RESERVED **Case Numbers: 2331696/2008**
2203189/2009

EMPLOYMENT TRIBUNALS

Claimant: Ms. U Bhardwaj

Respondents: FDA (R1)
Ann Crighton (R2)
Stuart Sampson (R3)
Paula O'Toole (R4)
Paul Whiteman (R5)
Sue Gethin (R6)

Heard at: Nottingham

On: 14th October 2019 (In Chambers – reading in)
3rd February 2020 (In Chambers – reading in)
4th February & 5th February 2020
22nd April 2020 (By Cloud Video Platform)
23rd April 2020 (By Cloud Video Platform)
24th April 2020 (In Chambers)

Before: Employment Judge Heap (Sitting alone)

Representation
Claimant: In person on 4th February 2020 & 22nd April 2020
Mr. H Southey A member of Her Majesty's Counsel on 5th February 2020 & 23rd April 2020
Respondent: Mr. M Sethi – A member of Her Majesty's Counsel

RESERVED JUDGMENT

1. The application of each of the six Respondents for costs arising from the proceedings before the Taylor Tribunal is refused.

2. The application of the Respondents for the costs thrown away in respect of the hearings on 4th and 5th February 2020 and by the adjournment on 5th February 2020 is well founded and is granted. Those costs are to be assessed if not agreed and the proceedings are stayed for 28 days from the date of this

Judgment to facilitate that. If costs cannot be agreed the parties should notify the Tribunal at the conclusion of the stay.

3. The application of the Respondents for the costs of dealing with the Claimant's recusal application is refused.

4. The Respondents application for costs arising from alleged breach of Orders for disclosure is refused.

REASONS

BACKGROUND & THE ISSUES

1. This hearing was listed for the purposes of determining an application for costs which had been made by on behalf of each of the six Respondents following dismissal of the Claimant's claims of unlawful race discrimination, victimisation and unjustifiable discipline by an independent trade union. Those claims were dismissed by an Employment Tribunal chaired by Employment Judge J Tayler in the London Central Employment Tribunal by way of a Reserved Judgment and Reasons sent to the parties on 23rd September 2010 ("The proceedings before the Tayler Tribunal").

2. The proceedings before the Tayler Tribunal took place over a period of 25 days between 5th March and 10th September 2010.

3. The application for costs was made by the Respondents as long ago as 19th October 2010. However, there have been a number of appeals which naturally had to be determined before the costs application could be properly considered. Those appeals, which reached as far as the Supreme Court, are now at an end. The Claimant was not successful in those appeals, which all related to the proceedings before the Tayler Tribunal.

4. Following the application for costs being made, the claim was transferred from the London Central Employment Tribunal. I do not need to deal here with the reasons for that and many of the historic interlocutory matters which I have dealt with since the transfer of the claim to this region are contained in previous case management Orders sent to the parties and which are not rehearsed in detail here. However, I would observe that there are two applications dated 19th October 2010. At the time that those applications were made, a number of the individual Respondents had separate representation from the First Respondent. However, all Respondents are now commonly represented by Messrs. Slater and Gordon who in turn instruct Mr. Sethi.

5. Following the transfer of the claim to this region, all that was initially left to be dealt with was the Respondents' application for costs. I should observe, however, that the Claimant did herself make her own application for costs against the Respondents. That application was made substantially out of time and I refused to extend time for it to proceed at a Preliminary hearing which took

place on 28th June 2019. I made it plain at the time, however, that nothing within that decision prevented the Claimant from relying upon any of the grounds on which she relied for her own an application for costs against the Respondents in defence or reply to the application made by the Respondents, insofar as those arguments may be relevant to the issues which I am required to determine.

6. In accordance with Orders made earlier in these proceedings, the Respondents set out the grounds upon which they made their costs application by way of submissions dated 19th August 2019. These appear in the costs hearing bundle at pages 56 to 90. The Claimant filed a detailed reply on 17th September 2019. That is included within the bundle at pages 97 to 111 inclusive.

7. The costs hearing was originally listed to take place on 14th to 18th October 2019. However, on the application of the Claimant, and for reasons which I do not need to detail within this Judgment but which I considered entirely reasonable, I postponed that hearing and it was accordingly relisted for 3rd to 6th February 2020.

8. However, that hearing also had to be adjourned on the basis that during the morning of the reading day (3rd February 2020) the Claimant raised a new issue in that she relied on specific legal advice given to her by her then solicitors in defence of the Respondents costs application. That was distinct from her earlier position as set out in Mr. Southey's written submissions that she sought inferences only about that advice to be drawn. The Claimant served a further witness statement and disclosed an email from her solicitors to her legal expenses insurers who funded the proceedings before the Taylor Tribunal in support of her position. That had not previously been disclosed in accordance with Orders made. It self evidently brought up the issue of waiver of privilege and I caused the parties to be written to about that on the afternoon of 3rd February 2020 in order that the Claimant could seek legal advice and the matter could be dealt with on 4th February 2020.

9. The Claimant's position was that she had not waived privilege and she wanted submissions on the question to be made by Mr. Southey who was only due to attend the following day. The hearing on 4th February was therefore adjourned to 5th February to deal with that, following which Mr. Southey sensibly conceded that the Claimant had waived privilege. Orders were made as to the extent to which the Claimant should give disclosure of the advice given to her by her then solicitors and of her means given that the Claimant was, at that stage, asking her means and ability to pay any costs Order made be taken into account. The Claimant has since abandoned that point and conceded that she would be in a position to meet any Order for costs made in the sums sought by the Respondents.

10. However, the raising of the new specific point about the precise advice given on merits and the failure of the Claimant to have previously disclosed adequate evidence of her means in accordance with Orders made in July 2019 meant that the hearing could not proceed as planned to determine the costs application and the whole of the 4th and 5th February 2020 was taken up dealing with the privilege point and the resulting Orders. The hearing therefore had to be relisted

and it took place on 22nd, 23rd and 24th April 2020, with the final day being a day in Chambers to determine the application.

11. The hearing on those dates took place via Cloud Video Platform ("CVP") given that by that stage the United Kingdom was on lockdown as a result of the Covid-19 pandemic. Steps were taken, including the hearing taking place in an open hearing room where I was located but with the parties joining remotely, to ensure that the hearing could be a public hearing so as to comply with Rules 46 and 59 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

THE CLAIMANT'S RECUSAL APPLICATION

12. Shortly before the resumed hearing was due to take place, the Claimant made a recusal application. Given that that application was only made on the afternoon of Thursday, 16th April 2020 and it was necessary for the Respondent to reply to it, it was not possible to give the parties full written reasons for the decision to refuse that application before the hearing was due to commence on Wednesday, 22nd April 2020.

13. Whilst the Claimant expressed some dissatisfaction about that position at the commencement of the hearing on 22nd April, the application could of course have been made much sooner. In addition, as a result of the pandemic I was working remotely without access to typing facilities and dealing at the same time with other hearings by electronic means. It was simply not practicable to deal with the reasons for my decision at the time and ahead of the reconvened hearing.

