Appeal No. UKEAT/0007/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 and 22 October 2019
Judgment handed down on 21 February 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR M RADIA — APPELLANT

JEFFERIES INTERNATIONAL LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL TATTON-BROWN QC (of Counsel) Instructed by: RadcliffesLeBrasseur 85 Fleet Street London EC4Y 1AE
For the Respondent	MR SEAN JONES QC MS JUDY STONE (of Counsel) Instructed by: Herbert Smith Freehills LLP Exchange House Primrose Street London EC2A 2EG

SUMMARY

PRACTICE AND PROCEDURE - Costs

In a Liability Decision which followed a full Merits Hearing, all of the Claimant's complaints brought pursuant to the **Equality Act 2010** by reference to the protected characteristic of disability were dismissed. The Respondent then applied for costs. In a further Decision which followed a Costs Hearing, the Employment Tribunal awarded the Respondent the whole of its costs of the litigation, subject to assessment. The principal bases of that Costs Decision were that the claims had no reasonable prospect of success and that the Claimant either knew or ought reasonably to have known that; and that, on that account, he had also conducted the proceedings unreasonably, by bringing the claims and/or continuing with them after receipt of a costs warning letter to which he did not respond. The Employment Tribunal also found that, in respect of certain complaints, he had lied to, or misled the Tribunal; and it would in any event have awarded costs in respect of those particular complaints.

An appeal against the Costs Decision was allowed to proceed to a full Appeal Hearing on four grounds, all of which failed.

Ground 1 challenged a finding in the Costs Decision that, at the time of a discussion with the Respondent, about the possibility of his departing with a severance package, at which the Claimant had, for the first time, raised allegations of disability discrimination going back five years, he did not believe those allegations to have merit. However, that finding was properly made, drawing on the findings in the Liability Decision; and the Claimant had had a fair opportunity to address the point in evidence at the Liability Hearing, and to make submissions about it at the Costs Hearing.

Ground 2 contended that, if Ground 1 was well-founded, then the conclusions in the Costs Decision, that the Claimant ought to have known that his claims had no reasonable prospect of success, and, on that account, unreasonably pursued them, could not stand. However, this Ground

failed because: (a) Ground 1 failed; (b) the awards of costs on those bases in any event stood on the independent footing that the claims had no reasonable prospect of success, which the Claimant ought reasonably to have known; and (c) those latter findings were not, as such, challenged, and were, in any event, properly made without the Tribunal having wrongly relied upon hindsight.

Ground 3 challenged the Costs Decision's reliance on findings that the Claimant had given false or misleading evidence on two particular issues. But these drew on findings in the Liability Decision, in respect of which the Claimant had been fairly cross-examined at the Liability Hearing, and which the Tribunal properly regarded as central to a sub-group of complaints.

Ground 4 challenged the conclusions that the Claimant acted unreasonably in continuing with his claims after receipt of the Grounds of Resistance and/or a later costs-warning letter. But, having regard to the reasons why Ground 2 failed, this Ground also failed.

HIS HONOUR JUDGE AUERBACH

Introduction

1. I shall refer to the parties as they were in the Employment Tribunal ("the Tribunal"), as Claimant and Respondent. This is the Claimant's appeal against a Decision ordering him to pay the Respondent's costs in respect of unsuccessful complaints of direct disability discrimination, discrimination arising from disability, failure to comply with the duty to make reasonable adjustments and disability-related harassment. As the amount sought exceeded £20,000, the Tribunal directed a detailed assessment. At the Costs Hearing the Judge was told that the costs sought were in excess of £300,000. At the Hearing of this appeal I was told that the Respondent's costs were in the region of £700,000, though they have capped what they seek at £550,000.

2. Following a full Merits Hearing before Employment Judge Baty, Mrs C I Ihnatowicz and Mr D Carter in November 2016 ("the Liability Hearing"), the Judgment and Reasons ("the Liability Decision") were sent to the parties on 3 February 2017. The Costs Hearing was on 31 July 2017. On that day Mr Carter was unavoidably detained and, by consent, the costs application was heard by Employment Judge Baty and Mrs Ihnatowicz. The Judgment and Reasons ("the Costs Decision") were sent to the parties on 7 September 2017.

3. Following a Hearing under Rule 3(10) **Employment Appeal Tribunal Rules 1993**, before Lavender J, four Amended Grounds of Appeal proceeded to a full appeal Hearing. That came before me in January 2019, but, in the event, significant time was devoted to consideration of an application by the Respondent to strike out the appeal on account of certain conduct of the Claimant, and associated applications, which failed. The substantive appeal Hearing was postponed and in due course came on for a fresh Hearing, again before me, in October 2019.

4. At all Hearings both parties have been represented by counsel. At the Liability Hearing in the Tribunal the Claimant was represented by Mr Massarella, the Respondent by Ms Stone. At the Costs Hearing they were respectively represented by Mr Neaman and Ms Stone. At the substantive Hearing of this appeal before me, as in January of 2019, the Claimant was represented by Mr Tatton-Brown QC, the Respondent by Mr Jones QC and Ms Stone.

5. The claim which gave rise to the Costs Decision which is the subject of this appeal was the first of three Employment Tribunal claims. It was presented while the Claimant was still employed by the Respondent, in May 2015. The second Tribunal claim was for victimisation. Following the promulgation of the Liability Decision dismissing the first claim, the Claimant was subjected to disciplinary proceedings, in light of certain of the Tribunal's findings. This led to his dismissal, following which he presented a third claim, of unfair dismissal and victimisation. Those complaints were dismissed, following a full merits Hearing, by an Employment Tribunal chaired by Employment Judge Henderson. Two of the complaints of victimisation in the second claim were later withdrawn, but the third was heard, and dismissed, by that same Tribunal. Their Decision was promulgated on 2 November 2017. The Claimant appealed the dismissal of the unfair dismissal claim. The EAT allowed that appeal and remitted the matter to the Tribunal to consider further whether the dismissal was rendered unfair by the lack of an internal appeal. At the time of the Hearing before me, that further Hearing in the Tribunal was pending.

6. The Respondent also applied for costs in relation to aspects of the second claim. That application was heard by the same Tribunal which heard the costs application arising from the first claim. The costs application relating to the second claim did not succeed. There was no appeal from that Decision.

7. There is also an ongoing contested High Court action.

The Liability and Costs Decisions of the Employment Tribunal

8. In summary, the salient findings and features, of the Liability Decision, were these.

9. The Respondent is a global investment banking firm. The Claimant was employed by the Respondent from June 2006 as an Equity Research Analyst. The Claimant's line manager was Richard Taylor. He in turn reported to Steven Black.

10. In November 2009 the Claimant was diagnosed with Acute Myeloid Leukaemia ("AML"), and as such, it was not disputed, was disabled in law. Following that diagnosis, he had a period of inpatient treatment, returning to work in June 2010. His complaints covered various alleged episodes and matters occurring in the period from then until 2015.

11. In the Liability Decision the Tribunal said the following of the Claimant's evidence.

> **"27. We did not find the Claimant's evidence to be credible in many respects. Under cross examination, he persistently failed to answer the question put to him and was on lots of occasions evasive and had to be told repeatedly by the Tribunal to answer the questions. This resulted in a considerable extra period of time being required for his cross examination to be completed.**
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> **28. In a number of respects, we found that the Claimant either did not tell the truth or misled the tribunal. Various examples were given by Ms Stone in her submissions. We do not repeat all of those here. However examples that stand out include that the Claimant told the Tribunal that, when he left hospital following his treatment for AML, he weighed 50 to 60 kilograms. He told Professor Marks, the independent expert who saw him and prepared a report in preparation for this Tribunal, that he weight 50 kilograms at the close of his treatment. That fact was a material place of evidence in Professor Marks' report into the impact of the Claimant's AML on him. However, the discharge records from the Hospital, which we were shown, showed that the Claimant weighed 81.5 kilograms at the time of discharge. This was clearly an untruth.**
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> **29. The other example that we set out is that the Claimant suggested that he was "forced to miss his holiday" in Mexico when he had to do some additional work for the Respondent. However not only did he join family on holiday within four days of it commencing, but he also extended his holiday so that it was just as long as he wanted it to be. He finally admitted that it was misleading for him to refer to joining his family for the "last few days" of his holiday in his claim form when in fact he joined them for matter of weeks.**
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> **30. Furthermore, the Claimant also gave untrue evidence to the Tribunal in exaggerating the length of his absence from work for his knee injury. In his witness statement, he stated**

that he was injured on 21 July, returned on crutches in August and "quickly slipped back into a normal routine". However, in evidence he initially stated that he was off for "one third of the year", a considerable exaggeration.

31. Furthermore, he gave evidence to the Tribunal that he was not aware of his disabled status until towards the end of 2014, which he then corrected to say in June or July 2013. However, at paragraph 61 of his witness statement, he gave evidence that his wife, who was at the time working in the Employment Team at Herbert Smith, had advised him in May/June 2010 that "these initial steps by Richard potentially represented disability discrimination". It cannot therefore have been true that he did not find out about his disabled status until 2013.

32. We also accept that the Claimant had behaved cynically in relation to his claim by sitting on serious allegations (whether or not he believed them to be true) and choosing to deploy them tactically when he considered it to be in his interests to do so many years later. To give one example, which Ms Stone gave in her submissions, the Claimant admitted in cross examination that, if he genuinely believed that his involvement in the Moneybookers IPO in 2011 was " blatantly illegal" (as he says in his witness statement), then, as a regulated person, his involvement and his failure to report it are themselves serious compliance breaches and constitute potential misconduct. Even the fact that he had recently returned to work after his lengthy absence due to AML would be no excuse for knowingly engaging in conduct that a regulated person considered "blatantly illegal". If, conversely, he did not genuinely believe there to be a breach, his sworn evidence would be false. Furthermore, if he did not genuinely believe that there was a breach, to raise it now and in this way would itself be a serious breach (as he himself admitted when pressed in cross examination). Either way, the Claimant's behaviour as a regulated person would be a matter of grave concern. In cross examination, following a number of evasive answers, the Claimant finally admitted that the fact that he had sat on it for five years could be a cause for concern.

33. Finally, we agree with the submission of Ms Stone that the Claimant is always ready to believe the worst about anybody and that very often his assessment of events simply did not tie in with reality. Examples include the fact that, when the Claimant was taken to perfectly reasonable emails from HR concerning his return to work and personal health insurance, he regarded HR's motives as suspicious; and the fact that the seemed unable to acknowledge that, throughout the period of his employment under the management of Mr Taylor, there were numerous occasions when Mr Taylor gave him considerable praise. This unwillingness to acknowledge the obvious casts further doubt on his credibility."

12. The Tribunal found Mr Taylor's evidence to be, by contrast, thoughtful and considered. Documents backed him up and showed that he was telling the truth. He acknowledged or admitted when his memory was confused or imperfect. He was not disingenuous. The Tribunal found that Mr Black was less well prepared, on several occasions had a confused memory, and acknowledged that there were some statements that he had made that were incorrect. But he gave direct answers to the best of his ability. He was not disingenuous. Another witness for the Respondent, Mr Ions, gave straightforward replies, and was prepared to admit things against the Respondent's interest. The Tribunal said that there was no reason to doubt his credibility.

