EMPLOYMENT TRIBUNALS

Claimant: Mrs C Hogan

Respondent: Liverpool John Moores University

HELD AT: Liverpool **ON:** 11 & 12 December 2019

BEFORE: Employment Judge Shotter

Members: Mr G Pennie
Ms JM Stewart

REPRESENTATION:

Claimant: Mr S Pinder, solicitor
Respondent: Mr J Boyd, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that;

The respondent's application for costs against the claimant is successful and the claimant is ordered to pay to the respondent a contribution towards costs in the sum of £5000 (five thousand pounds).

Preamble

1. This is a costs application made on behalf of the respondent following the claimant withdrawing all of her claims on 29 October 2019, the morning of the second day of the liability hearing whereupon the respondent sent to the claimant a written application for costs in a letter dated 30 October 2019. The costs claimed are in excess of £140,000 inclusive of VAT.

2. The costs application is made under rule 76(1)(a) on the basis that the claimant has acted vexatiously abusively, disruptively or otherwise, and/or 76(1)(b) any claim…had no reasonable prospect of success.

3. The Tribunal took into account lengthy oral submissions made by Mr Boyd on the 1 November 2019 cost hearing which was adjourned to give Mr Pinder time deal with the lengthy submissions made with case management orders that have since been complied with.

4. The Tribunal also has before it a substantial amount of correspondence including the a multi-page breakdown of costs carried out per fee earner prepared by the respondent's solicitor DWF, a lever arch file consisting of the cost application bundle, including the emailed application made by the respondent on 30 October 2019 in anticipation of the 1 November 2019 costs hearing, the initial Skeleton Argument together with "Respondent's Reply to Claimant's written costs Response" prepared by Mr Boyd, the email communications of DWF sent on 3 and 11 December 2019 together with the Abbey Legal Commercial Legal Policy, monthly cost reports and redacted client engagement letter.

5. In addition, the Tribunal had before it and took into account the written submissions made by Mr Pinder on behalf of the claimant sent 31 October 2019, the 'Claimant's Additional Submission in relation to costs' and the claimant's further written submissions sent by email dated 26 November 2019. The Tribunal has also taken into account a letter sent by the claimant dated 11 December 2019.

6. The documentation in this case is extensive; both Mr Pinder and Mr Boyd made detailed submissions that essentially invited to the Tribunal to make findings of fact it, having heard only a very small part of the case, which it is not prepared to do. In relation to the submissions made on behalf of both parties, the Tribunal was of the view that it could not determine part way through a liability hearing whether there was a reasonable prospect of success or not. On the face of the evidence before it, there were real issues to be decided on the evidence that was incomplete with evidential conflicts to be resolved. Only after hearing all of the evidence would the Tribunal have been in a position to consider submissions to the effect that the claimant had not articulated a clear case and there was no merit in any of her first claim. It was however in a position to deal with the second claim, concluding that it had no reasonable prospects of success.

7. The Tribunal took 2-full days considering the respondent's cost application which reflects the extend of the information placed before it by the parties and the Tribunal's attempt to refresh its mind as to the claims brought by reference to the bundles, particularly the pleadings and the evidence given by the claimant under cross-examination which led to her withdrawal. It does not intend to repeat that evidence or all of the oral and written submissions made on behalf of the parties' reference to which is set out below.

<u>The liability hearing</u>

8. On the first day of the liability hearing the Tribunal spent the whole day reading the documents enclosed within 4 lever arch files, including pleadings together with all witness statements.

9. It noted at the that the Work Allocation Model to which it had been referred to on behalf of the respondent (produced in bundle number 1) provided a breakdown of activities encompassing formal contact hours, preparation time and other academic duties which appears to be for full-time staff with no express pro-rata for part-time staff. There was no reference to time allocation for any meetings or away-days, and the Tribunal's understanding of the claimant's case was that the meetings and away-days she was required to attend could have been held outside her 0.5 contractual hours and in contrast with full-time employees she did not receive payment.

10. The Tribunal heard no evidence dealing with the relevant documents in the bundle, and it cannot say what their impact would have been on the claimant's case. On the face of the documentary evidence it appears that the claimant was required as a matter of contract and did attend meetings outside her 0.5 contract without payment or time off in lieu and this was clearly a triable issue that did not, at first blush, appear to be a claim, which on the face of it, had no reasonable prospect of success. For example, the bundle includes a minute of a legal practice course team meeting. At that meeting Fiona Fargo, one of the respondent's witnesses in this case, reminded staff's attendance at exam boards and boards of study was recorded and monitored, and an explanation was necessary for non-attendance and yet it appears no provision was made for such meetings in the Work Allocation model. These are matters that would have become clearer once the Tribunal had heard and assessed the evidence.

The two claims

11. There are two claim forms; the first received on 31 August 2017 case number 2404240/2017, and the second on 22 October 2018 case number 2416393/2018. The claimant was represented by EAD solicitors LLP throughout these proceedings. Mr Pinder is a very experienced employment lawyer and would no doubt have given the claimant legal advice on the strength of her claims and risks as to costs in the Employment Tribunal.