14. My reasons for refusing the application are therefore set out here. In determining the application in addition to that document itself I also had regard to the following when dealing with it:

    a. The Respondent's reply of 17th April 2020;
    b. The Claimant's email response to the Respondent's reply dated 17th April 2020;
    c. The Claimant's response to the Respondent's reply dated 20th April 2020 and covering email;
    d. All Orders that I have made in these proceedings; and
    e. My notes of each of the hearings held in respect of this matter.

15. The basis of the Claimant's application is one of bias and I take each of the points that she makes in relation to those issues in turn. The headings that I have adopted are a general summary of the points made and are not intended to be a comprehensive description. I should also observe that I have not set out the application or the various replies and responses comprehensively here because there is no need to do so. The parties can be assured, however, that I have carefully considered all that each of them has said.

16. When considering the application I have had regard to the test was that laid down by the House of Lords in **Porter v Magill [2002] 2 AC 357**. That is, whether the circumstances would lead a fair-minded and informed observer

to conclude that there was a real possibility that the Tribunal was biased.

17. In considering that question, I have also had regard to the various examples in the case of **Locabail v Bayfield Properties [2000] IRLR** 96 as approved for cases in the Employment Tribunal in **Ansar v Lloyds TSB Bank Plc [2007] IRLR 211.** I have had close regard to the principles set out by Burton J. in the EAT in Ansar as follows:

*"1. The test to be applied as stated by Lord Hope in **Porter v Magill [2002] 2 AC 35**7, at paragraph 103 and recited by Pill LJ in **Lodwick v London Borough of Southwark** at paragraph 18 in determining bias is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*

*2. If an objection of bias is then made, it will be the duty of the chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance: **Locabail** at paragraph 21.*

*3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: **Re JRL ex parte CJL [1986] 161 CLR 342** at 352, per Mason J, High Court of Australia recited in **Locabail** at paragraph 22.*

*4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application: **Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd [1999] VSCA 35** recited in **Locabail** at paragraph 24.*

*5. The EAT should test the employment tribunal's decision as to recusal and also consider the proceedings before the tribunal as a whole and decide whether a perception of bias had arisen: Pill LJ in **Lodwick**, at paragraph 18.*

*6. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without something more found a sustainable objection: **Locabail** at paragraph 25.*

7. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown: Pill LJ in Lodwick above, at paragraph 21,

*recited by Cox J in **Breeze Benton Solicitors (A Partnership) v Weddell [2004] All ER (D) 225 (Jul)** at paragraph 41.*

*8. Courts and tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment (or stay) cannot: Sedley LJ in **Bennett** at paragraph 19.*

*9. There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal employment tribunal hearings, of the dialogue which frequently takes place between the judge or tribunal and a party or representative. No doubt should be cast on the right of the tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies: Peter Gibson J in **Peter Simper & Co Ltd v Cooke [1986] IRLR 19** EAT at paragraph 17.*

*10. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal: **Locabail** at paragraph 25.*

*11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (**Locabail** at paragraph 25) if:*

a. there were personal friendship or animosity between the judge and any member of the public involved in the case; or
b. the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or,
c. in a case where the credibility of any individual were an issue to be decided by the judge, the judge had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or,
d. on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind; or,
e. for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues."
(e) for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment that on the issues."

18. In short terms, the basis of the application is that:

    a. I am tainted by apparent bias as a consequence of some loyalty to the Employment Tribunal system and a wish to defend criticisms made against it;

    b. I have some form of dependence upon the President of the Employment Tribunal and/or other unnamed senior Judges and as such would wish to shutdown any submissions highlighting their alleged failures;

    c. I have demonstrated bias by being unwilling to address evidence showing impropriety and dishonesty by the Respondent; the Tribunal service and what the Claimant refers to as "its most senior Judges" and failing to Order disclosure of important documents;

    d. That my "relative position" to the senior Judges who the Claimant criticises (I presume this to relate to Judge Brian Doyle, the then President of the Employment Tribunal) who the Claimant criticises makes it unlikely that I would impartially assess those criticisms;

    e. That my conduct to that point gave the appearance that my interests lay in protecting the Employment Tribunal Service and "its most senior Judges" than protecting the interests of justice; and

    f. That there is what the Claimant terms as collegiality with three Respondent Tribunal "colleagues" who she accuses of fundamental dishonesty. Those individuals are three of the six Respondents who at various times were appointed to sit as lay members in the London regions. The Claimant refers to that as an "*exclusive club of which* [she] *is a clear outsider*."

19. The Claimant's conclusions also set out her position that I have acted as an "extra advocate" for the Respondent and given an impression that I have a personal stake in the outcome of the case. Her position is that no Employment Judge within the Tribunal system is able to fairly and independently deal with the costs application and that it must be heard, in order to be dealt with fairly, by a Judge in a different forum and with equivalent or greater seniority to the President.

20. The Claimant also sets out at paragraphs 4(a) to (i) of her application the times when she contends that I have demonstrated apparent bias. Those matters, which I have had to paraphrase given the length of the points that the Claimant makes, are as follows:

    a. That it is said that I did not challenge Mr. Sethi and/or his instructing solicitor in respect of what the Claimant terms as false representations made at a Preliminary hearing on 21st March 2019;

    b. That I failed to challenge Mr. Sethi as to why a point on legal privilege was abandoned on 28th June 2019 without prior notice to the Claimant

who had incurred costs in obtaining advice on the point from Mr. Southey and that I failed to Order wasted costs in respect of that matter;

c. That I permitted Mr. Sethi to make submissions for the first time regarding the status of a first application for appointment that the Second Respondent had made; did not ask him for an explanation as to the contradictory position or Order disclosure of the applications. The Claimant contends that in doing so I have given an appearance that I am deliberately concealing the truth;

d. That I allowed Mr. Sethi to make submissions at a hearing as to the liability of the individual Respondents for costs and failed to Order of my own motion disclosure of documents in support or to challenge later what the Claimant contends were false representations;

e. That I refused her application for an extension of time to make her own costs application; did not Order disclosure in respect of points that she wanted to make in defence of this application and allowed the Respondent to expand their costs arguments which it is said is in marked contrast to the refusal to extend time for the Claimant's application;

f. That I treated the Claimant unequally to the Respondent in respect of the time permitted to provide written submissions and that when the Claimant applied for further time I referred to this as an extension of time when it is said that I should have acknowledged that I was doing no more than providing her with parity of time;

g. That I allowed the entirety of the hearing bundles before the Taylor Tribunal to be before me in respect of the costs application to the detriment of the Claimant;

h. That I had decided that the Claimant had waived legal privilege; effectively taken a point for the Respondent that they had not raised; provided case law to the Respondent which I said they could argue that privilege had been waived; did not allow the Claimant to retract words which, according to me, "likely" made indents into her right to privilege; inferred that the Claimant was deliberately concealing relevant documents and did not make reference in my Order to an explanation for an error made by the Claimant as to emails the previous day; made reference to the Claimant's third witness statement as being "unsolicited" which gave the impression that she would be criticised for relying on it and had given an appearance that I was "seeking a hook" on which to make a costs Order and that I had "no interest in addressing the unprecedented misconduct" by the Respondent, their lawyers and the failings of the Employment Tribunal Service and the Orders made for disclosure of the Claimant's legal advice was in contrast to Orders she had sought for disclosure from the Respondent which I had refused; and

i. That I had exercised no control of the "improper and inappropriate conduct" of Mr. Sethi.