13. The Tribunal continued:

> **"37. Therefore, in the absence of contemporaneous documentation or other evidence to the contrary, where there is conflict between the evidence of the Claimant and that of the Respondent's witnesses (in particular the evidence of Mr Taylor), we are inclined to prefer the evidence of the Respondent's witnesses to that of the Claimant."**

14. The bulk of the Liability Decision set out the Tribunal's detailed and reasoned findings of fact about various matters, starting with the Claimant's diagnosis with AML in November 2009, his absence for major treatment over several months, and then return to work in June 2010, and continuing with findings about various alleged events and episodes (in particular the matters that were the later subject of his Tribunal complaints) in the succeeding years and into 2015.

15. In relation to events from the end of 2014, the Tribunal found that, in light of the Claimant's metrics for 2014 being very poor, Mr Black decided to award him a zero bonus for that year. He was not the only analyst to get a zero bonus. At a meeting in December 2014, Mr Taylor informed the Claimant of his zero bonus. The Claimant said that he regarded this as "tantamount to constructive dismissal" and that the Respondent would hear from him.

16. The Tribunal found that the Respondent had been considering a termination package for the Claimant from as early as November 2014, and Mr Taylor had also heard that the Claimant had been to an interview at another bank. Following his comments at the bonus meeting, they were concerned that he might leave, and need replacing, and contacted a search firm. But it became apparent that the Claimant was not leaving or looking for an amicable exit.

17. The Tribunal said the following, about events in January to March 2015.

> **"159. However, the Claimant returned to work in early January 2015. On 23 January 2015, Mr Taylor met with him. They discussed whether, given his comments in his mid-year review and bonus meeting, he wanted to have another go at reinvigorating his career. Mr Taylor told him that they could make a real go of it together and that he would do his best to support him. Mr Taylor did stress to the Claimant that he wanted to reinvigorate his career and it could not only be about money. He said this because he felt that money (and the Claimant's displeasure with his remuneration) had increasingly become a focus of their discussions. The Claimant told Mr Taylor that he had lost his desire to compete aggressively and that he had fallen out of love with his role.**

160. Following his meeting, and as a result of the earlier discussions which Mr Taylor had had with Mr Black and with Mr Gary Baker, the recently appointed European Deputy Head of EMEA Research, and HR, it was decided that the Respondent would now proactively offer the Claimant a severance package. At this point, Mr Taylor was simply intending to have an opening discussion with the Claimant and he had permission from Mr Black and HR to do so. He was intending to gauge the Claimant's reaction and no course of action was set in stone. In particular, he did not have the relevant approvals from higher up in the Respondent for any severance package to be agreed.

161. On 29 January 2015, Mr Taylor met the Claimant. He explained that, given the tone of their previous discussions, the Respondent would be prepared to offer him severance package on an amicable basis. He told him that he would support a package that would include full pay in lieu of his notice of £90,000, waiver of his obligations to pay any restricted cash awards paid to him in prior years' bonuses, amounting to £86,000, and in addition an ex gratia payment. As a measure of the likely ex gratia payment, Mr Taylor told the Claimant that he would expect to be able to get authorisation in a redundancy situation (which was not the case here) for about £55,000. As the Claimant did not seem impressed with that, he said that if it did not seem generous, he might be able to get approval for up to £75,000. He mentioned this figure as he knew from discussions with HR that it might be difficult for him to gain support for any figure in excess of the maximum an employee who had been unfairly dismissed might receive.

162. The Claimant then said "are you aware that I am disabled for purposes of the Equality Act 2010?" and that he was minded to sue the Respondent for disability discrimination. He went on to say that the offer was "below the right level" as he was minded to sue for disability discrimination. He said, for the first time, that he considered that Mr Taylor had personally treated him in a discriminatory manner. This meeting was the first occasion when the Claimant at any point made allegations that he had been discriminated against by reasons of any disability.

163. Mr Taylor duly escalated the matter to Kate Hamilton, the Head of HR at the Respondent, as soon as he could. He went to her office to see her and explain his recollection of what the Claimant had said. He also reported the conversation to Mr Black.

164. Mr Taylor attended a further meeting with the Claimant together with Mr Baker on 10 March 2015. The Claimant said that he would be asking for compensation for the discrimination at a level of around twice the total annual compensation that he "should" have been paid and articulated that to be around £750,000 per annum, implying a claim of around £1.5 million on top of which he indicated that he would be entitled to claim compensation for injury to feelings to the tune of £30,000 to £40,000. He made various other threats. The Claimant went on to state that he considered the harassment by Mr Taylor started in their very first meeting in June 2010 and cited a number of examples of what he said was harassment including the "hiring" of Gerardus Vos, the supposed intention to move Mr Morris, Mr Taylor's part in the Anite and Capgeminl compliance issues, that Mr Taylor had asked a head hunter to look for a replacement and the alleged "misrepresentation" regarding the broker votes.

165. Mr Taylor was shocked by the allegations. He did not consider there was any truth in them at all and he thought they were simply deployed in an attempt by the Claimant to extract a better financial package from the Respondent. However, there is no evidence that he did not take them seriously and we accept that he did take them seriously.

166. We have no evidence before us that he specifically informed HR following that meeting on 10 March 2015 of the specific allegations raised by the Claimant at that meeting. However, the Claimant's allegations of disability discrimination had long since been referred by him to HR following the 29 January 2015 meeting."

18. Further on, the Tribunal said this.

"171. Finally, much of the case presented by the Claimant has been based on three particular assertions of fact, namely his contention that Mr Taylor formed a negative view of his performance as a result of his disability; that Mr Taylor did everything he could to undermine the Claimant; and that Mr Taylor's actions were driven by a plan a to dismiss

the Claimant. Finally, therefore, we make our findings of fact in relation to those general allegations.

172. In relation to the first of these, there is no evidence that Mr Taylor formed a negative view of the Claimant's performance by reason of his AML. Looking at Mr Taylor's reviews of the Claimant's performance over the entire five year period of the working relationship, those reviews are consistently fairly balanced. His reviews and opinions of the Claimant's abilities are tied to the metrics which the Respondent sets and applies to research analysts. Furthermore, in those cases, Mr Taylor's "management score" for the Claimant's performance is higher than the average of the objective metrics. Where Mr Taylor expresses any criticism in his performance reviews, it is generally to express disappointment that the Claimant's metrics do not properly reflect Mr Taylor's views of the Claimant's talent. In his evidence to the Tribunal, Mr Taylor repeated his assessment that the Claimant is a talented analyst but one who, at some point, ceased to perform at the levels expected of him. We have seen evidence of this in the form of the Claimant's compliance behaviour, significant drops in his metrics and his expressions of dissatisfaction in the workplace (for example the reference to "coasting"). We accept that this is the opposite pattern that one would expect to see if Mr Taylor had indeed formed a negative view of the Claimant because of his AML, which he knew about from the start, back in 2010."

19. After a self-direction as to the law, the Tribunal considered whether the burden of proof had shifted. It said this.

"190. Before dealing with each of the individual allegations in the list of issues, we address the general submission made by Mr Massarella that there are certain elements to this case which provide the "more" that is required to shift the burden of proof in relation to the complaints of direct discrimination, discrimination arising from disability and harassment and reasonable adjustments complaints. He draws our attention to the whole context of the whole period of the complaints and suggests a number of things which he says amount to the "more" that will shift the burden.

191. First of all, these submissions begin with the suggestion that, from the outset, Mr Taylor's treatment of the Claimant was materially influenced by the Claimant's disability and his perception that it made the Claimant a weak link. However, as is clear from our findings of fact we have not found any evidence to establish that.

192. We move on to the individual elements in respect of which he makes submissions.

193. He submits that there is a stark contrast between the Respondent's treatment of the Claimant before and after his illness. We do not accept that. The promotion and salary rise which the claimant achieved was whilst he was away ill with AML and the Respondent knew about his AML. There was no dispute at all that the Claimant was talented (both before and after his illness). The difference was that his performance dipped as his employment went on.

194. Mr Massarella suggests that Mr Taylor's "inappropriate" question to the Claimant about his illness at their first meeting is something else which shifts the burden. However, as we will come to, we do not find that that question was inappropriate.

195 Mr Massarella cites the fact that Mr Taylor had not had training on issues relating to equalities or disability at the Respondent and criticises the Respondent's equal opportunities policy for its alleged lack of detail. However, we do not consider that the fact that Mr Taylor had not had equal opportunities training at the Respondent at the time is enough to shift the burden of proof (although it may have been relevant to the establishment of any statutory defence had allegations and discrimination been proven agonist him). Furthermore, whilst the policy could have been more detailed, that in itself is nothing which goes to shifting the burden of proof in terms of Mr Taylor's alleged motivation for any actions in relation to the Claimant.

196. Mr Massarella referred to evidence submitted by the Claimant in relation to other employees of the Respondent, for example Ms Barnfather and Mr Hoi Lam. We have not

> **addressed these in our findings of fact because they are not relevant to the issues of this claim. It follows, therefore, that they could not shift the burden of proof.**
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> **197. Mr Massarella cites the criticism made by Professor Marks about the Occupational Health Report. Firstly, as we have already noted, Professor Marks' Report was based on false information given to him by the Claimant in any event so his criticisms are to be treated with more caution in the light of that. Secondly, even if the Respondent's OH provider could have produced a better report, that does nothing to shift the burden of proof in relation to the motivation of Mr Taylor in relation to his alleged discriminatory treatment of the Claimant.**
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> **198. Finally, Mr Massarella submits that the absence of any form of ongoing support or monitoring of the Claimant after his return to work was "shocking" and that there were no reviews by OH or meetings with the claimant's manager and the Claimant was not asked about his health by Mr Taylor beyond the initial meeting. However, whilst Mr Ions candidly admitted that the Respondent could have put in place a further process of monitoring, the Respondent is entitled to take the Claimant at his word. He said he was fine to return to work and he was very keen to do so. Furthermore, further direct questions about employees' health unprompted can be intrusive and having asked questions regarding his illness at the first meeting (for which the Claimant now criticises him), we do not consider that it was inappropriate for Mr Taylor not to raise the matter again therefore. These allegations do not therefore cause the burden of proof to shift.**
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> **199. In summary, contrary to the submission that Mr Massarella made that there was ample evidence from the Tribunal could conclude that the Respondent committed acts of unlawful discrimination, we do not find that there was any evidence which could lead to this conclusion and which could shift the burden of proof in the general sense which Mr Massarella has submitted.**
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> **200. We now go to consider the individual allegations. In relation to these, as will be seen from our analysis, we have not found any evidence which shifts the burden of proof. Therefore, whether one applies the burden of proof or simply asks the "reason why" question in relation to any allegations of unfavourable treatment made out, the outcome is the same."**

20. The Tribunal then went through all of the individual allegations in the list of issues, reaching conclusions about each of them, drawing on its earlier detailed findings of fact. All of them failed on their merits.