Claim number 2404240/2017

12. In claim number 2404240/2017 the claimant raised a number of complaints ranging from an unfair grievance hearing and outcome, unlawful age and sex discrimination affecting women over the age of 55 years in relation to a number of matters, including how work was allocated and progression from part time status to full-time status. The claimant provided Further Particulars that ran to 15-pages and Additional Further Particulars that ran to another 5-pages. It was confirmed the claimant was claiming less favourable treatment as a part-time worker; the less favourable treatment relied upon was that the claimant "wanted full-time worked for many years," her "grievance was treated in a derisory way" grievance hearing dates were offered outside the claimant's "established working pattern," she was expected to come into work outside the established working pattern with an expectation that she attended all meetings including when exam board issues were discussed, with no additional pay or time off in lieu until recently when overtime payments have

been made. The claimant compares herself with full time members of staff who were paid to attend meetings.

13. In relation to the sex discrimination complaint the claimant compared herself to a number of employees including Tony Harvey, a solicitor who held a full-time position with the respondent and received commensurate full-time salary despite working part-time as he also worked part-time for a commercial firm of solicitors. In contrast to Tony Harvey, the claimant held a part-time position but worked additional hours for which she was not paid. She also compared herself to Mr Ridyard who held a full-time lecturer post but at the same time studied on a full-time course at Oxford University. In relation to age discrimination the claimant relied on a number of comparators, she compared herself to Laura Samaroo, and she also alleged Ms Ellis had not encouraged her to apply for the role that Laura Samaroo was recruited into because the claimant was a part-time worker.

14. The claimant relied in respect of her age discrimination complaint on Mr S Cairns and Mr Ridyard who were offered and accepted positions in the business law department. The claimant did not apply for the vacancies because she was told by Mr Selfe a 2:1 degree and PhD were necessary. Mr Cairns had nearly completed his PhD, Mr Ridyard was completing a MA, neither comparators had doctorates and it is on this basis the claimant alleges she was "misinformed" by Mr Selfe because she was an older woman.

15. The claimant compared herself to a number of younger women, including Rachael Stalker and Alison Liu who had been made full-time members of staff without any interview/recruitment process being undertaken and "on an on hoc basis." The claimant alleged Rachael Stalker, who was much younger than the claimant, was supported by the respondent to a full-time position when the claimant was not because she was older. She also compared herself to other employees, Paul Fletcher and Fleur Lawrence, who had been allocated extra teaching hours in relation to the former, and "shoehorned" into a teaching role in relation to the later in comparison to the claimant who worked extra hours unpaid.

16. In the additional Further, the claimant clarified the part-time workers discrimination claim and her comparators, the less favourable treatment in relation to part-time status with specific reference to dates when the claimant was required to attend exam board meetings and required to give an explanation if she could not attend. In short, the claimant alleged she was required to attend meetings for which she was not paid or given time off in lieu, and would be criticised if she failed to attend in comparison to full time workers, such as Tony Harvey and Richard Ridyard who were not required to attend work and meetings outside their usual pattern and days of work.

17. The claimant clarified she was claiming direct age discrimination alleging D Selfe, F Faraher and A Ellis had provided her with incorrect information about the academic requirements for progression, direct age discrimination with reference to a number of comparators and direct sex discrimination.

<u>The respondent's response</u>

18. The respondent submitted a Response and Response to Additional Further, denying all the allegations and maintaining there was a requirement for the claimant to work flexibly in the contract. It admitted the claimant was required to attend Exam Board meetings, and if unable to attend would discuss the non-attendance with line managers. The meetings took place when part-time staff were not always scheduled to work and it was expected staff would take time-off in lieu. However, the Tribunal noted from the written evidence that it appeared uncontroversial that time off in lieu was not an option offered to the claimant or other part-time employees and this issue would not doubt have been explored in full had the liability hearing proceeded.

19. The Tribunal established early on one of the issues was whether the claimant, after she had been booked to lecture students and prepare, had sufficient time on a 0.5 contract to attend meetings and the like within her contractual hours. The claimant's claim was that she attended meetings outside the number of hours she was contractually obliged to work without overtime and without a payment in lieu. The Tribunal expected to hear evidence on this point, and it was clear to the Tribunal that there was a real issue concerning whether the claimant, as a part-time worker, was required to work over and above her 0.5 contract without pay or time off in lieu, and if the evidence was favourable to the claimant then if follows, her claim that she had been treated less favourably in comparison to full-time workers who attended meetings within their contracted hours, may well have succeeded.

20. In its Response to the Additional Further Particulars the respondent at paragraphs 2(C) confirmed that "when staff are not timetabled to teach, there is more opportunity to work flexibly provided this is agreed…" In paragraph 2 (iii) D there is a reference to the claimant's workload being "reduced and rebalanced to ensure she did not work more than her contracted 0.5FTE contract" which suggest a solution had been offered to a problem with the claimant working more than her contractual hours. The respondent threatened to make an application to strike out the claimant's claims and/or apply for a deposit order. This was not made.

Case number 2416393/2018

21. In case number 2416393/2018 the claimant claimed age, sex and part-time worker discrimination alleged to have occurred on 15 August 2018 when she applied for a vacancy teaching Tort, and rejected on the basis that she was required to have a PhD. The claimant made claims of direct sex and age discrimination and "indirect discrimination based on part-time worker status, age and gender."