21. I deal firstly with the Claimant's position that there is bias on account of my position as an Employment Judge within the Employment Tribunal system. This matter was dealt with exhaustively at the first Preliminary hearing on 21st March 2020. The position has not changed and I can in reality do no better than to repeat what was said at paragraph 15 of the Orders sent to the parties after that hearing which was as follows:

"…….I have explained to the parties that I have no partisan interest in either side. My role is to try the issues that are before me without partiality or favour towards a party or parties and I have sworn an Oath to do just that. Whatever criticisms are made of Judicial colleagues by Ms. Bhardwaj will not affect that. Indeed, it is not uncommon for expressions of dissatisfaction to be made by parties of other Judicial colleagues. That should not and does not in my view get in the way of a just disposal of the issues before me."

22. As I have also made plain from the very outset, I do not consider that I have any collegiate relationship with any of the lay member Respondents in this case. To my knowledge I have never met them. I have certainly never sat with them (indeed, in some cases I understand at least one of them has never sat as a lay member to date) and they are not members in the Midlands East Region.

23. In terms of the Claimant's position that I have failed to address impropriety by the Respondent and Order appropriate disclosure is, with respect to the Claimant, inaccurate. I have made it plain that she is free to raise and that I will determine, where relevant, the arguments that she raises. I understand her to mean here that I did not determine her arguments as to alleged impropriety in the context of her application for an extension of time to hear her costs application. The reason for that is that those arguments were not relevant to that issue but I made it plain that she was free to ventilate them in the context of her defence of this costs application by the Respondents. My Orders were clear on that point.

24. As to the Claimant's application for disclosure; where documents were relevant I Ordered disclosure. Where they were not, I refused her application for the reasons given at the time – that is when what was sought was not relevant to the issues that I need to determine in the costs application. I observe that the Claimant has not appealed those Orders. The fact that I have not determined applications or matters in the Claimant's favour cannot possibly lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased. If that was the case, any Judge making an interlocutory decision adverse to one party or the other would find that he or she could not hear the claim.

25. The simple fact that I am an Employment Judge in circumstances when the Claimant criticises others within that system, most of whom I do not know, and others where there is no "dependence" as the Claimant believes, is not such that a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased.

26. I also accept the position of Mr. Sethi that the Claimant has waived her right to raise the issue of alleged bias as she does at this stage having waited over 13 months before making this recusal application. At the Claimant's request full disclosure of any "relationships" with any of the persons involved in these proceedings was provided to the Claimant and recorded in the Orders made on 21st March 2020. The Claimant made no recusal application at that time and the circumstances on which she now relies in her application are no different to the position as it was in March 2019. More importantly perhaps than that is the fact that the claim was transferred to a different region was at the specific request of the Claimant. At that stage the Claimant did not say then that the matter should be determined by a senior Judge in another jurisdiction and it was at that time, not days before a resumed hearing, that was the appropriate point to raise that issue.

27. I turn then to each of the instances where the Claimant contends that I have exhibited apparent bias. In doing so I have adopted the same numbering system as above and in the recusal application itself in order that I do not need to repeat the matters upon which the Claimant relies.

a. This aspect of the application is unfortunately a product of the Claimant seeing conspiracy where none lays. What occurred during the Preliminary hearing is recorded in the following passage taken from the Case Management Orders issued after the same:

"……. yesterday Ms. Bhardwaj wrote to the Tribunal to set out her own costs application against the Respondents. She has confirmed today that this is the first time that that application has been formally made although she tells me that the Respondents would be aware of the position as she has previously indicated her intention to make the application. Mr. Sethi tells me that he is unaware of that. I note, however, that Ms. Bhardwaj is clearly correct that those instructing Mr. Sethi would have been aware of that as the issue was raised in a letter from Ms. Bhardwaj to the Tribunal (and copied to Slater & Gordon) dated 2nd March 2018 and a subsequent letter from that firm of 23rd March 2018 made explicit reference to such an application. Ms. Bhardwaj drew my attention to the 2nd March 2018 letter during the hearing today and I have thereafter located it on the Tribunal file. She also refers to Mr. Cooper of Slater & Gordon having been made aware in February 2018 at a costs hearing before the Supreme Court of her intention to make her own costs application to the Employment Tribunal."

As recorded above, it is plain that Mr. Sethi said that he was unaware that the Claimant had intimidated her intention to make a costs application. The fact that Mr. Sethi was incorrect about the position does not by any stretch amount to a false representation as the Claimant contends. As the paragraph above demonstrates, I agreed with her that she was correct about the position and there was no need for me to "challenge" Mr. Sethi about it.

b. It is not uncommon for a party to abandon an argument upon which they rely at a hearing. It is not my practice to take that party to task for conceding a point. To do so would have the negative effect of encouraging parties to continue to run points which have little merit which is not in accordance with the overriding objective. As to the Claimant's point regarding wasted costs, she made no such application. Had she done so, I would have dealt with it on its merits at the time.

c. This point was raised at a Preliminary hearing on 28th June 2019 which was listed to deal with the Claimant's application for an extension of time to make her own costs application. I heard submissions from both parties on the matter as is my practice. There was no need for me to call for an explanation from Mr. Sethi or Order disclosure as it was entirely irrelevant to the issues that I had to determine at that hearing. The parties will note that it formed no part of my decision.