21. In brief summary (and with some re-ordering by me), the Tribunal's conclusions were as follows.

22. At a "meet and greet" in June 2010, prior to Mr Taylor joining, Mr Taylor had asked the Claimant what his leukaemia was about. This was "a perfectly ordinary and polite enquiry by a manager coming into a job", who was aware that the Claimant had been absent for a significant time. If Mr Taylor made a reference to "managing the risks" of the business, it had nothing to do with the Claimant's disability. This could not have been harassment. The move of a certain

employee into the Claimant's team in September 2010 was a business decision because of the closure of the Paris team. It was not related to the Claimant's AML. As to an attempt to hire another individual in 2010, the Claimant was not kept out of the loop, but was involved in two of the interviews. The individual concerned would have been subordinate to the Claimant. The Claimant's view of him was the primary reason why this person was not hired. There was no evidence that this exercise was related to the Claimant's AML. It was a proper course of action that had no harassing purpose or effect.

23. The allegation that Mr Taylor had attempted to move a certain individual out of the Claimant's team in September 2010 was not factually made out.

24. The Claimant's 2010 bonus was an increase on the previous year and was not pro-rated on account of his absence with AML. This bonus decision was not related to his disability. There was "nothing to suggest" that the 2011 bonus was not awarded in accordance with the Respondent's usual principles. It was not in any way based on the AML. The same applied to the 2012 bonus. None of the bonus comparators relied upon by the Claimant was apposite. The same applied to the 2013 bonus, an additional factor affecting bonus in that year being that the Claimant had been the subject of two compliance matters.

25. It was a feature of the job that the Claimant sometimes had to work long hours, which was a provision, criterion or practice ("PCP") applied to him, but did not amount to harassment. Although the Claimant suffered some AML-related fatigue, that was not substantial, so this PCP did not put him at a substantial disadvantage. In any event, the Respondent could not reasonably have been expected to know about it. The Claimant did not mention it, but, rather, said that he was well. The Respondent was entitled to rely on this and an Occupational Health report.

A 26. An allegation that the Claimant had been forced to forego a substantial proportion of his family holiday to Mexico in 2011 failed on the facts. The few days he was required to spend in New York were the result of a perfectly reasonable business decision unconnected to his AML, and which did not place him at a substantial disadvantage (or, if there was any, the Respondent could not be expected to have known about it). Complaints concerning the Respondent not replacing a departing team member in 2012 failed, because the matter had nothing to do with the Claimant's AML. So did a complaint concerning the removing of a team member's access to a Bloomberg terminal, which was a "straightforward" resource-allocation decision, taken because someone else had a greater need to use the terminal.

D 27. In June 2013 Mr Taylor reported an issue concerning the Claimant and Capgemini to the Respondent's compliance team, following certain conduct of the Claimant being brought to his attention by two other employees. This raised a potential serious compliance breach, and Mr Taylor was obliged to report it. Thereafter the matter was handled by the compliance team. The handling of this matter was not related to the Claimant's AML.

28. Mr Taylor was alleged to have made certain negative comments about the Claimant in June 2013. Certain comments he might have made were found to have been related to compliance concerns. Other alleged comments were not factually made out, and the allegations amounted to speculation on the part of the Claimant. There was no conduct related to the AML. The Claimant's November 2013 performance review was carried out using the usual score card. There was "no evidence to suggest that this was anything to do with the Claimant's AML."

29. There were issues regarding the re-allocation of a certain individual to another team for a period of time in 2014. The Tribunal found that this was done for business reasons, which were

discussed with the Claimant and not misrepresented to him by Mr Taylor. It was a "perfectly reasonable business decision" which had no relation to the Claimant's AML.

30. The Claimant's 2014 performance review involved a full and frank discussion. Mr Taylor did not use the term "dead wood"; rather, the Claimant complained that that was how he was regarded. Mr Taylor did not follow up on this discussion because, having reflected on whether there were any ways to reinvigorate the Claimant's career, he could not think of anything more to add. There was no connection between this matter and the AML. The Claimant's 2014 bonus reflected the fact that he was not performing well, and his metrics were poor.

31. A proposal to change the Claimant's seating position in March 2014 was made for "perfectly reasonable business reasons", and, when the Claimant objected, he was allowed to have the new seat position that he wanted. There was no connection to his AML. The circulation of team rankings in November 2014, which incorrectly ranked the Claimant's team, was simply the result of a mistake by Mr Taylor.

32. The decision to produce and put forward a proposal to terminate the Claimant's employment in January 2015 was borne out of a build-up of concern over the Claimant's performance and motivation. In addition, there was a concern that he wanted to leave anyway. That was also why the Respondent contacted a head-hunter. Proposing an agreed departure with a package, as an alternative to performance management, was a normal approach to such situations in the banking industry. The proposal was just that, and not reflective of a firm decision to terminate the Claimant's employment. There was no connection to the AML.

33. Mr Taylor did not fail to take seriously the Claimant's allegations of disability discrimination made at the meeting on 10 March 2015. He had already reported these issues to HR after the Claimant first raised them in a discussion in January 2015. If he did not report the repeated allegations to HR, that was not because of, related to, or in consequence of, the AML.

34. Thus, all of the complaints failed on their merits. But, the Tribunal went on to consider time points (at paragraphs 252 – 256). All complaints relating to alleged conduct on or before 13 December 2014 were out of time. As there were no meritorious in-time complaints, there could have been no basis for finding a continuing act, so as to overcome the time hurdle in respect of those matters. Further, no adequate reason had been put forward as to why it might have been just and equitable to extend time. The Claimant was "more than capable of raising complaints when he wanted to" and, when he wanted, putting his points across in a firm manner, as he in fact did on certain occasions. All out of time complaints were therefore in any event dismissed.

35. I turn to the Costs Decision. In summary, the relevant aspects are as follows.

36. The Claimant had tabled a witness statement for the Costs Hearing and was cross-examined. The Tribunal had received skeleton arguments, which, as requested, it read after the evidence was completed. It then heard oral argument. The Tribunal also said this:

> **"15. In the first set of proceedings, much had been made by the Respondent of the fact that the first time that the Claimant raised allegations of disability discrimination (allegations which went back to 2010) was at a meeting on 29 January 2015, some 5 years later, when the Claimant's manager, Mr Taylor, had put a settlement package to the Claimant. The findings which the Tribunal made at paragraphs 161 to 162 of the Reasons for its Judgment in the first claim reflect this. The point which the Respondent made was that it considered that the reason that the Claimant brought up the allegations of disability discrimination at this point was simply as a tool to try and negotiate a higher settlement package. The Tribunal had deliberately not made a finding in its reasons as to whether or not that was the case as it was not necessary to do so in order to determine the issues before the Tribunal in the first claim. However, having read both parties' skeleton arguments in relation to costs, the Tribunal was surprised that the point did not come up in those skeletons. Having discussed this amongst itself, the Tribunal decided that, as the matter may be relevant to the determination of the costs application, it would only be right to tell the representatives before they made their oral submissions that it was surprised that there was no reference to this point and that, given it may be relevant, the**

> **representatives should have the opportunity to make submissions on the issue should they wish to. The Tribunal duly informed the representatives in this manner, setting out the background in this paragraph above.**
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> **16. After a short break, Mr Neaman (who had not been at the hearing of the first claim himself as the Claimant was represented by different Counsel), said the Claimant had asked again about the point the Tribunal had raised and asked if the Tribunal could repeat why it had raised it. The Judge duly did so.**
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> **17. Both representatives addressed the point in submissions."**

37. I interpose that therefore the sequence of events was: hearing of the Claimant's live evidence, reading of written skeletons, the Tribunal raising (and confirming) the aspect referred to in those paragraphs, and oral submissions. The Tribunal then reserved its Decision.

38. The Costs Decision itself continues with the Tribunal's self-direction as to the law. This is not criticised as such, but I will note that, after referring to the relevant Rules, the Tribunal identified that a two-stage process is required:

> **"18. The Tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules of Procedure 2013, at Rule 74-84. The test as to whether to award costs comes in two stages:-**
>
> **1. Firstly, has a party (or that party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the Claim or Response have no reasonably prospect of success? If that is the case, the Tribunal must consider making a costs order against that party.**
>
> **2. Secondly, if that is the case, should the Tribunal exercise its discretion to award costs against that party? In this respect the Tribunal may, but is not obliged to, have regard to that party's ability to pay."**

39. The Tribunal also gave itself further directions regarding the approach to be taken to the question of means, referring to pertinent authorities in that regard.

40. In turning to its findings of fact the Tribunal noted:

> **"25. We reiterate all of the findings of fact made in our Judgment and Reasons in relation to the first claim and do not repeat those here."**

41. The Tribunal went on to record that the Claimant had at all times been legally represented, and had in place legal expenses insurance, that there had at no time been any application for

strike-out or deposit Orders, nor had the Tribunal otherwise been asked to, or at any stage issued, any warning regarding the merits of this claim.

42. The Tribunal then referred to a costs-warning letter.

> **"30. On 24 March 2016, the Respondent's solicitors issued a "without prejudice save as to costs" letter in relation to the first claim. Many of the reasons which the Respondent set out in that letter as to why it considered that the Claimant's complaints under the first claim had no prospects of success were duly reflected in the findings of the Employment Tribunal when it dismissed those complaints. The letter warned the Claimant that the Respondent would seek to recover its costs for the Claimant bringing the first claim (which, at the time of the letter, were stated to be anticipated to be in excess of £200,000) unless the Claimant withdrew his claim by 1 April 2016. At paragraph 7 of the Respondent's without prejudice save as to costs letter, the Respondent states:-**
>
> ***'7. It was only in the course of trying to negotiate an increased severance payout that your client raised these very serious allegations allegedly going back five years. With respect, that action speaks for itself and we have no doubt that an employment tribunal will agree.'"***

43. There was no reply to that letter. However, it was disclosed to the Claimant's insurers, who, after taking advice, continued to support his claim. The Tribunal observed:

> **"32. However, the Claimant's solicitors were obliged to disclose the without prejudice save as to costs letter to the Claimant's legal insurers and did so. After taking advice from Solicitors and Counsel, the insurers continued the Claimant's legal insurance in respect of the first claim. The Claimant accepted in cross examination at this Tribunal that the view of the insurers as to the merits of the claim was to a large extent dependent upon what the Claimant/his Solicitors/Counsel told them."**

44. I interpose that the Claimant chose not to waive privilege, and therefore the Tribunal did not know what the advice given to the insurers, in substance, was, or on what information it was based.

45. The Tribunal continued, as follows:

> **"33. We refer to the findings of fact in our Judgment and Reasons on the first claim at paragraphs 161-162. In summary, we found that on 29 January 2015, the Claimant's manager Mr Taylor offered the Claimant a settlement package at that meeting and indicated that the amount he might get could be approved at £75,000 (which is roughly the maximum compensation payable in relation to an unfair dismissal complaint); and that, at that point, the Claimant raised the issue of disability discrimination and that this was the first occasion that the Claimant made any allegations that he had been discriminated against by reason of disability, the disability being the Acute Myeloid Leukaemia ("AML") which he suffered from in 2010. Whilst the Claimant denies that he only made the allegations of disability discrimination in the context of the settlement negotiations, we refer to our findings of fact made in our decision in relation to the Claimant's credibility in his evidence (see in particular paragraphs 27-33) and to the fact**

> **that the Claimant was more than capable of raising complaints when he wanted to do so and of putting his point across to the Respondent when he wanted to in a firm manner (see paragraph 255 of our Reasons) such that we could see no good reason why the Claimant could not have brought those complaints earlier. In addition, it is absolutely stark that nothing was said to the Respondent for 5 years but was only said in January 2015 at the point when a settlement was being discussed and where, to be able legitimately to claim in an Employment Tribunal more than the amount which the Respondent was prepared to offer the Claimant, the Claimant would need to bring claims other than unfair dismissal (for example discrimination claims or whistleblowing claims). In the light of all of these factors, we find as a fact on the balance of probabilities that the Claimant only raised these issues at this point to try and increase his bargaining position in relation to settlement negotiations and that he did not consider that there was genuine merit in the allegations."**

46. After a section concerning means, the Tribunal turned to the arguments, discussion and its conclusions, in relation to the costs application arising from the first Tribunal claim.