22. In its Response the respondent maintained in early 2015 it had introduced a new recruitment policy designed to improve academic quality and a minimum of a 2:1 class of degree and PhD or one near to completion, was a requirement which the claimant did not have. The respondent pleaded part-time and full-time status was irrelevant, there were no comparators, and the claimant was ruled out as a result of her lack of qualifications.

23. The claimant provided Further Particulars in relation to both claim forms that set out a number of comparators, pleading that senior employees did not satisfy the criteria of having a PhD. This point was reiterated by Mr Pinder in paragraph 18 of the 'Claimant's Additional submissions in Relation to Costs' when lists of names are provided, ignoring the fact that the senior people listed were recruited before there was a requirement for a PhD. The Tribunal, who did not hear evidence to this effect during the liability hearing, has no knowledge when the senior employees were recruited and the terms of the recruitment relating to these individuals and this may be flaw in the claimant's logic, as she cannot apply the 2015 Recruitment Policy to individuals to whom it did not apply.

List of issues

24. A lengthy list of issues was agreed between the parties which reflected the complexity of the case. A number of part-time worker detriments were listed including an "expectation that the claimant should attend work for teaching and meetings on days which were not part of her usual work pattern" and "there being no pay or time off in lieu of pay for hours worked outside her normal work pattern…"

The liability hearing

25. Mr Pinder in the 'Claimant's Additional submissions in Relation to Costs' drew a distinction between the flexibility of the claimant's contract as described by Mr Boyd, and what had been agreed with the claimant at interview stage. Mr Boyd and the claimant had a different interpretation as to the extent of the flexibility in the claimant's contract which could only have been decided after the Tribunal had heard all relevant evidence.

26. The claimant's oral evidence on cross-examination before this Tribunal was confused. The claimant, who was not an employment lawyer, appeared to misunderstand the legal differences between direct and indirect discrimination, struggling to cope with the distinction. Despite the evidence pointing to the claimant raising legitimate grievances flowing from her part-time status, she was unable to clarify the legal basis for her claims for less favourable treatment.

27. Mr Boyd cross-examined the claimant on the PhD requirement, and she confirmed that requirement for a PhD was not deliberately directed towards her personally, and not aimed at ensuring the claimant failed in her application. The claimant's oral evidence missed the mark, she believed that her student satisfaction scores were better than her younger colleagues who had PhD missing the point that student satisfaction scores were not a requirement for the role. In short, the claimant's complaint in case number 2416393/2018 was that the respondent's recruitment policy requiring a PhD did not select the best teachers; she was experienced and a good teacher without a PhD, therefore should have been considered and was not, her career path blocked by younger less experienced colleagues with enhanced academic qualifications.

28. In oral evidence at the liability hearing the claimant gave evidence that there was nothing preventing her from publishing since 2009, and as she had not published she conceded that had not met one of the necessary qualifications for the vacant positions.

29. It was notable to the Tribunal that the claimant complained about post she had not applied for in December 2013, and in oral evidence the claimant explained she had spoken to David Selfe around September/October 2012 and was told she needed a PhD and published research, and "I knew from then on it wasn't worth applying for grade 8 posts…I had a good record, the criteria was shifting, and would like to have a chance at interview." The claimant's evidence appeared to be on the one hand the conversation with David Self discouraged her and on the other, she hoped her experienced counted for more than the PhD and published research. In respect of the job applications this was a running theme, and the Tribunal queried how the claimant could formulate a case when she had not applied for the vacant position, and how she believes she could have succeeded in the vacancies she did apply for in the knowledge that the respondent had changed its requirement in order to compete against other universities who also required PhD's and published research. In her oral evidence the claimant described herself as a "workhorse" with no opportunity for advancement, and the Tribunal accepts Mr Boyd's general submission that the claimant's claim in this respect had no reasonable prospects of success and was misconceived.

Submissions made on behalf of the respondent

30. Lengthy oral submissions were made by Mr Boyd, who referenced the written Skelton Argument. Essentially, Mr Boyd's arguments were:

30.1 The claimant was legally represented, her claim was misconceived and she must have known there was no reasonable prospects of success. There was no evidence of this before the Tribunal, however, had the claimant stood back from her second complaint she would have realised it was misconceived and had no reasonable prospects of success.

30.2 The claimant withdrew her claim after one-day, not after "bad day on the stand" but because her case was flawed and she accepted that with "all proper candour." This submission was accepted by the Tribunal.

30.3 Reference was made to the EAT decision in Chandock v Tirkey UKEAT 0190 14 1912 in which it was held the Tribunal should be given a clear statement of the essential case to which the respondent is required to respond. Mr Boyd submission was essentially the claimant had not prepared a clear statement of case, which she should have done. The Tribunal took the view that if the respondent were to consider cumulatively all of the pleadings and further information provided, a clear statement of case had been made evidenced by the fact a detailed list of issues was agreed.