   This element of the application also deals with the position in respect of an investigation undertaken by Employment Judge MacMillan. That was also dealt with at the hearing on 28th June 2019. I have checked my notes of the hearing as to the discussion with regard to Judge MacMillan which record that after I had disclosed that Judge MacMillan had previously been my Regional Employment Judge and had given me a reference for my now salaries position, the Claimant was happy to take my assurances that I would look at matters independently and that she would let me know if there were any further issues. Nothing further was raised regarding Judge MacMillan until this recusal application and I would also observe that I have, in fact, never seen Judge MacMillan's investigation outcome.

d. I did not consider it necessary to Order disclosure at that time because it was not relevant to the issues that I was required to determine – which at that particular hearing was limited to the question of whether to extend time for the Claimant's application for costs to be made outside of the appropriate rime limit. When the Claimant later made an application for specific disclosure, I granted it in the face of objections from the Respondent.

e. I refused the Claimant's application for an extension of time to make her own costs application on the facts and for the reasons given at the time and the application that she made for reconsideration was also rejected for the reasons given at the time. No appeal has been made against either decision that I am aware of. The fact that I have made a decision which was adverse to the Claimant and with which she does not agree cannot be grounds to say that I am biased against her. It is a fact of litigation. I rejected the Claimant's disclosure application on its merits on the basis that the documents sought were not relevant to the issues to be determined. Where the Claimant has made an application for relevant documents; I have Ordered them to be produced. In terms of the Respondent expanding on the grounds of their application for costs

with oral argument, the Claimant is comparing apples with oranges. She did not make an application for costs until 20th March 2019 in respect of a Judgment that was promulgated on 23rd September 2010 – well over 9 years out of time. That is an entirely different consideration to allowing the development of an application for costs which had already been made in time.

f. On 19th July 2019 I made Orders at the same time as dealing with my reserved decision on the Claimant's application to extend time to make her own costs application. Those were sent to the parties the following day by a clerk of the Tribunal. They were made without a hearing and therefore without representations from the parties. The Orders required the Respondent to set out their costs application by no later than 19th August 2019 and for the Claimant to reply by 9th September 2019. Whilst it is fair to say that the Claimant had less time than the Respondent, that was on the basis that I had anticipated that there might be delay in despatching the Orders to the parties. When the Claimant asked for further time, that was granted as she had requested. Whilst the Claimant objects to the fact that that was phrased as an extension of time; in reality that is what the application was.

g. It is common practice for the Tribunal to have access to the original hearing bundles when determining an application for costs. This claim has been no different to any other with which I have dealt.

h. I had not decided that the Claimant had waived legal privilege before the hearing on 5th February 2020 when the point was in fact conceded by Mr. Southey and contrary to the position that the Claimant had adopted the day previously. The relevant part of the email that I caused be written to the parties on 3rd February 2020 read as follows:

"Thank you for your email of today's date which has been passed to Employment Judge Heap.

She has read the content of the email and attachments which can be discussed during the Costs hearing. However, given the disclosure by the Claimant of legal advice regarding the merits of her Employment Tribunal claim it would appear likely that legal professional privilege has been waived. If that is disputed, the Claimant may wish to take some advice on the issue.

Employment Judge Heap has directed that this matter is raised ahead of the commencement of the hearing tomorrow as she is unclear whether the Claimant is to be legally represented then or only on 5th February 2020. This will therefore allow her the opportunity, if necessary, to seek advice."

The waiver of privilege point was an obvious one that would be raised. As set out in the email, the purpose of it was to give the Claimant an opportunity to consult with Mr. Southey. As it was, I acceded to the Claimant's application, which was opposed on behalf of the Respondents, on 4th February not to determine that point until 5th February 2020 when Mr. Southey was attending the hearing. I provided both parties with a relevant authority at the outset on 4th February given that I wanted to be addressed on it.

I could not give the Claimant the opportunity to retract the words which had seen her lose privilege as she contends in her recusal application that I should have done given that once privilege has been lost or waived, it cannot be reclaimed.

I did not infer that the Claimant was deliberately concealing relevant documents. It was clear that there were additional documents which were relevant and which the Respondent was entitled to see and the Orders that I made reflected that. Both parties were, in fact, consulted as to the precise wording of the Order which was substantially narrower than sought by the Respondent in terms of their position that the entire case file should be disclosed. Those Orders for disclosure were made because the documents were relevant to the points that the Claimant sought to advance in defence of the Respondents costs application. Again, it is to compare apples with oranges to contrast that with the parts of her application for disclosure that I refused.

The reference to the Claimant's witness statement being unsolicited was because that was precisely what it was given that it was served significantly outside the terms of the Orders that I had previously made.

i. There is something of an irony in the Claimant's submissions in respect of this issue given that her own behaviour has been far from professional or appropriate on a number of occasions. That has included talking over me and others, raising her voice and making serious and repeated assertions of impropriety in a highly emotive way – including in this application as to "false representations". She has enjoyed far more latitude than I might ordinarily have given in view of the fact that I am aware of the stressful impact that the ongoing proceedings have had on her and the sense of injustice that she continues to feel over the outcome of the Taylor Tribunal.

I have had to stress on more than one occasion during the course of dealing with these matters that the parties must conduct themselves in a professional and respectful manner. Indeed, that is recorded in Orders that I have made. When there has been inappropriate conduct, I have therefore dealt with it.

Dealing with the two specific incidents that the Claimant relies upon, I have revisited my own notes of the hearings where those matters took place. The first was at the hearing on 28th June 2019 at 3.35 p.m. During that hearing the Claimant became upset and left the hearing. Mr. Sethi had not, in my view, said anything inappropriate to prompt that. The Claimant was clearly upset as a submission touched upon her mother's illness and tragic passing – a point on which the Claimant relied as to an extension of time. When the Claimant raised that she found that submission "disgusting" I indicated to Mr. Sethi that I did not need any further submissions on the point and suggested that we take ten minutes as an adjournment in order for the Claimant to compose herself. The Claimant left the hearing room at that stage and I caused a clerk of the Tribunal to try to locate the Claimant to check on her. It is not factually accurate, therefore, to say that I showed no concern for her welfare or allowed offensive comments to be made.

Turning to the second incident relied upon, this occurred during the hearing on 5th February 2020 at 12.20 when Mr. Sethi described a submission which was made by Mr. Southey as "ludicrous" in his own representations. Mr. Southey in reply invited Mr. Sethi to consider the language that he used and referred to it as being the first time that such a thing had been said in his career. Mr. Sethi immediately indicated that he would rephrase the comment to "misconceived" and apologised to Mr. Southey. No further actions was required given that Mr. Southey indicated that he would not take the matter further.

28. I am satisfied that neither singularly or when taken together on the basis of what in fact objectively occurred can it be said that a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased.

29. It was for all of those reasons that the Claimant's application for recusal was refused.

THE LAW

30. I therefore turn back to the costs application made on behalf of the Respondents and set out the law that I am required to apply to it.

31. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of whether an Employment Tribunal should make an Order for costs.

32. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs, which are as follows:

"When a costs order or a preparation time order may or shall be made

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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing."

33. In short, therefore, there is discretion to make an Order for costs where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings. Equally, the discretion is engaged where a party pursues either a claim or defence which has no reasonable prospect of succeeding or, to put it as it was termed previously, where a claim or defence (or part of it) is being pursued which is "misconceived".

34. With regard to unreasonable conduct it is necessary for the Tribunal to consider *"the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had." (***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78)**

35. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where a claim or response (or part of it) has no reasonable prospect of succeeding, it does not automatically follow that an Order for costs should be made. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. Particularly, when deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.

36. In accordance with Rule 84 of the Regulations, a Tribunal is entitled to have regard to the ability to pay any award of costs both in relation to the making of an Order at all, or the amount of any such Order. However, it is not a mandatory requirement that such consideration must automatically be given.