47. The first basis of the application was that the Claimant had conducted himself unreasonably, in view of the finding at paragraph 28 of the Liability Decision, that, in a number of respects, he did not tell the truth, or misled the Tribunal, persistently failed to answer questions and/or was evasive. Ms Stone relied on the specific examples that the Tribunal had given in paragraphs 27 – 33 of that Decision, and its finding that he had behaved cynically in sitting on various allegations. The Tribunal relied on the findings that it made in its Liability Decision. The Tribunal referred to a clutch of authorities concerning the potential significance of a finding that a party has lied (there is no criticism of its self-direction in that respect). It continued:

> **"49. However, concentrating for the moment on the first stage, we consider that the fact that the Claimant either did not tell the truth or mislead the Tribunal and sat on the serious allegations both amount to examples of unreasonable conduct on his part. Mr Neaman suggested that the examples which we gave were just exaggeration on the Claimant's part. However, that does not tie in with our findings; we found that he did not tell the truth or mislead the Tribunal. In those circumstances, we consider that that behaviour in itself was clearly unreasonable."**

48. At the second stage the Tribunal observed that it had not found that everything which the Claimant had said, or every allegation he made, was a lie; but, it continued.

> **"51. However, two of the examples we gave related, both deliberately, seriously and centrally to various of the allegations (specifically the untruth about his weight which the Claimant told Professor Marks and the suggestion in the ET1 that the Claimant was "forced to miss his holiday" in Mexico when in fact he did not).**

52. This included, in the case of the allegation regarding weight, the reasonable adjustments complaints (as that evidence went directly to the issue of whether the Claimant was placed at a substantial disadvantage) and the discrimination arising from disability complaints, as the Claimant's fatigue was relied upon as being a consequence of his disability). The issue regarding the holiday was central to most of the reasonable adjustment complaints and one of the individual complaints of direct discrimination, discrimination arising from disability and harassment.

53. Therefore, to the extent that costs were incurred in defending these particular complaints, we would, subject to the other factors that we consider in relation to the second stage later on, be minded to make an award of costs in relation to the costs of defending those specific allegations. We would not have considered that other costs incurred in defending the claim flowed from these examples of unreasonableness and would not on this particular basis have made an order in respect of the costs of defending those other elements of the claim."

49. The second basis of the costs application, was that the claims had, from the outset, had no reasonable prospect of success.

50. The first strand of the Respondent's case on this was that this was so in respect of the vast majority of the complaints, because they were out of time. As to this, the Tribunal identified that the Claimant had been unable to succeed in a "continuing act" argument, as all of the claims failed on their merits. But, given the nature of the complaints and that the alleged perpetrators were generally Mr Taylor and/or Mr Black, *had* some complaints had merits, *then* the time point might have been overcome. The Tribunal would not therefore have found the complaints concerned to have no reasonable prospect of success, merely because of the time obstacle.

51. However, the Tribunal continued:

"55. Turning to the substantive merits of the various complaints, however, we note first of all that, as Ms Stone submits, many of the large number of complaints in the long list of issues failed on multiple grounds. Firstly, in many of them, even the treatment which was said to be unfavourable/less favourable/harassment was not even established. Furthermore, in relation to all of the complaints, notwithstanding Mr Massarella's ingenious arguments trying to convince us that the burden of proof should shift, we found that there was nothing which would shift the burden of proof in relation to these discrimination complaints.

56. Mr Neaman has suggested that there might have been things which might make the burden of proof shift which were not necessarily put at the time; however, that is not the point; in our findings of fact in this respect (and we refer in particular to paragraphs 190 – 200) we found that there was nothing to shift that burden. This was not a case where there was a chance that the burden might have been shifted; given that the Claimant is an intelligent individual with professional representation, it was apparent that there was nothing beyond assertion that could realistically be put forward as evidence as to why the burden of proof should shift. Furthermore, this was not something which was not

apparent until the evidence was heard; given the state of knowledge of the Claimant, this would have been apparent from the start. We also refer to paragraphs 171 – 174 of our findings of fact in the decision in this respect.

57. Mr Neaman has drawn us to much of the case law about the difficulty of proving discrimination/unconscious bias and the difficulties that arise from this which, he submits, should make it difficult to find that, in discrimination cases, there was no reasonable prospect of success in showing that the allegations of detrimental treatment were for a discriminatory reason. We are very conscious of the case law in this respect. However, in the context of this case, with an intelligent Claimant and good legal representation, we find that the Claimant should have been well aware from the start that there was no reasonable prospect of success in showing that any of the alleged treatment was for a discriminatory reason; or of us finding that any of the alleged treatment was for a discriminatory reason; or of the Respondent failing to show that all of the treatment alleged (to the extent that it even took place) was for an entirely non-discriminatory reason. In addition, we refer to our earlier finding of fact that the Claimant only brought up allegations of discrimination at the point when he was trying to negotiate a settlement agreement some 5 years after the first of these alleged acts is said to have taken place; in the light of that we similarly find that he knew or should have known from the start that there was no reasonable prospect of success in showing that any of the alleged treatment was for a discriminatory reason; or of us finding that any of the alleged treatment was for a discriminatory reason; or of the Respondent failing to show that all of the treatment alleged (to the extent that it even took place) was for an entirely non-discriminatory reason.

58. We therefore find that, on their merits, all of the complaints in the first claim had no reasonable prospect of success from the start: there was no reasonable prospect of success in showing that any of the alleged treatment was for a discriminatory reason; or of us finding that any of the alleged treatment was for a discriminatory reason; or of the Respondent failing to show that all of the treatment alleged (to the extent that it even took place) was for an entirely non-discriminatory reason. We therefore will need to consider whether to exercise our discretion as to whether to award costs for this reason and do so below."

52. The Tribunal then turned to two particular arguments that had been raised, that were pertinent to stage 2 in respect of this basis for the costs application. First, the fact that no strike-out or deposit Order application had been made did not necessarily militate against the making of a costs Order. The Tribunal cited **Vaughan v London Borough of Lewisham** [2013] IRLR 713 in this regard. In any case, it found, the Claimant was put on notice as to the Respondent's view of the merits, by both the Grounds of Resistance and the later costs-warning letter. Secondly, the Claimant relied on the fact that his legal expenses insurance had been maintained; but the Tribunal noted that the insurer could only go on what it was told. It did not consider this to be relevant at stage two.

53. The third basis for the costs application was that the Claimant had acted unreasonably both in bringing the proceedings and in persisting with them. As to the bringing of the

proceedings, the Tribunal accepted that, by virtue of his own knowledge of the events in question, and access to legal representation, and in view of what they considered to be the merits, it was unreasonable of the Claimant to bring the claim in the first place.

54. It was not, therefore, strictly necessary to consider the alternative submission that the Claimant had, at least, acted unreasonably from the point of receipt of the costs-warning letter; but the Tribunal did consider it, and found that he had. The letter identified in terms why the Respondent considered the claim had no reasonable prospects of success; and there was considerable overlap with what proved in due course to be the Tribunal's own Reasons for dismissing his claims. The Tribunal also considered that the Claimant unreasonably failed properly to engage with the letter, by never replying to it.

55. At stage two the Tribunal considered it relevant that the Claimant had had experienced legal representation from the outset and that, as it had found, the claims had failed for reasons which would, or should, have been apparent to him from the outset.

56. The next basis of the costs application was dubbed "procedural unreasonableness." The first strand was that the complaints were needlessly complicated, by repeated reliance on multiple types of discrimination in relation to a given allegation. The Tribunal observed that this overlapped with the "no reasonable prospects" basis; but it did agree that there had been no thought or analysis as to which type or types of discrimination a given allegation should be framed as raising, and that this was unreasonable.

57. Ms Stone had also referred to certain complaints having been withdrawn only on the second day of trial, arguing that they were plainly unsustainable, and should never have been

made, for example a complaint based on a factual premise which was obviously wrong. The Tribunal agreed; but it noted that, at stage two, any costs referable to this head would be limited to the costs associated with those particular complaints. Ms Stone had also referred to an attempt by the Claimant's then counsel on day one of the Liability Hearing, to expand certain of the allegations; but the Tribunal did not consider that crossed the threshold of unreasonable conduct.

58. Further on, after considering the costs application relating to the second claim, the Tribunal indicated that all of the features that it had so far considered in relation to the first application, pointed towards the exercise of its discretion to make a costs award. It then turned to the Claimant's means. For reasons it gave, it decided not to take into account his means, but added that, had it done so, it would not have considered that these prevented it from making the award sought. There was, I note, no appeal from this aspect of the Costs Decision.

59. The Tribunal then indicated that, in view of its conclusions that the complaints had no reasonable prospect of success from the beginning, and were unreasonably pursued from the beginning, all the costs incurred by the Respondent in defending the proceedings from the beginning should be awarded, but that was subject to detailed assessment.

The Law

60. Rule 76(1) of the **Employment Tribunals Rules of Procedure 2013** provides as follows.

> **"76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—**
>
> > **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
> >
> > **(b) any claim or response had no reasonable prospect of success."**

61. It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal *may* make a costs order, and *shall consider* whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.

62. At the first stage, accordingly, it is sufficient if either Rule 76(1)(a) (through at least one sub-route) or Rule 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.

63. In this regard, the remarks in earlier authorities, about the meaning of "misconceived" in Rule 40(3) in the **2004 Rules of Procedure**, are equally applicable to this replacement threshold test in the **2013 Rules**. See in particular **Vaughan v London Borough of Lewisham** [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.

64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?

65. I should say something further about how the Employment Tribunal should approach an application seeking the whole costs of the litigation, on the basis that the claim "had no reasonable prospects of success" from the outset. It should first, at stage 1, consider whether that was, objectively, the position, when the claim was begun. If so, then at stage 2 the Tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering these questions, the Tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation.

66. This point needs to be considered in a little more detail. It may be observed that the test of "no reasonable prospect of success" appears in both Rule 76(1)(b), and in the strike-out Rule (Rule 37(1)(a)). But the task carried out by the Tribunal under each of these provisions is different. When considering a strike-out application, the Tribunal must decide whether the complaint or argument in question "has" – at the very same time when it decides that application – no reasonable prospect, based on the information available to the Tribunal at that point. Such

applications are often considered at an early stage in the litigation, without the benefit of sight of any evidence; and the Tribunal's task is to assess the prospects of the claim succeeding if or when it comes to trial in the future. Those prospects are usually considered, therefore, on the basis of the case asserted, taken at its highest, although the Tribunal can also take account, for example, of key documents that may be before it at that point.

67. Where the Tribunal is considering a costs application at the end of, or after, a trial, it has to decide whether the claims "had" no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start, and considering how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may, and should, take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time.