30.4 Mr Boyd referenced to the agreed list of issue, arguing the claimant had not established a link with the part-time working. He referred to the

working arrangements, submitting the claimant had meetings on non-work days and this had not been done because she was a part-time worker. Mr Boyd stated the claimant's normal working pattern was Monday to Wednesday but she was contractually obliged to work flexibly and no overtime was payable by the respondent. Staff were "often" required to work additional hours and attend outside the normal work hours, the claimant did not attend and would be expected to offer an explanation. Mr Boyd did not appear to address the claimant's claim that she was required and did attend meetings for which she was not paid and other full-time staff were, and the Tribunal found there was a triable issue in respect of what working pattern had been agreed and whether it had contractual effect.

30.5 With reference to the direct age discrimination Mr Boyd raised the issue of the claimant making a claim in relation to vacancies for which she did not apply, and thereafter made "unreasonable disclosure requests." The Tribunal took the view Mr Boyd's observation in this respect was a valid one, and the claimant's claims brought in relation to vacancies she had not applied that required a 2:1 class of degree, PhD and published research were misconceived, had no reasonable prospect of success and the extent of the disclosure requests were unreasonable when it came to these claims, and gave the appearance of the claimant being on a "fishing expedition."

30.6 Mr Boyd complained about the information the respondent was required to provide in respect of a number of comparators, an example of Mr Harvey was given about the claim for age and sex discrimination. It is difficult if not impossible task for the Tribunal to comment on the validity of comparators relied upon by the claimant without hearing all of the relevant evidence, and on the face of it Mr Harvey appeared to be a valid comparator from which the Tribunal could build a hypothetical comparator if there were issues with him as an actual like-for-like comparator.

30.7 On the face of the information gleaned by the Tribunal about Mr Harvey as a comparator from its first day of reading; it appears Mr Harvey was paid under a full-time contract but did not work full-time for the respondent as he also worked for a commercial firm of solicitors. In one of the witness statements provided on behalf of the respondent reference was made to the respondent being unaware as to whether Mr Harvey received remuneration from the firm of solicitors he worked for. The Tribunal found this comment surprising, and it may have gone to credibility issues. In contrast, the claimant was part-time but on her case, expected to work additional hours unpaid and/or without a lieu payment. It is conceivable the burden of proof may have shifted, and the Tribunal can only guess on what impact the evidential shift would have had on all the other claims brought by the claimant, and unlike Mr Boyd and Mr Pinder it is not prepared to second guess what would have happened at the end of the liability hearing when all the evidence had been heard, the conflicts in the evidence resolved, the credibility issues considered and the facts applied to the law. Often, in complex discrimination and less

favourable treatment claims the resolution to the list of issues only becomes clear after the Tribunal has heard all the evidence and carried out the necessarily judicial exercise in chambers before arriving at a final decision. The claimant's case is no different from many other cases the Tribunal deals with in this way, both in terms of its complexity and resolution to the real issues in the case only when all the evidence has been heard

30.8 Mr Boyd made the valid point that the target age group of 55 years could not have resulted in a valid comparator, the PhD requirement was not changed to disadvantage those of a certain age and when the claimant applied for the vacant role she was under 55 and outside her own comparator age group.

30.9 With reference to the second claim Mr Boyd submitted that the assertion made by the claimant that the PhD requirement was not about raising standards and increasing the research profile, her argument was that it was done deliberately to discriminate or disadvantage the claimant as a part-time employee. The Tribunal agreed with Mr Boyd that this was a "hopeless assertion." Mr Boyd also reminded the Tribunal of the respondent's objective justification, which was to raise standards and the research profile. The Tribunal agreed with Mr Boyd's submission that the second claim was fundamentally flawed.

30.10 The issue of limitation and time limits could have resulted in some of the claimant's claims being struck out, but without hearing all of the evidence and deciding whether there was continuing act or not, the Tribunal is not in a position to analyse the strengths or weakness of any argument in this respect as none were made, and the Tribunal cannot assess this aspect of the defence, which had not been addressed as a result of the claimant's withdrawal.

Cost warnings

30.11 Mr Boyd relied upon cost warnings, the first sent on 10 July 2018 well before the second claim was issued, following the claimant's request for additional disclosure. The respondent invited the claimant to reconsider her request with a view to providing a "more proportionate request" and explain relevance, putting the claimant on notice that "should our client be put to unnecessary costs as a result of vexatious or unreasonable requests it would be our intention to seek an appropriate order for costs."

30.12 In a letter dated 17 September 2018 some one-month before the second claim was issued, the respondent set out why it believed the claimant's claims had no reasonable prospects of success, the costs incurred to date and the claimant was invited to withdraw. The respondent highlighted what they considered to be weak claims from claimant's response to the further information requested. The Tribunal noted that in the final paragraph on the first page of the letter the following reference was made; "We cannot see how it can be sensibly suggested that any requirement to work outside the claimant's normal

patter was "imposed" because of the claimant's part-time status …the claimant's contract…is such that you are expected to work such hours as are reasonably necessary to fulfil your duties and responsibilities." This was a key disputed issue in the case that in the Tribunal's view could only be resolved after all relevant evidence had been heard.