37. I have set out below, albeit in relatively brief terms, the diametrically opposed position of the Respondents and the Claimant in respect of this application for costs. I should stress that the respective positions of the parties as set out below are somewhat, and by necessity, paraphrased for the purposes of this Reserved Judgment. Both oral and written submissions of both sides have been at some length. It is neither necessary nor proportionate to set them out in full here. The parties should both be aware, however, that whilst I may not have set out the entire verbatim content of their respective submissions, I have considered all that they have had to say and have taken it into account before determining the costs application.

38. Similarly, I have not rehearsed here the volume of authorities relied on by the parties in the joint authorities bundle unless they are relevant to my conclusions as set out below. The parties should again be assured, however, that I have read each of them and taken them into account where relevant and to the extent necessary.

39. I should also stress that, as I have made plain previously, it is not the purpose or role of an Employment Judge tasked with a costs hearing of this nature to seek to go behind or revisit the findings of fact made or conclusions reached by the original Tribunal that heard the case - in this instance the Taylor Tribunal. I am bound by both those findings of fact and conclusions reached when dealing with this application and those are not matters which are permissible for me, or indeed the parties, to seek to reopen.

THE RESPONDENTS' POSITION

40. This brings me to consideration of the application made by the Respondents. As I have already observed, the Respondents pursue their costs application on the basis of what is asserted to be the Claimant's unreasonable conduct in the bringing and conducting of the proceeding and/or on the basis that it is said that the claims were misconceived and that that should have been plain to her.

41. The Respondents rely upon findings of the Tayler tribunal that the core allegations made by the Claimant were in bad faith. Particularly, the Respondents rely upon paragraphs 500, 502, 503, 504, 510, 512 through to 517

of the judgment of the Tayler tribunal and those matters set out in table form at page 69 to 89 of the costs bundle.

42. The Respondents also rely upon the following findings and/or factors as part of the costs application although those are relied on to a lesser degree than reliance upon the bad faith element of the application:

(i) The costs of defending the proceedings had had a material adverse effect on the running of the First Respondent, that organisation being an independent trade union relying on subscription income;

(ii) That even prior to the proceedings, the First Respondent had incurred substantial costs in conducting an extensive internal enquiry and instructing external Counsel to address complaints made by the Claimant against the Second, Third and Fourth Respondents;

(iii) That the Claimant had been represented since prior to presentation of the proceedings by expert employment and discrimination solicitors, Messrs Cayter Leyton Millard, and that the Court of Appeal had observed the following in relation to the Claimant herself:

"Ms Bhardwaj was a barrister of some 25 years standing, who also had the added advantage of being represented by counsel who was not only experienced in employment law but who could also bring in the additional insight given to him by his status as a part-time chairman of the employment tribunals.[1]"

(iv) The Claimant was warned in what is referred as "no uncertain terms" that her core complaints were false and had no reasonable prospect of success. She was clearly warned as the costs implications of pursuing the core allegations if matters proceeded to trial. Those core allegations related to the Claimant's suspension as a CPS[2] London branch officer and the fact that the CPS section committee had been suspended. The Claimant contended within the proceedings that that was because she had made complaints of race discrimination and victimisation and the suspension amounted to direct race discrimination, victimisation and unjustifiable trade union discipline. The Respondents rely particularly upon a costs warning letter sent to the Claimant by Messrs Russell, Jones & Walker[3] dated 14 November 2008. That letter was despatched to the Claimant's then solicitors before presentation of the first claim in these proceedings on 8th December 2008. The Respondents rely particularly on the following extracts from that correspondence (page 1415 in the bundle):

"*We assume that your client would have made you aware before you*

[1] Now of course referred to as an Employment Judge but those comments were made in light of the title that would have been held by the Claimant's Counsel at the material time of the hearing in 2010.

[2] An abbreviation for the Crown Prosecution Service, who at the material time employed the Claimant

[3] Russell, Jones & Walker were acquired by Messrs Slater & Gordon in 2012 and thereafter took over conduct of the proceedings on behalf of the First Respondent.

wrote your letter[4] that she has on more than one occasion expressed concern about the functioning of the London CPS branch officers and called for action to be taken.

In an email to Paul Whiteman of 10 September 2008 she went as far as to state:

"*You asked me whether I would be happy with you suspending ALL London Officers and you taking control of London affairs. My answer is a definite yes I would like you to take that action".*

Further at the meeting on 16 October [2008] *of the CPS Section Committee, before the decision was taken, your client when permitted an opportunity to make representations regarding the position in London confirmed she considered that London CPS branch was not being effectively run, agreed something was needed to be done, confirmed that she had previously urged FDA to consider suspending <u>all</u> CPS London officers and that the Section Committee should seriously consider bringing in a new group of officers so that London be properly represented. Our client did not understand these representations to be other than urging the stance that was then adopted by the Section Committee.*

Your client has now asserted that the decision was taken (which has the effect, you say, of suspension), though one that she had been suggesting the Committee take, is "clearly" unlawful victimisation of her under the Race Relations Act 1976.[5] This assertion is without any merit. Further, neither we nor our clients see how she can allege this when she apparently supported the action taken.

Any complaint taken by your client to the Employment Tribunal will be vigorously defended and costs will be sought against your client in these circumstances."

The letter similarly set out that the claim for unjustifiable trade union discipline would be equally "misconceived" for the same reason.

(v) It is also said that the litigation has been wholly disproportionate and the Respondents rely upon the following in support of that position:

(a) Compensation was sought for injury to feelings only in it is said that such an award would never have been more than £10,000.00 and that given the costs incurred, no account was taken of proportionality;

(b) That at a Preliminary hearing for case management on 8th September 2009 there had been an expression of concern about the way in which the proceedings were being conducted by the Claimant. The Respondents rely upon the following comments as recorded in the

[4] That is a reference to a letter of claim received from CLM dated 6 November 2008.
[5] This correspondence of course was written prior to the Equality Act 2010.

relevant case management order in that regard;

"*Finally, I mentioned proportionality, a concept which the parties to this dispute appear to be overlooking. Justice is not aided by over-elaboration, copious correspondence and constant applications to the Tribunal. The Claimant should consider confining her case to her best points; experience shows that (unless, as alas occasionally happens, the purpose is to put the opposing party to needless trouble and expense by fighting on numerous fronts at the same time) to do otherwise is counter-productive since the weak claims distract attention from the stronger ones. The Respondents should make a virtue of co-operating with the Claimant so far as they can in the preparation of the case for hearing. And all parties should give urgent thought to any means of resolving the case outside the Tribunal, reflecting on the horrific waste of money and energy which a 19-day hearing, the cost of which will massively exceed the sums at stake, will entail."*

(c) That the Claimant sought to pursue what is referred to an extremely long list of allegations set out within the agreed list of issues, which I have seen.