68. The foregoing is, in my judgment, in principle the correct approach to take. Read with care, and in light of the particular facts of that case, I do not read the observations of Slade J in **Swissport Limited v Exley** [2017] ICR 1288 at paragraphs 62 – 68 any differently. The Tribunal may draw on the evidence that it has read and heard at the full hearing, provided that it does so to inform its view of the prospects at the earlier time, based on what was known, or could reasonably have been known, back then.

69. Further, the mere fact that there were factual disputes, which could only be resolved by hearing evidence, and fact finding, arising from the final Hearing, does not necessarily mean that the Tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, nor that it cannot conclude that the complainant could or should have appreciated this from the outset. That still depends on what they knew, or ought to have known, were the true facts, and what view they could reasonably have taken of the prospects of the claims, in light of those facts. See **Vaughan** (above), in particular at paragraph 14(4).

70. I turn, now, to the Grounds of Appeal.

The Grounds of Appeal

71. The Amended Grounds of Appeal that were permitted to proceed to this hearing were as follows.

Ground 1

> **1. "The ET erred in law in finding (because of the time at which the Claimant first raised the allegations) that the Claimant did not consider that there was genuine merit in his allegations of discrimination (para. 33) and that he knew that there they had no reasonable prospects of success (para. 57) when:**
>
> **a. There was no finding to that effect in the Judgment sent to the parties on 3 February 2017 ("Liability Judgment/Hearing");**
>
> **b. That allegation did not form part of the Respondent's cost application;**
>
> **c. The allegation was never put to the Claimant in cross examination (whether at the Liability Hearing or the hearing on 31 July 2017 ("the Costs Hearing"); and**
>
> **d. The ET at the Costs Hearing itself invited submissions (as opposed to evidence) on a different point, not advanced by the Respondent, namely whether the Claimant made the allegations as a tool to negotiate a higher settlement package (para. 15).**

Ground 2

> **2. If, as alleged in ground 1, the ET erred in holding that the Claimant did not believe that there was genuine merit in the allegations it erred in concluding that he ought to have known at the outset that the proceedings had no reasonable prospects of success (para. 57) and (para. 62) he had acted unreasonably in commencing and/or pursuing the proceedings.**

Ground 3

3. The ET erred in concluding that the Claimant had conducted the proceedings unreasonably by giving evidence that was deliberately false and central to the case (para. 51) in circumstances where:

a. It did not make findings of dishonesty (as opposed to inaccuracy) in the Liability Judgment;

b. If it did, it ought not to have done so as the allegations of dishonesty (as opposed to inaccuracy) were never put to him;

c. In any event the allegations of dishonesty were not put to the Claimant at the Costs Hearing during his cross examination;

d. The alleged dishonesty was not central to any aspects of the case.

Ground 4

4. The ET erred in concluding (at para. 64) that the Claimant acted unreasonably in not withdrawing the claim upon receipt of the grounds of resistance and/or the cost warning letter."

72. Battle was initially joined in a short Answer from the Respondent. The parties then tabled detailed written skeletons, and there was more than a day of oral argument at the Hearing of this appeal. I was referred to numerous authorities and a considerable range of material generated in the course of the litigation. I have considered everything that was raised. I shall not refer to all of it, in what follows, but to what seemed to me to be the most significant and material aspects. I have reflected, in my summary of the parties' respective submissions, what seemed to me to be the main points made in the Amended Grounds of Appeal, the Answer, the written skeletons and oral arguments.

Claimant's Submissions

73. By way of general submissions Mr Tatton-Brown referred to the exceptionally high amount of costs sought by the Respondent. He said that the very substantial size of the sum at stake was pertinent when considering whether the Tribunal approached controversial issues with a sufficiently fair degree of rigour.

74. Mr Tatton-Brown argued that the Tribunal erred in concluding that the Claimant should have realised that his complaints had no reasonable prospect of success from the very outset.

Some types of complaint are plainly misconceived, perhaps because there is a clear and obvious jurisdictional obstacle, or they face a fundamental evidential problem, such as where there is fatally-undermining contemporaneous documentation. But this case was not of any such type. It is well-recognised that discrimination is rarely overt, and usually denied, and that the prospects of success of such complaints are hard to assess, in particular until the evidence of the alleged perpetrator has been heard, seen and tested. He referred to the discussion to that effect in **Saka v Fitzroy Robinson**, EAT/2041/00; and he dubbed this the **Saka** principle.

75. In this case, he argued, the essential reason why the Claimant lost was because the Tribunal found Mr Taylor's evidence to be credible, accepting his explanations for his conduct, and preferring his evidence to that of the Claimant; and, in relation to bonus, because of its appreciation of the evidence given by Mr Black. This was a case of the Tribunal having applied hindsight bias, mistakenly relying on how the crucial witness evidence had turned out, to inform its view of the prospects at the outset. It was noteworthy that the Respondent had never applied to strike out the complaints, or for a deposit order, had spared no expense in defending the claims, and in the costs-warning letter, had made the Claimant a "drop hands" offer on a without prejudice basis; and (as costs schedules revealed), there had been "witness familiarisation" sessions. These were all signs that the Respondent, for its part, had considered (prospectively) that there *were* real prospects that the complaints could succeed.

76. By contrast, as the section of the Costs Decision concerning the unsuccessful costs application in relation to the second claim recorded, in *that* case there had been strike-out and deposit-order applications, which had prompted the withdrawal of certain complaints. The Tribunal observed that, as a result, it recognised that it had not had full evidence in relation to those complaints, unlike in relation to the first claim. The fact that it made that remark suggested

A that the evidence heard at trial was indeed influential on its Decision in relation to the first-claim costs application. If so, this showed again that the Tribunal had wrongly applied hindsight.

B 77. The Tribunal also ignored the inter-related nature of the Claimant's complaints, such that, if one had succeeded, that might have strengthened the prospects of others. It also erred in the weight it attached to the Claimant's intelligence and the fact that he had legal representation. That was given, in particular, the foregoing substantive points about the potential prospects of C the claims, and the inherent uncertainty of discrimination litigation of this sort.

78. The Tribunal was also wrong to treat as irrelevant, the fact that the Claimant had legal D expenses insurance. What advice the insurers had been given was not known to the Tribunal, but it could be inferred at least, from the fact that cover was granted and then maintained, that the advice was not to the effect that the complaints were likely to fail.

E

79. In oral submissions Mr Tatton-Brown acknowledged (as he was bound to) that the live Grounds of Appeal did not seek to challenge, as such, the Tribunal's conclusion that, objectively viewed, the claims had no reasonable prospect of success from the outset. His case was that the F Tribunal had wrongly applied hindsight when considering whether the Claimant ought reasonably to have appreciated that from the start.

G 80. Turning to the specific grounds, as to Ground 1, Mr Tatton-Brown said there was an important distinction between a finding that an allegation of discrimination had been raised with an ulterior or collateral motive, and one that it had been raised dishonestly. He drew on the H discussion of the different meanings, albeit in different statutory contexts, of the concept of "bad faith" in **Saad v Southampton University Hospitals NHS Trust** [2018] UKEAT/0276/17. At

the Liability Hearing the Claimant was only cross-examined about whether, as a matter of fact, the severance discussion was the first time he had raised an allegation of disability discrimination. In the Liability Decision the Tribunal had made a finding of fact that the Claimant had indeed first raised allegations of disability discrimination only during the severance negotiations. But it had made no finding that he had not believed, when he did so, that they had merit.

81. The Respondent also did not raise the issue at the Costs Hearing. The Tribunal had invited submissions on whether the Claimant had raised the allegations as a tool to negotiate a higher settlement, but not as to whether it should be inferred that he had not believed that they had merit. Nor had that been put to the Claimant in cross-examination at that Hearing. This was despite the Claimant having disputed, in terms, in his witness statement for the Costs Hearing, that he had been dishonest, and having asserted that he had put extensive effort into understanding the merits of his claims. That was not fair. Further, neither the fact that he had not previously raised such claims, nor the finding that he did so to strengthen his hand in severance negotiations, justified that further inference, that he did not believe at the time that they had any merit, being drawn.

82. As to Ground 2, this was not, when it was begun, an obviously misconceived case. The **Saka** principle applied. There was material that might support an inference of discrimination, in particular Mr Taylor having asked questions about the Claimant's AML, and having referred to "risk", at their June 2010 meeting. Nor was the position in relation to matters such as bonus clear from the metrics and the figures. The detailed Liability Decision findings, for example, in relation to the 2013 bonus, reflected that the result of undocumented discussions was that the Claimant ultimately received a bonus of about one quarter of the amount that Mr Black initially had in mind for him at the start of the process. The fact that the Respondent approached him in 2015 with a proposal for a parting of the ways was also something that could reasonably be relied upon.

A The Tribunal had also, in terms, at paragraph 51 of the Costs Reasons, found that this was *not* a case where *every* allegation was based on a lie.

B 83. The Tribunal had relied, wrongly, on three matters: the Claimant's intelligence, his good legal representation, and the fact that he first raised allegations of discrimination in the context of severance negotiations. For the reasons already argued, none provided a proper basis on which to conclude that he should have realised from the outset that the claims had no reasonable prospect of success. In any event, even if (contrary to Mr Tatton-Brown's primary case) the Tribunal had permissibly concluded that the Claimant did not, at the time of the severance meeting, believe that complaints of disability discrimination would have reasonable prospects of success, it could not be inferred that that remained his view by the time he took the decision to issue the claim.

C

D

84. As to Ground 3, the Tribunal had, in its Liability Decision, made findings that certain specific aspects of the Claimant's evidence were untrue, or misleading in effect, *not* that he had been dishonest; or, if the findings were ambiguous in this regard, the ambiguity should be resolved in his favour. The need for a clear and unambiguous finding was particularly important where the allegation is of dishonesty, just as it is where there is an allegation of fraud. The Tribunal had said, in the Costs Decision, that it was relying on the words of the Liability Decision, which the Claimant's then counsel, Mr Neaman, could not gloss or go behind. But there was not, in fact, a finding of dishonesty in the Liability Decision.

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85. Alternatively, if the findings in the Liability Decision amounted to findings of dishonesty, they could not be fairly relied upon, because the allegation of deliberate dishonesty, as opposed to giving evidence that was inaccurate, had not been put to the Claimant at the Liability Hearing.

H

A See: **Vogon International Limited v The Serious Fraud Office** [2004] EWCA Civ 104; and **Williams v Solicitors Regulation Authority** [2017] EWHC 1478 (Admin).

B 86. In oral submissions Mr Tatton-Brown further argued, by reference to the particulars of claim, and the Claimant's witness evidence for the Liability Hearing, that the Tribunal's findings on the two key issues identified by it – concerning his weight loss and the Mexican holiday – about the nature of his evidence on those topics, were not warranted.

C

87. Further, if, as Mr Tatton-Brown contended, the Tribunal had not made a (fair) finding of dishonesty in the Liability Decision, the matter was not put right at the Costs Hearing, at which
D the allegation of dishonesty was not put to him when he gave evidence. That was despite him having specifically denied dishonesty in his witness statement for that Hearing.

E 88. As to Ground 4, if it was (as Mr Tatton-Brown contended) wrong to hold that the Claimant should have known prior to the full merits Hearing, when evidence was heard and tested, that his complaints were not reasonably arguable, then it was also wrong to conclude that it was unreasonable conduct to persist with them after receipt of the costs-warning letter. That letter
F had the hallmarks of the sort of tactical letter commonly written in litigation of this sort. It was significant that it was not written on an open basis. It did not contain anything that should have altered the Claimant's view of the prospects of success, as such.