30.13 The claimant was accused of exaggerating the hours she had worked. This was also a key issue before the Tribunal on which it had heard no evidence, and the documentation read by the Tribunal on the first day appeared to suggest that the claimant had many hours of lecturing and torturing/contact hours booked in; the issue was all of the other time the claimant spent working and attending meetings beyond the 0.5 contract. It is not an answer to a claim bought under the Part-time Worker Regulations for an employer to say the part time worker's contract requires them to work such hours as was reasonably necessary to fulfil duties and responsibilities, such as attending meetings and away-day which full time workers are paid for.

30.14 The 17 September 2019 costs warning letter with some justification reminded the claimant that she had applied for only three positions and for those she had not applied for "it is hard not see how these claims can even get off the ground…there were clearly defined requirements…your lack of a "2:1 degree or better of relevant private practice experience, or relevant experience of teaching particular subjects and or a PhD (or being able to demonstrate that she is working towards a PhD) meant she had no prospect of being appointed to any of the position or being awarded the increase in hours in question." Deconstructing that passage, the Tribunal accepts the proposition that the claimant had no prospect of being appointed into a grade 8 vacancy for which she did not possess the necessary qualifications. The reference to the claimant, who was already working for the respondent, not being awarded an increase in hours on the basis that she did not hold the qualifications relevant to vacancies is a nonsense, and undermined the effect of the cost letter pointing to the respondent using any argument as leverage to pressurise the claimant to withdraw the case on the basis that "it is highly likely the Tribunal will award costs…"

30.15 Mr Boyd submitted the late strike out application made on behalf of the claimant was a "non-starter." The Tribunal agreed.

31. The claimant's solicitors responded to the cost warning letter on 24 September 2018 to the effect that the respondent's view had been taken without exchange of documents or witness statements and the respondent was holding back on providing information. Reference was made to the Work Allocation Model which the claimant had not seen, and the fact the respondent did not have a "formal procedure for dealing with part-time workers despite what you say about the terms of the contract, if in practice the parties have agreed a work structure, the respondent can still treat a person less favourably because of her protected characteristic…when the respondent publishes the timetable for workers, such as my client, in practice that establishes the normal working arrangement and the percentage of time for

work that has been agreed between the parties…the approach adopted by the respondent towards my client and other part time workers is less favourable with a higher degree of expectation in terms of flexibility as between the two work groups."

32. The Tribunal's recollection was that there existed contemporaneous documentary evidence in the Trial bundle that may well have supported Mr Pinder's contentions, and it was not unreasonable for work commitments of some full-time comparators to have been sought in the circumstances. Without going into any great detail, it appears to the Tribunal that Mr Pinder addressed his mind to the respondent's arguments save for one, and that was the possibility that the claimant had no case in respect of vacancies she had chosen not apply for, and her claims in respect of vacancies she had applied for had little reasonable prospect of success on the basis that she did not have the necessary qualifications, not least a 2:1 or above class of degree and the answer was not that the claimant was an experienced teacher with a good record and student feedback.

33. The respondent responded on 25 October 2018 referring to weak claims.

34. On the 6 July 2019 the claimant served the respondent with a Request for Additional Disclosure" which ran to 4.5 pages of document requests which the respondent referred to in its email of 10 July 2018 as "a significant majority…are irrelevant…we put you on notice that, should our client be out to unnecessary costs because of vexatious or unreasonable requests, it would be our intention to seek an appropriate order for costs." The respondent did not make an application to the Tribunal at the relevant time, and the relevance and fairness of the claimant's request was not considered by a judge. Mr Boyd submitted at the costs hearing that the references by the claimant's witnesses to favouritism within the department was not a protected characteristic, and her disclosure requests amounted to a "fishing expedition." The Tribunal is not in a position at a costs hearing, given the complexity of the claimant's case, to be able to satisfy itself her requests for further disclosure was vexatious and unreasonable save in respect of the second claim and in addition to its observations set out above.

35. A cost letter dated 9 October 2019 was sent after the second set of proceedings were issued and before exchange of witness statements. It is agreed between the parties both were in default of the case management orders with the result that there was effectively a last-minute flurry to produce the trial bundles (4 in total) and a considerable number of witness statements together with late production of documents on the part of the respondent. The 9 October was concerned with the exchange of witness statements which had yet to happen, and the claimant's threat to seek an adjournment. DWF wrote "This is an opportune moment to remind you that it remains my client's intention to pursue an order for costs." It was this cost that that resulted in an application being made to strike out the response on behalf of the claimant on 16 October 2019.

36. It is clear to the Tribunal that when the cost warnings were made the parties were not ready for trial, the bundle had only just been provided and it appears

some of the respondent's documents were missing. Witness statements were yet to be exchanged, with the result that the claimant was unaware of what the respondent's witnesses were saying about the claims she had brought, and could not take stock of this. It is this general state of unpreparedness that resulted in an application being made on behalf of the claimant to adjourn the final hearing, refused for a number of reasons not least the re-listing of a 2017 claim on the only available date in October 2020.

37. It is against this backdrop that the respondent threatened costs, and it is notable that the costs appeared to have increased over a short period of time. By 9 October 2019 the costs were in excess of £100,000 plus VAT and 16 October £120-125,000 plus VAT. In short, within a 7-day period the respondent's costs had increased by approximately £25,000, £5000 per day on a working 5-day week. By the time the claimant had made the decision to withdraw, the total costs between 16 October 2019 to 29 October 2019, a period of less than two weeks, was less than the costs referenced in the 16 October 2019 letter. This is an indication of the pressure the respondent tried to put on the claimant to withdraw.