(d) That the Claimant sought to include excessive documents within the bundles before the Tayler Tribunal, many of which were irrelevant and were not referred to.

(e) That following disclosure, the Claimant did not withdraw any of the allegations.

(f) That there was what is referred to as excessive prolixity, with the Claimant having served what is referred to as a voluminous witness statement taking up some 234 pages.

(g) That the Claimant did not withdraw any allegation following the exchange of witness statements at a time when the Respondent's position is that had the matter been thought about sensibly, it would have been seen there was virtually no evidence to support the allegations.

(h) That what is referred to as the Claimant's dogged pursuit of the claim to the bitter end came at considerable and avoidable costs.

(i) That at the outset of the hearing, Employment Judge Tayler had brought the attention of the parties to the overriding objective but that the Claimant's conduct during the hearing did not accord with that in that it is said that she had:

a. ambushed the Respondents with new witness evidence;

b. sought to adduce irrelevant and disproportionate witness evidence;

c. sought to vex the Tribunal and the Respondents twice with the same application;

d. objected to the original unrevised witness statement of Wendy Jones for "no good reason";

e. ambushed the Respondents with new documentary evidence during the cross-examination of the 5th Respondent; and

f. applied to treat the Claimant's witness statement for the purposes of a Pre-Hearing Review[6] as part of her sworn evidence-in-chief after closing submissions had taken place.

(j) That the Tayler tribunal's findings of fact were said to demonstrate how each allegation in the agreed list of issues was unreasonably brought or pursued and/or was misconceived and that the tribunal found that many of the alleged detriments;

a. had no foundation in fact;

b. could not be subject to proper criticism, were so meritless or manifestly futile that they did not leave the starting block;

c. were not capable of amounting to a detriment in law and on the Claimant's own case, the allegations were not capable of amounting to a detriment so that there was no basis at all for a finding of unfavourable treatment;

d. were unarguably out of time and the Claimant adduced no evidence as to why it may be just and equitable to extend time for those complaints;

e. were unable to amount to acts of agency given that the First Respondent was not the employer of the Second, Third or Fourth Respondents nor was the FDA their principal and that those individuals were acting in their personal capacity; and

f. the core allegations were false and made in bad faith.

(k) That the Claimant's conduct post the Taylor Tribunal hearing involved:

(i) making a "manifestly futile" application to review the interlocutory decision not to treat the Pre-hearing review statement as part of the Claimant's sworn evidence;

(ii) making a "manifestly futile" and out of time application to review

[6] As then was, now an open attended preliminary hearing

the judgment of the Tayler tribunal[7];

(iii) making a "manifestly futile" application to extend time for her own costs application.

43. In support of those broad submissions, the Respondents set out in table form reliance on 46 separate points and/or findings in support of the application (see page 69 to 90 of the costs hearing bundle). I do not set those out here, nor do I set out the Claimant's reply to each (see pages 108 to 111 of the costs hearing bundle) as they form part of my conclusions on the application, which I have set out in detail below.

44. There are now further strands to the costs application which have developed over the course of my dealing with the original application. These are as follows:

a. That the Claimant's conduct was unreasonable in raising reliance on legal advice received in defence of the costs application late in the day which resulted in the hearing having to be adjourned;

b. That the Claimant's conduct was unreasonable in respect of a recusal application made on 16th April 2020; and

c. That the Claimant failed to comply with Orders made on 5th February 2020 and that also amounted to unreasonable conduct and/or a breach of Tribunal Orders.

THE CLAIMANT'S POSITION

45. The Claimant opposes the Respondents' applications for costs in robust terms and she has made detailed written argument on the point (see pages 97 to 111 of the costs hearing bundle) which have been helpfully supplemented by oral argument by Mr. Southey during the course of this costs hearing. I summarise here her main points of argument against an order for costs being made in favour of the Respondents given that the oral argument particularly is extensive and it is not necessary to record all matters here. The Claimant's specific replies to the table relied on by the Respondent appears in the costs bundle at pages 108 to 111.

46. It is said that the findings of the Tayler Tribunal were clear that the Claimant had a genuine commitment to equality, which implied that there was every reason to believe that the Claimant was motivated by concerns of the highest order and that litigants such as the Claimant must be free to raise such complaints.

47. That there was good reason for the Claimant to be concerned about racial discrimination within the CPS in that:

[7] Now an application for Reconsideration but at the time, the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 were in force which that process was termed a review.

a. In 2001, the Denman Report concluded that the CPS was institutionally racist and, although subsequent progress had been made, the Commission for Racial Equality still recognised that it needed to undertake a watching brief at the time of the events of which the Claimant complained;

b. At a similar time, the Court of Appeal had upheld findings that the CPS had racially discriminated against an Asian solicitor **Aziz v CPS [2007] ICR 153**; and

c. The Claimant's starting salary was lower than that of other equivalent prosecutors and statics disclosed by the CPS showed that white lawyers were far more likely to be placed on a higher grade and salary than black lawyers with similar experience.

48. It is said by the Claimant that tat background is key because it implied that it was important that the FDA were rigorous in protecting the interests of its members such as the Claimant who were at risk of potential racism within the CPS.

49. It is also argued that there was good reason for the Claimant to be concerned about conscious or unconscious racial bias on the part of the FDA and its officers and also good reason for the Claimant to be concerned that that bias influenced the response of the FDA to complaints of racism in that:

a. The FDA and the TUC agreed that there was a need to investigate race equality policies within the FDA with the implication that those policies might be inadequate;

b. That agreement between the FDA and the TUC was part of the settlement of an earlier claim brought by the Claimant against the FDA. That claim had also alleged discrimination and in particular a discriminatory failure to provide legal advice and support to a claim of race discrimination against the CPS;

c. That the Tayler Tribunal appeared to accept that at least one serious allegation of racial discrimination seemed not to have been investigated by the FDA; and

d. That the Claimant was encouraged to believe that the FDA had failed to deal with complaints about racism within the CPS by the Second Respondent and that the Tayler tribunal had concluded that the Second Respondent had "egged the Claimant on" in an increasingly vitriolic manner. The proceedings were motivated therefore by a desire to promote the public interest by exposing potential racism within a trade union.

50. Finally, it is said by the Claimant that at all material times she was advised by specialist employment solicitors and Counsel that her claim had reasonable prospects of success and that she relied on that advice in

pursuing the matter.

51. Overarching all of these submissions is the Claimant's case that there has been misconduct and impropriety by the Respondents to the proceedings and their lawyers and that, as I understand it, it is said that it would be inequitable to make any Order for costs in their favour. As a result of my conclusions on other matters, I have not found it necessary to determine that aspect of the claim. Whilst the Claimant will no doubt want findings made on that issue, it is not necessary to do so and she still has an outstanding complaint with the President's Office where those matters can be further ventilated to the extent necessary.