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89. Mr Tatton-Brown confirmed, however, during oral submissions, that the Claimant did not, as part of this grounds, seek to challenge the separate finding that the Claimant acted
H unreasonably in failing to engage with that letter.

Respondent's arguments

90. By way of general submissions, Mr Jones argued that the Claimant had sought at the Costs Hearing, and was seeking again in this appeal, to mount a collateral attack on the Tribunal's findings in its Liability Decision. The Tribunal had, in its Costs Decision, engaged in a carefully and cogently-reasoned exercise of a discretion, with which the EAT should not interfere. The amount of costs at stake could not and should not affect the standards of fairness to be applied. Those costs would be subject to a separate process of assessment, and the Respondent would only be awarded the amount to which it was entitled. Nothing could be inferred about the merits, from the fact that the litigation was hard fought, or thoroughly prepared by the Respondent.

91. As to Ground 1, the Tribunal was entitled, in its Costs Decision, to draw the inference from its primary findings in the Liability Decision, that the Claimant raised the claims in the severance negotiations, in order to strengthen his hand, *and* that he knew from the start that his claims had no merit. The two-member Tribunal at the Costs Hearing had heard and observed the Claimant at the Liability Hearing and been party to findings about his credibility and about the way in which he gave evidence at that Hearing. They were uniquely placed to draw such inferences as they thought appropriate. The findings in the Liability Decision had included that the Claimant had raised the issue of disability discrimination for the first time in the settlement discussions, and in its Costs Decision the Tribunal was entitled to comment that it was "absolutely stark" that he did so at this point, nothing having been said for five years beforehand.

92. The Claimant *was* given a reasonable opportunity to address the point. Alternatively, he had waived any unfairness by not, for example, applying to give further evidence at the Costs Hearing, once the Tribunal had raised the point; and he could not now properly raise it as an issue on appeal. In any event he was repeatedly told during the Liability Hearing that he was not

answering questions and that his credibility was in issue. He was cross-examined in various ways multiple times as to whether he truly believed various of his own allegations, for example that the level of his 2014 compensation was linked to his disability. The Respondent had submitted in closing submissions at that Hearing that the Claimant had lied, misled, or told reckless untruths on various matters. These matters had been fairly addressed at that Hearing.

93. Further, in the disciplinary process which followed the Liability Decision, the Claimant himself referred to the Tribunal as having found him to have been dishonest, and the Respondent as having accused of him of being dishonest. The Claimant was aware during the Costs Hearing that there was an issue about whether he had raised his allegations of disability discrimination merely in order to improve his position in settlement negotiations. The issue was also repeated by the Judge, at the request of the Claimant's counsel. There was, at that point, no objection to that aspect being considered, nor application to recall him to give further evidence. Given what had happened at the Liability Hearing, it was not plausible for the Claimant to say that the implications of the Tribunal raising the question of whether he had made his allegations simply as a tool to negotiate a higher settlement package were not understood. Given what had happened at the Liability Hearing, he could not have complained, had the Tribunal made the same finding in the Liability Decision itself; so he could not complain about it doing so at the costs stage.

94. As to Ground 2, the Tribunal's conclusion that the Claimant should have been aware from the outset that his claims had no reasonable prospect of success was *not* dependent on the finding about his state of mind at the severance meeting which was challenged by Ground 1. That was an *additional* consideration referred to by the Tribunal, pointing to why he knew that the prospects were poor, but not an essential factor in its decision that he knew *or ought to have known* that from the outset. Even if Ground 1 disclosed an error of law, the conclusion that he

should have known that his claim had no reasonable prospects was not challenged, the Tribunal was still entitled to find that he ought reasonably to have known that this was the case from the outset, and that provided sufficient reason to dismiss the appeal in any event.

95. As to that, the Tribunal had, properly, found that, not only was there no evidence or facts sufficient to shift the burden, but there was no chance that it would shift. This was not something that was not apparent until the evidence was heard. The point of the findings that the Claimant was intelligent and had good legal representation, was that this was *not* a case where, through *lack* of these things, he might forgivably not have appreciated the poor prospects. The Tribunal had specifically considered the difficulties of proving discrimination, the possibility of it occurring unconsciously, and so forth; but it had found in terms that, in this case, the Claimant should have been well aware that there was no reasonable prospect of any of the treatment being shown to be for a discriminatory reason. The Tribunal was entitled to reach that conclusion having regard, in particular, to its findings about the lack of evidence to support the Claimant's over-arching contentions, in paragraphs 171 – 174 of its Liability Decision, and as to the significance of the objective and documentary evidence. The Claimant's account of Mr Taylor's remark, in June 2010, about "risk" had been rejected on grounds of credibility.

96. As to Ground 3, the Liability Decision did plainly make findings of dishonesty, in particular at paragraphs 27 to 32. The Tribunal did not, in its Costs Decision, misunderstand its own earlier reasons. The Claimant's observations in the later internal dismissal and appeal process reflected his own appreciation that the Tribunal had made what amounted to findings of dishonesty. The Henderson Tribunal, which heard his subsequent unfair dismissal claim, read the Liability Decision in this case the same way, and held that it was an abuse to seek to reopen the point. That determination of that Tribunal was itself binding on the parties. The Claimant's

counsel's own submissions for the Costs Hearing were premised on the Liability Decision having found him to have been dishonest.

97. Whether a witness has had a fair opportunity to meet a challenge of dishonesty does not depend necessarily on whether that particular word has been used. What matters is whether the substance of the case advanced against him, and cross-examination, has given the witness fair warning, and a fair chance to respond to the nature of the allegation. See **Howlett v Davies** [2018] 1 WLR 1948, a case concerned with the concept of fundamental dishonesty in the civil costs jurisdiction. In this case, the Claimant had a reasonable opportunity to address the allegations or dishonesty, in particular in relation to the issues to do with his weight, and the Mexican holiday. Like Mr Tatton-Brown, Mr Jones sought to make his point good by close analysis of the pleadings and evidence.

98. In any event, said Mr Jones, a Tribunal can make findings on a basis contended for by neither party. It is highly desirable, but not essential, in such a case, that the matter be raised before the Tribunal reaches its decision; but failure to do so will not always be appealable. See **Judge v Crown Leisure** [2005] IRLR 823 (CA). Whilst the need for a fair trial is paramount, some account also had to be taken of the desirability of finality in litigation. A finding based on grounds which were not put to a witness will not necessarily be challengeable on appeal, having regard to factors such as (a) the importance of the issue; (b) the closeness of what was not put to what was put; (c) the reasonableness of not putting what was not put; (d) whether the point was touched on elsewhere; (e) the plausibility of whether the witness might have had a satisfactory answer. See **Chen v Ng** [2017] UKPC 27. All of these factors favoured the Respondent in this case.

99. In any event, if the Claimant considered that any of the Liability Decision findings had been reached as a result of an unfair process, he could have appealed. He could not, at the Costs Hearing, seek to revisit findings made in an unappealed Decision. So, his insistence, in his witness statement for the Costs Hearing, that he had not been dishonest, did not need to be challenged by cross-examination at that Hearing. The Tribunal was also entitled, drawing on the authorities concerning the potential significance, for a costs Decision, of a finding that a party has lied, to find that the Claimant's dishonesty on these two issues, was "deliberate, serious and central" to the particular complaints which it identified.

100. As to Ground 4, there was no error in the Tribunal's finding that the Claimant acted unreasonably in maintaining his claim following receipt of the costs-warning letter. It set out a fully-reasoned conclusion on that point. The Tribunal found a clear overlap with the reasons why the Claimant later lost. The letter came after disclosure. Though it should never have begun, the litigation should certainly have stopped at this point. Alternatively, if only this Ground succeeded, that would not be enough to affect the outcome of this appeal.

Discussion and Conclusions

101. It is helpful, first, to recap briefly on the six out of seven bases on which the costs application was advanced, which the Tribunal upheld, in the order that it considered them in its Costs Decision, and to correlate the Grounds of Appeal to them.

102. First, it found that there was unreasonable conduct, by the Claimant deliberately giving misleading and/or untrue evidence in relation, specifically, to the four matters referred to in paragraphs 28 to 31 of the Liability Decision. Of these, two – the weight issue and the Mexican holiday issue – were found to be "serious and central" in relation to a particular sub-group of

A complaints. For those reasons it found that it would, in principle, be appropriate to award costs *in respect of those allegations*. That is the particular subject of Ground 3.

B 103. Secondly, the complaints as a whole had no reasonable prospect of success on their merits, from the outset. The Claimant knew, or should have known, that from the outset. Third, having regard to their weak prospects, there was unreasonable conduct, in pursuing the claims from the outset, and the Claimant knew, or should have known, that from the outset. Aspects of these C conclusions were challenged by Grounds 1 and 2; but the reasoning of the Tribunal, and how these Grounds challenged it, requires close and careful analysis, as I shall explain.

D 104. Fourth, the Tribunal found that there was unreasonable conduct in any event, in continuing with the litigation after the costs-warning letter. That was the subject of Ground 4.

E 105. Fifth, the Tribunal found that there was unreasonable conduct by needlessly pursuing multiple heads of complaint in respect of the same matters. That was not challenged on appeal.

106. Sixth, the Tribunal found that there was unreasonable conduct in respect of certain late-F withdrawn complaints, which should never have been pursued in the first place. Mr Tatton-Brown submitted that Grounds 1 and 2 effectively challenged this conclusion, as it was a sub-instance of the more generalised third conclusion.

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107. I observe that the second and third of these bases of the Tribunal's Decision were both found by it to support the conclusion that the Respondent should be awarded the whole of its H costs of the litigation, subject to assessment. The Tribunal also arrived at its conclusions on the second and third bases by two different legal routes: Rule 76(1)(b) and Rule 76(1)(a) respectively.

But they both relied on the underlying conclusions that the complaints, objectively viewed, had no reasonable prospect of success from the outset of the litigation, *and* that the Claimant either knew, or ought to have known, that to be the case, when he embarked on his claims.

108. I will take each of the Grounds in their numerical order.

Ground 1

109. Ground 1 challenges the Tribunal's findings that the Claimant did not, when he first raised them in severance discussions, consider there was genuine merit in his allegations of discrimination (Costs Decision paragraph 33), and hence that, in view of this, he knew that they had no reasonable prospects of success from the start of the litigation (paragraph 57).

110. It should be noted that, as the opening words of Ground 2 effectively acknowledge, Ground 1 is postulated to be an essential building block of Ground 2. That is because it is a premise of these two Grounds, that the Tribunal's conclusion, in the Costs Decision, that the Claimant did not believe that his allegations had merit when he raised them in the severance discussions, formed an essential element of its reasoning that he knew or ought to have known, when he embarked upon them, that his claims had no reasonable prospect of success.

111. However, the Respondent's case is that the Tribunal reached separate conclusions, first that the Claimant ought to have known that his claims had no reasonable prospect of success, and, secondly, that he did not, at the time of the severance discussions, believe that his allegations of disability discrimination had merit. The Respondent's case was that the Tribunal's first conclusion provided free-standing and properly sufficient support for the costs awards on the

second and third bases; with the second conclusion providing an additional, but not an essential, plank of support for them. I will consider that argument when I come to Ground 2.