Submissions made on behalf of the Claimant

38. Mr Pinder in written submissions sent on 31 October 2019 and Claimant's Additional Submission in Relation to Costs argued the following:

38.1 The claimant's claims were advanced in good faith based on a genuine belief her legal rights had been breached and "the fact that the evidence given to the Tribunal on 28 October did not assist the claims advanced does not mean that the claims were misconceived or had no reasonable prospect of success. The Tribunal accepted this submission in respect of the first claim only.

38.2 The withdrawal led to a substantial savings of costs. The Tribunal accepted this proposition, both in respect of the parties costs and the judicial/administrative time of the Employment Tribunal.

38.3 The fact that an indirect discrimination claim could have been advanced on certain points does not detract from the allegation that managers were discriminating against the claimant as an individual.

38.4 With reference to the grievance issue, the Tribunal has not reviewed the evidence and there is a difference of opinion. The Tribunal accepted this was the case.

38.5 The Tribunal were cautioned from accepting the analysis presented by counsel for the Respondent having heard part of the Claimant's case and not all of the Claimant's evidence, let alone the evidence advanced on her behalf by witnesses, and those of the Respondent. Mr Pinder submitted It is easy sometimes to think that the evidence would have been advanced without challenge, and would have been accepted by the Tribunal as true. He validly argued that "In any case before the Employment Tribunal, especially one involving so many allegations, the

Tribunal should take account of the fact that many of the points which the Claimant advanced may have been accepted. Whilst counsel for the Respondent attempted to advance the rebuttal of the whole of the Claimant's case on 1 November…the fact that the Claimant's case was withdrawn, does not of itself lead to a conclusion that the claims were always doomed to failure." The Tribunal agreed.

38.6 Mr Pinder attempted to present the Tribunal with his view of the strength of the claimant's claims and what may have been the outcome of the liability hearing. There was disputed evidence and the Tribunal is not in a position to comment on what evidence it would have found in its findings of facts, for example, in relation to Professor Leatherbarrow and the claimant's grievance. The gist of Mr Pinder's submission was that the claimant believed she was treated less favourably, and the fact that she withdrew her claims when she did does not mean they were "doomed" to failure. He failed to address the possibility that the second claim was doomed to failure. The Tribunal did not accept Mr Pinder's submissions that the claimant's claim was not doomed to failure, and had the Tribunal heard all the evidence some elements her claim may have been upheld with the exception of the second claim which had no reasonable prospects of success.

39. Having taken into account all of the oral and written submissions with reference to excessive requests for disclosure of documents, as indicated earlier in this judgment, the Tribunal found there was some evidence that the claimant may have been demanding and on a "fishing expedition" to gather evidence that may assist her in framing her case. In the words of Mr Pinder "the case evolved as the evidence came to light". The Tribunal, who did not deal with any application for specific disclosure, cannot ascertain without hearing evidence, what specific documents requested by the claimant were irrelevant other than those relating exclusively to the second claim.

40. There are many aspects of the claimant's case, taken as a whole and factoring into the litigation the behaviour of both parties including late disclosure, late production of the trial bundles and very late exchange of witness statements, which points to this ligation being complex, aggressive and antagonistic on both sides, which may account for the huge amount of costs generated by the respondent in defending this case. The path taken by this litigation is unfortunate to say the least, bearing in mind the continuing employment relationship existing between the parties.

41. It is a matter of logic that taking stock of the evidence and considering the strength of a particular claim could realistically only have taken place after exchange of the evidence and witness statements, with the exception of the second claim which had no reasonable prospect of success from its inception and that did not change throughout the litigation. The cost warning letters the claimant should have heeded not only when they were issued but for the duration of the litigation. In short, the claimant was always at a risk of costs in relation to her claims that she had been less favourably treated when people were recruited into vacancies she had not even applied for, and vacancies for which she did not satisfy the most basic of qualifications. The Tribunal found it

was unreasonable conduct on the part of the claimant for her to proceeded with the second complaint to trial.

42. With reference to the second claim Mr Pinder submitted the Respondent favoured male workers. He argued the claimant was not even interviewed for the tort job which she had taught for some years, whilst Mr Selfe was appointed to a job not advertised at Grade 8, when he does not tick any of the criteria boxes for selection and Mr Selfe as a male employee, received considerably greater advantage. He attempted to persuade the Tribunal that this tied in with the Claimant's criticisms in her second ET1 about the Respondent's recruitment, and "it is easy for the Respondent to break down the Claimant's case and to basically tell her that because they changed the criteria from time to time (and don't even tell the Claimant about that), she should simply accept it. Unfortunately, for the Respondent the Claimant was not prepared to do that and the fact that her view on the unfairness ultimately did not come out in her evidence does not mean that it was always doomed to fail…" The Tribunal disagreed for the reasons already expressed above, and took the view that it was clear from the outset the second claim had no reasonable prospects of success and it did not need to reach a liability hearing for such an assessment to have been made.