CONCLUSIONS

52. I turn then to my conclusions on the costs applications made by the Respondents.

The proceedings before the Taylor Tribunal

53. I begin by considering if the proceedings before the Taylor Tribunal had no reasonable prospects of success (commonly still referred to as the term under a previous incarnation of the Tribunal Rules as "misconceived") or whether they were pursued unreasonably.

54. Those matters are inextricably linked as the Respondents rely on all grounds as being unreasonable conduct or alternatively evidence that the claims were misconceived. I take each of those grounds in turn.

Core allegations made in bad faith

55. As set out above, the Respondents rely upon findings of the Tayler Tribunal that the core allegations made by the Claimant were in bad faith. Particularly, the Respondents rely upon paragraphs 500, 502, 503, 504, 510, 512 through to 517 of the Judgment of the Tayler Tribunal and those matters set out in table form at page 69 to 89 of the costs bundle.

56. The central element of this matter is that underpinning part of the claim was the fact that the Claimant was complaining about (either as an act of detriment or relevant protected act) being suspended from her role as Equalities Officer in the London Branch which was a decision communicated to her on 22nd October 2008. The Taylor Tribunal found that the decision had in fact been to suspend all London officers (including the Claimant) from their London roles and that that had been a course of action recommended and specifically asked for by the Claimant.

57. The key finding in relation to that matter comes at paragraph 517 of the Judgment of the Taylor Tribunal which said this:

"We accept that the decision to suspend the Section Committee arose from the complaint that the Claimant had made in relation to her suspension from Branch Office. She alleged that this was victimisation and/or unjustifiable discipline in her email to the members and the letter from her solicitors to the FDA (see eleventh protected act and second protected act in the second claim). However, we consider that these allegations were false and made in bad faith. The Claimant had on two occasions specifically suggested that Branch Officers should be suspended. When the Section Committee acted in accordance with her suggestion she responded by suggesting that they had acted unlawfully and might face legal action. In doing so she made false allegations and was not acting in good faith. Furthermore, the real reason for the suspension of the Section Committee was the breakdown in trust and confidence that arose from the Claimant's change of position."

58. I accept the position of the Respondent that it is clear that this element of the claim had no reasonable prospect of success given the detriment of which the Claimant complained and upon which she underpinned claims to have done a protected act came from her very own quite forceful suggestion. It cannot reasonably be said to be a detriment for the First Respondent to have done exactly as the Claimant proposed. The first strand of the test for costs is therefore made out in respect of this particular matter but I go on below to consider whether to exercise my discretion to make a costs Order.

Table of findings and conclusions

59. Before that, however, I deal with the other matters contained within the Respondent's table which are said to amount to either unreasonable conduct or claims that had no reasonable prospects of success. I have adopted the same numbering system as utilised in that table and the reply from the Claimant for brevity and ease of reference:

Item one

60. The basis of this particular ground is that it is said that either at the point of bringing proceedings and/or following disclosure and the exchange of witness statements the Claimant can be taken to have known or ought to have known that if she had gone about the matter sensibly that the allegations that she was making had no substance in fact or law and that if she had taken the trouble to inquire into the facts and law surrounding her allegations instead of reacting in a hostile manner with threats and false statements, she would have realised that her claims were devoid of merit.

61. The Respondent relies on paragraphs 458, 459 and 512 to 517 of the Judgment of the Taylor Tribunal. In reply, Mr. Southey says that the findings do not support the point the Respondents make and only show

that the Claimant had difficult relationships and could be volatile. Mr. Southey also submits that the findings are not accepted by the Claimant but that is not to the point given that quite clearly the Taylor Judgment stands as the Claimant's attempts to appeal it have all failed.

62. After consideration of those particular paragraphs, I am satisfied that in reality it is paragraph 512 of the Judgment which is key and the whole of that paragraph needs to be read in context. That paragraph recorded as follows:

"In our above analysis there are numerous of the complaints raised by the Claimant that we have not accepted as a matter of fact or have not held that the Claimant was subject to a detriment. Save in relation to the matters that we go on to consider in further detail we have fully accepted the Respondent's explanations for the Claimant's treatment and consider that the evidence does not support any contention that the Claimant was treated less favourably on racial grounds, was subjected to victimisation or to unjustified discipline in those respects. We go on to analyse the remaining matters in further detail. We also note at this stage that we have accepted that a number of the complaints raised by the Claimant did not amount to protected acts."

63. In my view, it is right as Mr. Southey points out to say that the Tribunal were clearly troubled by certain aspects of the Respondents evidence and/or actions and there were matters which caused them concern – see for example paragraphs 449, 451, 452, 453, 454 and 455. Indeed, it appears from my reading of paragraph 457 that the Tribunal accepted that the burden of proof had shifted given those troubling aspects. It cannot on that basis be said that these elements of the claim were devoid of merit and unreasonably pursued.

64. It is not uncommon, after the dust has settled and with the benefit of hearing evidence and cross examination, for a Tribunal to reject claims on the facts or on the basis of the law. That does not mean that they have no reasonable prospects of success or that they have been unreasonably brought. The Claimant was in my view entitled to have those matters determined by the Tribunal. As the burden of proof had clearly shifted, those aspects of the claim cannot reasonably be characterised as having no reasonable prospects of success nor can it be said that it was unreasonable for the Claimant to ventilate and have them tested by the Tribunal.

<u>Item two</u>

65. The Respondent's position is that bringing or pursuing a complaint in reliance on protected act number two was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 463 in this regard. Again, I agree with the submissions of Mr. Southey that

this is simply a case that this aspect of the claim failed following the facts found by the Tribunal. That is not unusual and it cannot be the case, I accept, that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item three

66. The Respondent's position is that bringing or pursuing a complaint in reliance on detriment number one was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 464 in this regard. Again, I agree with the submissions of Mr. Southey that this is simply a case that this aspect of the claim failed following the facts found by the Tribunal and, for the same reasons as given in respect of item number two above, I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item four

67. The Respondent's position is that bringing or pursuing a complaint in reliance on protected act number three was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 465 in this regard. The fact that the Tribunal found that the facts relied on by the Claimant did not, after ventilation of the evidence, amount to a protected act is not in my view sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success. It is for the Tribunal to apply the law to the facts as they have found them to be and the Claimant was, in my view, entitled to have this aspect of the claim ventilated and determined.

Item five

68. The Respondent's position is that bringing or pursuing a complaint in reliance on detriment 2(a)(i) was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 467 and 468 in this regard. Again, I agree with the submissions of Mr. Southey that this is simply a case that this aspect of the claim failed following the facts found by the Tribunal and for the same reasons as given in respect of item number two above I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item six

69. The Respondent's position is that bringing or pursuing a complaint in reliance on detriment 2(a)(ii) and detriment 14 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 469 and 471 in this regard. Again, I agree with the submissions of Mr.