112. Staying with Ground 1, at present, I note the following.

113. First, it is correct that the Liability Decision did not contain a finding, in express terms, that the Claimant did not believe his allegations to be true, when he raised the possibility of a disability discrimination claim in the severance discussions. Indeed, in its Costs Decision at paragraph 15 the Tribunal referred to the Respondent's case as having been that the Claimant alleged disability discrimination at this point, "simply as a tool to try to negotiate a higher settlement package", but itself observed that it had "deliberately" not made a finding about that in its earlier reasons, because it was not necessary to do so to determine the issues in the claim.

114. I interpose that this Tribunal plainly had a good command of the costs Rules, and relevant authorities. Given that, and the particular phrasing of this remark, I strongly suspect, though it did not cite the authority, that the Tribunal was concerned, in its Liability Decision, not to overstep the mark, as was found to have occurred in **Oni v NHS Leicester City** [2013] ICR 91. If so, it is worth bearing in mind that the Tribunal in **Oni** made statements which the EAT there considered amounted, in their particular language, to the expression of concluded views on the costs tests, prior to a costs application or arguments in relation to it. See also, in this regard, by way of contrast, **Hussain v Nottingham Healthcare NHS Trust** UKEAT/0080/16.

115. Whether or not it had specifically had the **Oni** case in mind when it wrote its Liability Decision, this Tribunal plainly considered that, at the stage of reaching its decision on the Costs application, it had a proper basis, drawing on its findings in the Liability Decision, to draw the

A further inference that the Claimant did not consider that there was genuine merit in his allegations when he raised them, for the reasons that it set out in paragraph 33 of the Costs Decision.

B 116. I agree with Mr Tatton-Brown that the proposition that the reason why the Claimant raised allegations of disability discrimination in the severance discussions, was in order to strengthen his case for a higher severance package, and the proposition that he did not believe those allegations had merit, are two different things, and one should not be treated as *necessarily* C flowing from the other. However, it seems to me that the Tribunal's reasoning in paragraph 33 of the Costs Decision was not so simplistic. In particular, as it explained in that paragraph, it drew on various of its earlier findings to support the conclusion that, *if* the Claimant had believed D his allegations to be true, *then* he would have raised them much sooner than he in fact did.

117. However, I turn to the question of whether the Claimant had, whether in evidence and/or E submissions, a fair opportunity to respond to that allegation, before the Tribunal drew that conclusion. I do not think that there is any tension between the authorities relied upon by Mr Tatton-Brown, and those relied upon by Mr Jones, on this point. What emerges from them are two, perhaps unsurprising, propositions. The first is that a Court or Tribunal should not make a F material and serious adverse finding about a party's conduct unless they have had a fair opportunity to address it in both evidence and submissions. The second is that whether they have had that fair opportunity does not necessarily turn on whether certain particular words have or G have not been used, but on whether the essential nub or sting of the allegation has been fairly raised and/or put. It was on this latter point that, at the heart of it, Mr Tatton-Brown and Mr Jones disagreed, Mr Jones' case being that it was perfectly clear to the Claimant from the outset that H the Respondent's case was not only that his complaints had no merit, and that he could not have reasonably supposed that they did, but that he never in fact believed that they did.

118. I was referred, in submissions, to various materials in that connection.

119. The Ground of Resistance stated, at paragraph 13: "The Respondent considers that these allegations were made *without proper foundation* in an attempt to negotiate a higher severance payment." (Emphasis added by me). The costs-warning letter referred to various of the complaints being "wholly fanciful" and "absurd" and asserted variously that the Claimant was "perfectly well aware" and "knew full well" that certain matters were unconnected to his AML, and that he "cannot have expected" to receive higher bonuses. This was followed by the assertion that: "It was only in the course of trying to negotiate an increased severance payout that your client raised these very serious allegations allegedly going back five years. With respect, that action speaks for itself and we have no doubt that the employment tribunal will agree."

120. As to the cross-examination of the Claimant at the Liability Hearing, he was challenged, on a number of the individual allegations, as to the credibility of his evidence, and as to whether he truly believed them to be true. In cross-examination on this particular aspect, it was then put to him that he had raised disability in the severance discussion for the first time to bolster his position, and his reply is recorded as: "No that's not correct I did so having taken some advice."

121. The Respondent's written closing submissions for the Liability Hearing included the submission that the Claimant "cynically" deployed these allegations in the severance discussions.

122. Pausing there, I consider that this material (even excluding the costs-warning letter) properly supported the conclusion that the Respondent's consistently-expressed case was not merely that the Claimant's claims had always lacked merit, and that he ought to have known this, but that he did not believe them to be meritorious; and that this was particularly demonstrated by

A the fact that he had not raised any of them over a five-year period, and then raised them for the first time only in the severance discussions. The response of the Claimant when cross-examined about that, also supported the conclusion that he fully appreciated that this was their case.

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123. The content of the costs-warning letter reinforces that conclusion; but, though the Tribunal was not aware of it at the time of the Liability Decision, in light of the other material, I agree with Mr Jones that the Tribunal would have been entitled to draw that inference from its

C other findings of fact in the Liability Decision. He was fairly on notice that this was implicitly, if not explicitly, part of the Respondent's case, the cross-examination of him about the severance meeting built on the cross-examination which had challenged him as to what he truly believed in

D relation to his individual underlying complaints, and his answer showed that he appreciated that this part of the cross-examination was also challenging his account of what he believed.

124. I therefore also agree with Mr Jones that, properly rooted as it was in the findings of fact

E already made in the Liability Decision, fairness did not, in this case, require the Claimant to have the opportunity to give further evidence, or be further cross-examined on this aspect, at the Costs Hearing, prior to the Tribunal reaching the conclusion that it did at the end of paragraph 33 of the

F Costs Decision. Nor did the fact that the Claimant, in his witness statement for the Costs Hearing, denied dishonesty, mean that he should have been further cross-examined about that at that Hearing. The Tribunal rightly pointed out, during the Costs Hearing, and in its Costs Decision,

G that its Liability Decision findings stood, and could not be reopened, though the Claimant might still assert that he did not accept them.

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125. Ought the Tribunal nevertheless to have refrained from making the finding that it did at the end of paragraph 33 of its Costs Decision, on the basis that there had not been a fair opportunity to make *submissions* about it at the Costs Hearing?

126. As to that, the Respondent's costs application did not specifically invite the Tribunal to draw any further conclusion to the effect that the Claimant did not believe in his allegations when he raised them at the severance meeting; nor did its skeleton for the Costs Hearing do so. Indeed, it was having read that skeleton, and noted that the point had not been raised there (or in the Claimant's skeleton), that the Tribunal raised the matter itself at that Hearing. Mr Tatton-Brown further submitted that the Tribunal had, even then, only raised the issue of whether the Claimant had raised allegations of disability discrimination to strengthen his bargaining hand, not the issue of whether he, at the time, actually believed those allegations to be meritorious.

127. However, once again, I accept Mr Jones' submission that this needs to be considered in the wider context of what had occurred in the litigation up to this point. The Tribunal had already made findings of fact in its Liability Decision, that the Claimant had raised the possibility of a disability discrimination claim in the severance discussions, that he had not previously raised any such allegation over the course of five years, and that he had put it to Mr Taylor that, because of that aspect, he would be entitled to greater compensation than was being offered. The proposition that he was relying on this feature as a bargaining tool was therefore not, as such, new.

128. Against that background, in paragraph 15 of its Costs Decision, when it described the Respondent's point at the Liability Hearing (about which it had not made a finding in its Liability Decision), as being that the Claimant had made these allegations "simply" as a tool, I think it is clear that the Tribunal was plainly referring to the *further* proposition that he had done so *purely*

for tactical reasons, cynically (in the Respondent's word), and not also because he also believed them to be meritorious. This is also reflected in the Tribunal's conclusion, in paragraph 33 of the Costs Decision, that he "only" raised these issues at this point to increase his bargaining position "and that he did not consider that there was genuine merit" in them. It is also, I think, clear from paragraph 15, that the Tribunal raised the matter proactively, precisely because it was alive to the potential for unfairness, were it to address in its Decision a point which seemed to it to be relevant, but on which the parties had not had a fair opportunity to make submissions.

129. I note that, as the Tribunal set out in paragraph 16, the Claimant himself regarded this as sufficiently significant that, after a break, his then counsel, who had not represented him at the Liability Hearing, asked the Tribunal to repeat it (and, as it later transpired, the Claimant recorded this part of the Hearing – it was this conduct on his part that gave rise to the application I heard in January 2019); and I agree with Mr Jones' submission that, if the Claimant or his counsel had been unclear then about the Tribunal's point, they would surely have pressed for clarification.

130. I conclude that the Tribunal did get across that it had occurred to it that the question of whether the Claimant had believed that there was merit in his allegations when he first raised them, might be relevant to its decision on the costs application, and it did then do sufficient to ensure that there was a fair opportunity to make submissions about it at that Hearing.

131. Ground 1 therefore fails. I turn to Ground 2.

Ground 2

132. It is important, when we come to Ground 2, to restate, and review with some care, what the Tribunal's relevant conclusions actually were, which of those conclusions this Ground challenges, and on what basis.

133. First, as I have noted, this Ground does *not* challenge the Tribunal's conclusion, as such, that the Claimant's claims had no reasonable prospect of success at the outset. But because of how the argument unfolds, it is helpful briefly to recapitulate why it so found. First, in respect of a number of complaints (including withdrawn complaints) it found that the alleged treatment was factually not established (paragraph 55). Secondly, not only did none of the matters relied upon by the Claimant shift the burden of proof, but none stood any chance of shifting the burden (paragraph 56). Further, the Tribunal observed that this was *not* dependent on how the oral evidence emerged at the Hearing. The Tribunal drew here on paragraphs 171 – 174 of its Liability Decision, where it concluded that the Claimant's three general allegations about Mr Taylor's attitude and approach to him were not supported, and/or contradicted by the contemporaneous evidence; and paragraphs 190 – 199 of that Decision, where it went carefully through each of the matters said to support a shifting of the burden of proof, and why there had been no evidence in relation to any of them, such as might have even arguably supported such a conclusion.

134. As I have noted, the Tribunal's unchallenged conclusion that the claims had no reasonable prospect of success, underpinned both the second successful basis of the costs application: no reasonable prospect of success, under Rule 76(1)(b); but also the third basis: unreasonable conduct under Rule 76(1)(a) by pursuing a claim that had no reasonable prospect of success.

135. What Ground 2 then challenges, is the Tribunal's reliance on its holding that the Claimant did not believe that his allegations had merit when he first raised them, in support of its further conclusion that he ought to have known that his claims did not have a reasonable prospect of success from the outset, in support of its granting of the costs application on both the second and third bases.

136. But, in my judgment, there are a number of reasons why this Ground must fail.

137. First, as framed, Ground 2 is entirely dependent on Ground 1 being well-founded, as its opening words make clear. (This is not accidental: Lavender J referred to it when allowing these Grounds to proceed.) Ground 1 having failed, for that reason alone Ground 2 must fail.