43. In respect of the first claim, to which the Tribunal has not attached any order for costs, it accepts Mr Pinder's submission that at no time during the proceedings did the Respondent suggest that the further information provided by the Claimant required an amendment to either ET1, and that was also the position of the Tribunal. The Respondent at no point made any application to strike out all or any part of the claims advanced by the Claimant. It did not however accept Mr Pinder's argument that the cost warning letters were only applicable to the period before they were written and not after, and a one-line repetition of a costs threat dating back over a year can be effective. Mr Pinder referred the Tribunal to the EAT decision in Peat and Others v Birmingham City Council UKEAT/0503/11/CEA, in which the EAT approved a costs order made against the claimants on the grounds that the claimants' solicitors acted unreasonably in failing to address their minds to the nature and extent of the collective consultation and that if they had done so, they would have been likely to have appreciated that the prospect of success "was so thin, that it was not worth going on with the hearing" (para 28, per Supperstone J). As set out in Harvey at paragraph 1088, this failure was held to be unreasonable conduct under what is now r 76(1)(a) of the 2013 Rules, which meant that it was unnecessary for the respondents to go on to satisfy the tribunal that the arguments based on individual consultation had no reasonable prospect of success (see para 29). In short, Mr Pinder submitted the respondent had not provided the claimant with a basic analysis of the weaknesses in her claim set out in a cost warning letter, and she was not guilty of unreasonable conduct when failing to address her mind to those weaknesses.

44. The Tribunal took the view that in respect of the second claim the claimant did not need a cost warning letter from the respondent to inform her that it had no reasonable prospect of success; she should have realised that from the outset prior to issuing proceedings. It does however accept Mr Pinder's argument

that the claimant's solicitors had not acted unreasonably when the cost warning letters were sent, and it is clear there was an exchange of views and an assessment undertaken as to the validity of the points raised by the respondent. The Tribunal agreed with Mr Pinder's observation that a properly formulated analysis of the case accompanied by an explanation of the costs being incurred is one thing, simply adding a line to an email about practical trial preparation is another, however, unlike Mr Pinder it took the view that the cost warning letters could be interpreted to have cumulative effect.

The claimant's means

45. The Tribunal heard oral evidence under oath, which it does not intend to repeat. In short, the claimant remains in part time employment with the respondent which may be in the balance given the indication made by the claimant that she had been invited to resign in return for the cost application being withdrawn. The claimant has savings earmarked to pay Mr Pinder his legal costs and contribute towards her son's wedding. Her income and expenditure do not balance, as the payments out slightly exceed earnings. The claimant has a small interest only mortgage of £50,000 with equity in the property approximately £100,000. There is a suggestion by the respondent the property should be sold to meet the respondent's costs.

46. The claimant at present remains employed with the respondent, however, the claimant has given an account in her letter of 11 December 2019 of an offer made whereupon she was invited to resign with immediate effect on the basis that the cost application with the possibility consequences of the claimant losing her home, would be dropped. The claimant made the point that it was difficult to reconcile how leaving her position as lecturer with the respondent would satisfy the insurance company, and the Tribunal can infer, and there was no reason not to believe the claimant, that the respondent wishes her to resign following these proceedings and this puts in question what the future will bring, despite the legislative protection enjoyed by the claimant.

47. Mr Pinder in written submissions reminded the Tribunal that the claimant is not a person of significant means, and does not have significant assets. She uses a car which had been provided to her mother, who is now in a home, under the Motability scheme which is to be returned in the New Year. The claimant has some savings which she has acquired based upon her work, and at least one of the accounts relates to the claimant's care responsibilities involving her mother. The savings are subject to other demands for the claimant, including her legal costs and matters such as her dental treatment. Mr Pinder argued if the claimant's savings were reduced so that she lived only month to month, this would be a financial sanction upon the claimant which she states would be unfair. The current mortgage term (interest only) expires in July 2024. This not an asset which involves very significant funds for the claimant, and for the claimant to be required to liquidate her property asset

would put the Claimant at a very substantial personal detriment. She would need funds from her home to pay a deposit on a new home, and the claimant has lived in her current property since about 1993, and it is a property within a half mile of the care home in which her mother currently resides. The Tribunal accepted the claimant's evidence as to her means, found her to be honest and straight-forward witness and concluded it was not just and equitable in the circumstances of this case to order her to pay costs in excess of £5000. The Tribunal is aware that costs is to compensate and not punish, a principle relevant to the claimant given the substantial amount of costs incurred by the respondent.

The law and conclusion

48. It is common ground that the Tribunal has the discretionary power to make a costs order under the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Rule 74 defines costs and rule 76 sets out when a costs order may or shall be made.

49. Rule 76(1)(a) 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 party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or (b) the way that the proceedings (or part) have been conducted; or any claim or response had no reasonable prospect of success.

50. A Tribunal must consider whether to make a costs order against a party where he or she has acted unreasonably in the bringing or conducting of proceedings". Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party (and not the party who is seeking a costs order) has acted unreasonably, such that it has jurisdiction to make a costs order. If satisfied that there has been unreasonable conduct, the Tribunal is required to consider making a costs order and has discretion whether or not to do so. Fees for this purpose means fees, charges, disbursements or expenses incurred – rule 74(1) Tribunal Rules 2013. In Employment Tribunal proceedings costs do not ordinarily follow the event, unlike County Court and High Court actions.

