluded that the Claimant’s perception of events was distorted and that any reasonable and objective person looking at the evidence would not have concluded that the case was arguable: see paragraph 12 of the Costs Judgment. In my judgment, that was a conclusion that the Tribunal was fully entitled to reach. The test is not whether there was dishonest conduct but whether there was unreasonable conduct in bringing proceedings. The test of reasonableness is an objective one which will encompass a wide range of matters, one of which would be deliberately dishonest conduct, but which might also include an unreasonably distorted perception of matters. It is for the Tribunal to judge whether that perception was unreasonable in the circumstances and such that the discretion to award costs should be exercised. This Tribunal, having heard the matter over 27 days, was entitled to reach the conclusion that the Claimant’s distorted perception was unreasonable in the circumstances. I therefore see no basis on which this Appeal Tribunal could interfere with the Tribunal’s conclusion.

Public Policy

48. The Claimant’s submission here is that the Tribunal should have considered, as part of its decision-making exercise, the public policy interest in encouraging, rather than deterring, those within the NHS from making protected disclosures in good faith and from having recourse to an Employment Tribunal. I was referred to the Francis Inquiry Report, which made a number of recommendations to provide greater encouragement to and protection for those seeking to blow the whistle within the NHS. Mr Neaman’s submission is that a large costs order such as this one

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would operate as a disincentive for a claimant from bringing legitimate claims and would be contrary to the policy of encouraging NHS whistleblowers.

49. I consider this argument to be without merit. There is nothing in the ET Rules which provides for any special treatment of a particular group of whistleblowers, whether within the public sector or otherwise. A decision as to costs, based on its own particular facts, cannot have the effect of deterring a claimant from reasonably pursuing a claim where he or she alleges a detriment having made a protected disclosure. The deterrent effect of a costs decision, if any, will only be in respect of those who pursue such claims where they are wholly lacking in merit or where in bringing or conducting the claims, the whistleblower is acting unreasonably (or in any of the other ways set out in Rule 76 of the ET Rules). That is no more than is already provided for by the limited costs regime in the ET Rules. The Francis Report describes internal NHS measures which should be put in place to protect those who make disclosures; it does not suggest that the costs regime in Employment Tribunals should be relaxed or in any way softened for those who act unreasonably in pursuing complaints.

Entire Case

50. This is a further point based on the contention that by stating that many of the Claimant’s allegations had no reasonable prospect of success, the Tribunal had necessarily concluded that some of them did. For reasons already discussed above, I do not accept that contention. The Tribunal clearly did find that the Claimant had acted unreasonably in bringing and pursuing his claim.

Costs warning

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51. The absence of a costs warning does not advance the Claimant’s case. Whilst such a warning is a relevant factor to take into account, the absence of such a warning does not preclude the making of a costs order.

Conclusion on Grounds 1 to 5

52. For these reasons it is my view that the high threshold for a perversity challenge has not been crossed and Grounds 1 through to 5 fall to be dismissed.

Ground 7 - Inadequate reasons

53. Mr Neaman makes four points in support of this ground:

a. The first is that the Tribunal did not specify which of the remaining 19 detriment allegations lacked reasonable prospects of success and why. I have already referred to this above. In circumstances where the Tribunal has set out its conclusions in detail in respect of each of the 40 (or 37) detriments relied upon in the Liability Judgment, it is not necessary for it to repeat the entirety of those conclusions in the Costs Judgment. By reading both judgments together, the Claimant can be in no real doubt as to basis for the Tribunal’s conclusion that his claim had no reasonable prospect of success.

b. The second point made is that the Tribunal’s reasons failed to clarify whether the Claimant was considered to be acting unreasonably in pursuing this claim from the outset or simply in pursuing the case over the course of a lengthy final hearing. I do not see any lack of clarity in the judgment in this regard. The Tribunal concluded both that the claim was unreasonable from the outset and that proceeding with the allegations through to hearing amounted to unreasonable conduct: see paragraphs 14, 17 and 18 of the Costs Judgment.

c. The third point made is that the reasons do not make it clear whether the Respondent’s first ground for making the costs application, namely that there was unreasonable

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conduct by reason of advancing a case without foundation and giving untruthful evidence, was accepted or rejected. This argument was not pursued orally and it is easy to see why: Ground 1 of the costs application was dealt with in paragraphs 9 to 12 and 17 of the Costs Judgment.

d. Finally, it is said that the Claimant does not know why the Tribunal concluded as it did given that there were, on the Tribunal's own findings, some aspects of his claim which did have a reasonable prospect of success. This argument, which is a repeat of points made under Grounds 1 to 5, appears to me to misunderstand what is meant by stating that the claim has no reasonable prospects of success. Many claims which have no reasonable prospects of success will contain some aspects which are inevitably likely to be made out. For example, in a claim of discrimination, a difference in protected characteristic between the Claimant and the comparator, is highly likely to be made out without any difficulty; indeed, it may not even be an issue. To that extent it can be said that the Claimant had more than reasonable prospects of making out that constituent part of the claim. However, in order to succeed in his claim overall, the Claimant would have to show that the impugned act was done because of the protected characteristic. If there were no reasonable prospects of establishing that aspect of the claim, then it is open to the Tribunal to conclude that the claim overall had no reasonable prospect of success. In any case, it seems to me that this argument is based on an incorrect premise, namely that the Tribunal's reference to "*many*" of the Claimant's claims as having no reasonable prospect of success necessarily meant that *some* of them did. For reasons already discussed above under Grounds 1 to 5, I do not consider that argument to be correct.

Conclusion

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54. For the reasons set out above, and notwithstanding Mr Neaman’s powerful submissions, this appeal fails and is dismissed.