138. Secondly, however, the converse is not true. That is, although, Ground 1 having failed, Ground 2 must fail, it is not the case that, had Ground 1 succeeded, Ground 2 would also have been bound to succeed. That is because – I agree with Mr Jones on this point – the Tribunal's upholding of the costs application on the second and third bases was not dependent on its conclusions about the Claimant's frame of mind at the time of the severance discussions. In particular, it was not dependent on it concluding that the Claimant knew that his claims were not meritorious. I come to that conclusion for the following reasons.

139. In paragraph 57 of the Costs Reasons, the Tribunal comes, first, to a self-contained conclusion that the Claimant "should have been well aware" that his claims (to paraphrase several lines that spell out the underlying propositions more fully) had no reasonable prospect of success. That draws entirely on the conclusions set out at paragraphs 55 and 56, and the start of paragraph 57. Then, beginning with the words "In addition", the Tribunal sets out why, by reference to

what it has found about his state of mind in the severance discussions it "similarly" finds that he "*knew or* should have known" (emphasis added by me) that (again, spelled out more fully by the Tribunal) his claims had no reasonable prospect of success.

140. I think it is clear from these passages that the Tribunal, without recourse to the findings it had made about the severance discussions, came to the conclusion not only that the claims had no reasonable prospect of success, but that the Claimant reasonably *ought* to have known this from the outset; which would be sufficient to warrant a costs award under the Rule 76(1)(b) route, subject to its later consideration of the matter of means. The next part of this paragraph is not an additional or essential reason for reaching that first conclusion, but the reasoning which supports a further conclusion – drawn from its findings about the severance discussions – about not merely what he ought to have known, but what he actually believed. That was clearly expressed by the Tribunal to be an additional or alternative reason why the costs application based on that route succeeded, subject to further consideration of the means question. This approach, it seems to me, is then repeated when the Tribunal comes to consider the third basis of the costs application – unreasonable conduct in bringing the claims – in paragraphs 62 and 63.

141. Ground 2 does not, in fact, strictly construed, challenge, as such, the Tribunal's conclusion that the Claimant ought reasonably to have appreciated from the outset that his claims had no reasonable prospect of success. But the point was, as I have described, fully argued by both sides on this appeal, and so I will address it.

142. As I have described, at the heart of Mr Tatton-Brown's submissions were the related contentions, first, that this was not a case where there was plainly a fundamental jurisdictional problem, or documentary evidence that obviously fatally undermined the Claimant's case, from

A the very outset; secondly, that there were good reasons for raising at least the possibility of discrimination; and thirdly that the outcome of these claims was heavily dependent on the Tribunal's findings, having heard and evaluated the live evidence of the witnesses, and that it wrongly drew on the hindsight of its own post-Hearing conclusions in that regard.

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143. However, to take the last of these first, the fact that the Tribunal made significant findings about the reliability and credibility of the witnesses in its Liability Decision, certainly does not demonstrate that it would have been difficult to come to a view of the prospects of success from the outset. Indeed, the very trenchant and extensive nature of the Tribunal's findings about the credibility and reliability of the Claimant's evidence, and the manner in which he gave it, and its contrasting appraisal of that of the Respondent's witnesses, tends to suggest the very opposite.

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144. Secondly, the Tribunal addressed in terms, in the Costs Decision itself, the various arguments advanced at the Costs Hearing itself, and to some extent re-run by Mr Tatton-Brown in arguing this appeal, as to why it was said that the Claimant reasonably believed that his claims had some reasonable prospects.

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145. In paragraph 56 it set out its conclusion that the matters that pointed to the lack of reasonable prospects would have been apparent from the start, drawing properly on its earlier findings in the Liability Decision, in particular, at paragraphs 171 – 174 of those Reasons. Building on this, in paragraph 57, the Tribunal considered, but properly rejected, the suggestion that the difficulties of proof in discrimination cases made it difficult to assess the prospects of success prospectively in this case. I should add that, having regard to the Tribunal's (proper) findings about the Claimant's credibility and manner of giving evidence, I do not think it erred

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in not coming to a different view about the claims relating to the "risk" remark at the very first meeting with Mr Taylor, or to the bonus awards.

146. Nor do I agree that the Tribunal wrongly relied on the fact that the Claimant is highly intelligent and had access to good professional advice. It was not making the mistake of supposing that, if there were features which might make the outcome of a case hard to predict, these could be dissolved by the application of intelligence or legal knowledge. It was simply, and properly, making the point that this was not a case where the Claimant could seek to claim indulgence at stage 2, by arguing that he lacked the intellectual or professional resources to enable him to appreciate how weak his case in fact was.

147. In paragraph 60 the Tribunal also set out why the Claimant could not reasonably have been given false hope by the failure of the Respondent to apply for strike-out or deposit orders, pertinently citing the critique in **Vaughan** of such arguments, and noting, fairly, that in this case the Respondent had clearly set out its position in some detail in both the Grounds of Resistance and the later costs-warning letter.

148. In paragraph 61 the Tribunal also cogently explained why the Claimant could not reasonably rely upon the fact that he was granted, and continued to receive, the support of his insurers – for the simple reason that, as he accepted, the stance that they took was entirely dependent on what they (and/or the advisers concerned) were told. (Mr Jones noted in oral submissions that a similar point was made, in relation to reliance on professional advice, in the recent decision of Choudhury P in **Brooks v Nottingham University Hospitals NHS Trust** [2019] UKEAT/0246/18, at paragraphs 36 – 39).

149. These passages seem to me to show that the Tribunal was *not* drawing on hindsight in this respect, but making a careful and properly-reasoned appraisal of what the Claimant should have known, given the contemporaneous evidence, and information available, at the start, were the false premises and weaknesses in his own factual and legal case; and fairly considering whether there was any feature that might reasonably have led him astray as to its prospects.

150. I therefore conclude, for all of these reasons, that, in any event, the Tribunal's conclusion that the Claimant should reasonably have appreciated, prospectively, that his complaints had no reasonable prospect of success, was properly reached without error of law.

151. Accordingly, Ground 2 fails, because it was premised on the success of Ground 1, which had itself failed, because the conclusion which formed the second and third bases of the Tribunal's costs decision were not, in any event, dependent on the holding that was attacked by Ground 1, and because those conclusions (which were not, strictly, challenge by this Ground, in any event) were, in any case, soundly reached.

Ground 3

152. This Ground attacks the Tribunal's reliance in its Costs Decision, on two of the examples it gave in its Liability decision, at paragraphs 28 – 33, of aspects of the factual issues in relation to which the Claimant, to quote paragraph 28 of that Decision, "either did not tell the truth or misled" the Tribunal, being, for shorthand, the "weight" issue and the "Mexican holiday" issue. In the Costs Decision, at paragraphs 51 – 53, the Tribunal concluded that this conduct was deliberate and serious, and central to certain of the complaints, such that it was unreasonable conduct, which, crossed the stage 1 threshold, so as to give rise to a potential award of the costs of defending those specific allegations, subject to stage 2 considerations.

153. Although, as formulated, the last part of this Ground argued that these issues were not central to any aspect of the case, this strand was not in fact developed in argument. In any event, the Tribunal identified which claims it regarded them as potentially relevant to, noting in this regard that the Claimant's weight was regarded as a key indicator of how rapidly, and how well, he was recovering from the effects of the arduous treatment he had been through for his AML. I cannot see that it erred in regarding these aspects as central to the particular claims mentioned.

154. The principal basis of this Ground was that the Tribunal had not made findings in its Liability Decision that the Claimant had been deliberately dishonest about these matters, that he was not cross-examined to that effect at either the Liability or Costs Hearings, and that it was therefore not fair for the Tribunal to draw the relevant conclusions that it did in its Costs Decision.

155. As to that, in relation to the matter of the Claimant's weight, at paragraph 28 of the Liability Decision the Tribunal recorded that he told the Tribunal that, when he left hospital, he weighed 50 to 60 kilograms, that he told the expert, Professor Marks, the same thing, and that this was contradicted by the discharge records, which showed he weighed 81.5 kilograms. The Tribunal concluded that this was "clearly an untruth". Mr Tatton-Brown, referring to the Claimant's witness statement and notes of cross-examination at the Liability Hearing, sought to make good the submission that it was not fair for the Tribunal to conclude that the Claimant had been deliberately dishonest in this regard. There are, however, the following difficulties with that line of argument.

156. Firstly, the Tribunal relied, in the Costs Decision, on the findings that it had already made in the Liability Decision. It did not make any further material findings. Secondly, it properly regarded its earlier findings as not being merely to the effect that the Claimant had made a

mistake, or exaggerated the position, but that he had deliberately told an untruth and sought to mislead. That was, properly, treated by the Tribunal as, in substance, a finding of dishonesty. It was not then open to the Claimant to seek to reopen that finding either at the Costs Hearing, or in the context of this appeal (and, once again, for this reason, the fact that he maintained, in his statement for the Costs Hearing, that he had not been dishonest, did not mean that he had to be cross-examined on the topic again at that Hearing).

157. In any event, the Tribunal's findings in the Liability Decision were properly made, in light of the evidence it had (including from Professor Marks). This was, in summary, that, although the discharge notes were among the materials provided to him, the weight figure that Professor Marks wrote in his notes, and then used in his report, was given to him by the Claimant; and that, in oral evidence, the Claimant stood by that figure, until he was shown the discharge notes.

158. In relation to the Mexican holiday, the pleaded claim was that the Claimant was "forced to miss his holiday". The Tribunal found, in the Liability Decision, that he joined his family within four days of it commencing, was able to extend it and "finally admitted that it was misleading for him to refer to joining his family for the 'last few days' of his holiday in his claim form." Once again the Tribunal did no more, in the Costs Decision, than draw on the findings in the Liability Decision; once again it was not open to the Claimant to seek to reopen those findings either at the Costs Hearing or in this appeal. Once again, in any event, I consider that the findings were fairly made. While Mr Tatton-Brown drew a distinction between what was in the claim form, and what was in the Claimant's evidence, the same submission was made by Mr Neaman at the Costs Hearing. The Tribunal was nevertheless entitled to attach significance to what was in his pleading (both for the purposes of the Liability and Costs Decisions), its finding focussed, properly, on his response when challenged in evidence *about that pleading*, and the notes of cross-examination I was shown supported the Tribunal's conclusion on that point.

159. In summary, the conclusions that the Tribunal reached on these aspects in its Liability Decision were not properly open to challenge in this appeal, were in any case fairly reached, and were fairly and proportionately relied upon in the Costs Decision.

160. Ground 3 therefore fails.

Ground 4

161. In view of the conclusions I have already reached, I can take this Ground very shortly. Given that the Tribunal properly concluded that the Claimant acted unreasonably in embarking on his claims, it also properly concluded that he continued to act unreasonably in continuing with them after the receipt of the Grounds of Resistance, and, in due course, the costs-warning letter and/or in not engaging with its "drop hands" offer. I add that, even had the Tribunal found, for some reason (or had I concluded that it was wrong not to have so found) that the Claimant had acted reasonably up to the point of receipt of the costs-warning letter, its timing, coming after discovery, and its contents, putting forward a cogent and closely-reasoned case as to why the claims had no merits, and why the Claimant knew, or should have known that, certainly demanded a considered response.

162. Ground 4 accordingly fails.

Outcome

163. For all the foregoing reasons, this appeal is dismissed.