51. The Court of Appeal held in the well-known case of Yerrakalva v Barnsley Metropolitan Borough Council and nor [2012] ICR 420, CA, costs in the employment tribunal are still the exception rather than the rule. It commented that the tribunals power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. 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 tribunals power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings.

52. Rule 78(1) of the Tribunal Rules sets out how the amount of costs will be determined. There is provision for:• 'unassessed costs' (which cannot exceed £20,000), a detailed assessment of costs (to be determined in accordance with the Civil Procedure Rules either by a county court or by an employment judge; or, in Scotland, to be taxed according to the rules applicable in the sheriff court by an auditor of the sheriff court or by an employment judge).

53. In awarding costs against a claimant who has withdrawn a claim, an employment tribunal must consider whether the claimant has conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was in itself unreasonable — McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA. In the McPherson case, M withdrew an unfair dismissal claim just over two weeks before the postponed hearing of the claim was due to take place. The Court of Appeal warned it would be wrong if, acting on a misconceived analogy with the Civil Procedure Rules, tribunals took the line that it was unreasonable conduct for tribunal claimants to withdraw claims, and that if they did so, they should be made liable to pay all the costs of the proceedings. The Court pointed out that, in fact, withdrawals could lead to a saving of costs, and that it would therefore be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs upon withdrawal that might well not be made against them if they fought on to a full hearing and failed. Therefore, before an order for costs can be made, it must be shown that the claimants conduct of the proceedings has been unreasonable. This is determined by looking at the conduct overall.

54. The Tribunal is also aware of the well-known phrase referred to in Rodrigo Patrick Lodwick v London Borough of Southwark [2004] EWCA Civ 306 2004WL 960969 quoting ET Marler Limited v Robertson [1974] ICR 72 "Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms". "To order costs in the Employment Tribunal is an exceptional course of action and the reason for and basis of an order should be specified clearly..." particularly relevant in Ms Hogan's case as the dust of battle is yet to settle.

55. The purpose of an award of costs is to compensate the receiving party, not to punish the paying party (Lodwick above).

56. It is "rare" for costs orders to be appropriate in Employment Tribunal proceedings; they do not follow the event as in the ordinary course of litigation. Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party has acted unreasonably, such that it has jurisdiction to make a costs order. In relation to the first stage of the exercise the Tribunal decided in the respondent's favour, satisfied the claimant had acted unreasonably in bringing and continuing with the second claim that was bound to fail from the outset given the facts known to the claimant at the time. Even if the claimant held a genuine but wrong belief that the second claim had merit, this does not detract from the fact that it had no reasonable prospect of success from the outset of this litigation, and the claimant had no reasonable

grounds for taking a view that she did. The claim was unmeritorious and no amount of evidence put forward, either at disclosure stage or in the final hearing, would have strengthened the prospects of the claimant succeeding in her second claim which did not have any reasonable prospects of success either at the time of conception or during the course of its currency throughout this litigation to final hearing.

57. With reference to the first claim, the Tribunal was satisfied there had not been unreasonable conduct on the part of the claimant for the reasons set out above. It does not accept the claimant withdrawing all of her claims on the second day of the liability hearing amounted to unreasonable conduct in the specific circumstances of this case where production of the trial bundles and exchange of witness statements took place close to the trial with the effect that it was difficult for the parties, particularly the claimant, to take stock of the evidence.

58. Satisfied that there has been unreasonable conduct in respect of the second claim only, the Tribunal is then required to consider making a costs order and has discretion whether or not to do so. Taking into account the claimant's means it is just and equitable for the claimant to make a broad brush global contribution to the respondent's costs in the sum of £5,000 to be paid by the claimant, which takes into account the unmeritorious application made on behalf of the claimant to strike out the response (an unsuccessful application for which oral reasons were given) and the broad-brush costs incurred as a result pf unreasonable disclosure requests limited to the second claim. With reference to the strike out claim made against the respondent for threatening costs in the way it did, the Tribunal is aware that it is a common tactic for respondents (and represented claimants on occasion) to threaten costs in order to pressurise parties into settling or withdrawing in what is essentially a no cost forum. The claimant's first claim could not have been said to have had no reasonable prospect of success and up until the date she withdrew and the manner in that withdrawal took place, she could not have been described as acting unreasonably in the bringing and conducting of those proceedings. There existed a number of important key issues as set out by the parties at case management, the list of issues confirmed at the outset of the liability hearing that required the Tribunal to consider a complex factual matrix and a considerable number of documents. The Tribunal recognises a considerable proportion of the time and expense was uncured by the respondent defending this complaint, and the Tribunal without hearing all of the evidence and applying its findings of facts to the law, was not able to satisfy itself on the balance of probabilities that all of the claimant's claims were "extremely weak" and had no reasonable prospects of success.

59. In conclusion, the claimant is ordered to pay to the respondent a global broad-brush contribution towards the respondent's legal costs in the sum of £5,000 taking into account the claimant's means and ability to pay.

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7.1.20
Employment Judge Shotter

JUDGMENT SENT TO THE PARTIES ON
28 January 2020

FOR THE TRIBUNAL OFFICE

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