Southey that this is simply a case that this aspect of the claim failed following the facts found by the Tribunal and for the same reasons as given in respect of item number two above I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item seven

70. The Respondent's position is that bringing or pursuing a complaint in reliance on detriment 2(a)(iii)[8] was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 470 in this regard. Again, I agree with the submissions of Mr. Southey that this is simply a case that this aspect of the claim failed following the facts found by the Tribunal and for the same reasons as given in respect of item number two above I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item eight

71. The Respondent's position is that bringing or pursuing a complaint in reliance on detriment 13 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 467 and 468 in this regard.

72. Again, I agree with the submissions of Mr. Southey that this is simply a case that this aspect of the claim failed following the facts found by the Tribunal. Simply because the Taylor Tribunal accepted the Respondent's evidence for the treatment of the Claimant does not make the allegation either unfounded or unreasonable. Therefore, again for the same reasons as given in respect of item number two above I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item nine

73. The Respondent's position is that bringing or pursuing a complaint in reliance on detriment 3(i) was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 464 in this regard. Again, I agree with the submissions of Mr. Southey that this is simply a case that this aspect of the claim failed following the facts found by the Taylor Tribunal and for the same reasons as given in respect of item number two above I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

[8] Although in the table this is referred to as detriment 2(a)(ii) it appears that it should be a reference to detriment 2(a)(iii).

Item ten

74. The Respondent's position is that bringing or pursuing a complaint in reliance on detriment 3(iv) was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 475. This relates to very similar issues as arose in respect of item nine above. Again, it is a claim that failed on its facts. The Claimant was entitled in my view to have those matters tested and the fact that the Tribunal accepted the Respondents evidence does not mean that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item eleven

75. The Respondent's position is that bringing or pursuing a complaint in reliance on detriment 5 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 476 in this regard.

76. I do accept that this aspect of the claim was misconceived on the basis that it is not possible to see how the actions of the Respondents towards another individual could amount to a detriment to the Claimant.

77. The first strand of the test for costs is therefore made out and I go on to consider below whether it is appropriate to exercise my discretion to make an Order for costs.

Item twelve

78. The Respondent's position is that bringing or pursuing a complaint in reliance on detriment 3(ii) was unreasonable and/or misconceived and relies on the findings of the Tribunal at paragraph 477 in this regard. It is said that the Tribunal made an express finding in this paragraph that the Claimant knew of the reasons for her exclusion from the Whitley Council attendance and as such detriment 3(ii) was either brought or pursued in bad faith.

79. I agree with Mr. Southey that there is no express finding of bad faith in respect of this part of the claim and that had the Tribunal considered that to be the case then that finding would have been made as it was with the suspension of the London Officers issue. I do not accept that it is for me to imply that that was the finding that they made or substitute that finding now.

80. Again, this is a matter of a finding of fact made by the Tribunal after the ventilation of evidence as to the real reason for the change in arrangements in respect of the Whitley Council. Making findings of fact after hearing the evidence is a central function of a Tribunal and it is only by that process that a Claimant is able to test whether there has been discrimination as he or she believes and cross examination is key to that issue particularly, as relied on here, where there are allegations

of subconscious discrimination.

81. The fact that the finding was adverse to the Claimant does not mean that the allegation was misconceived or that it was pursued unreasonably.

Item thirteen

82. The Respondents position is that bringing or pursuing a complaint in reliance on detriment 15 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 479 and 482 in this regard. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that the real reason that informal resolution could not take place was the position taken by the London Respondents.

83. Again, I agree with the submissions of Mr. Southey that this is simply a case that this aspect of the claim failed following the facts found by the Tribunal and for the same reasons as given in respect of item number two above I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item fourteen

84. In similar vein to item 12, the Respondent's position is that bringing or pursuing a complaint in reliance on detriment 6 was unreasonable and/or misconceived and relies on the findings of the Taylor Tribunal at paragraph 481 in this regard. It is said that the Tribunal made an express finding in this paragraph that the Claimant knew of the reasons for her exclusion from the Whitley Council attendance and as such was either brought or pursued in bad faith.

85. Again, as with item 12 I agree with Mr. Southey that there is no express finding of bad faith in respect of this part of the claim and that had the Tribunal considered that to be the case then that finding would have been made as it was with the suspension of the London Officers issue. For the same reasons as previously given, I do not consider that it is for me to imply that that was the finding that they made or substitute that finding now.

86. Again, this is a matter of a finding of fact made by the Tribunal after the ventilation of evidence as to the real reason for the Whitley Council arrangements and I agree with the submissions of Mr. Southey that this is simply a case that this aspect of the claim failed following the facts found by the Tribunal. Therefore, for the same reasons as given in respect of item number two above I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item fifteen

87. The Respondents position is that bringing or pursuing a complaint in reliance on detriment 7(i) was unreasonable or misconceived and they rely on the findings of the Taylor Tribunal at paragraphs 479 and 482 in this regard. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that. In essence, this is a very similar position to item 13 above.

88. Again, I agree with the submissions of Mr. Southey that this is simply a further situation where this aspect of the claim failed following the facts found by the Tribunal and for the same reasons as given in respect of item number two above, I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item sixteen

89. The Respondents position is that bringing or pursuing a complaint in reliance on detriment 7(ii) was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 479 and 482 in this regard. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that. In essence, this is a very similar position to items 13 and 15 above.

90. Again, I agree with the submissions of Mr. Southey that this is simply a case that this aspect of the claim failed following the facts found by the Tribunal and for the same reasons as given in respect of item number two above and generally, it cannot follow that this aspect of the claim was either unreasonably pursued or that it had no reasonable prospect of success. As I have already observed above, central to a Tribunal's role is to find finds and determine the real reason for the treatment complained of.

91. I do not accept that merely having a fact found against the Claimant is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success. If that was the case, then I agree with Mr. Southey that there is a danger of injustice and a barrier to discrimination claims being able to be pursued if costs follow a factual allegation not being made out when it is not found that there has been any issue of untruthfulness. It is common of course for there to be differing standpoints on the "reason why" in discrimination cases and the only way for those matters to be determined is by hearing the evidence in a contested hearing. The Claimant was, in my view, entitled to ventilate these matters and to have them determined.

Item seventeen

92. The Respondents position is that bringing or pursuing a complaint in reliance on detriment 7(iii) was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 486 in this regard. The Respondents submit that the allegation was not included in the claim and no application to amend was made; that the detriment claimed did not occur and the Claimant was not present at the meeting so she could not know what was said.

93. Whatever the position with regard to whether the allegation was pleaded or not, the Tribunal clearly determined it. In respect of whether the allegation was unreasonably advanced or misconceived, I agree with the submissions of Mr. Southey that this is simply a case that this aspect of the claim failed following the facts found by the Tribunal. Therefore, for the same reasons as given in respect of item number two above I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item eighteen

94. The Respondent's position here is that bringing or pursuing a complaint in reliance on detriment 7(iv) and 16 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 488 in this regard. It is said that the Tribunal made an express finding in this paragraph that the Claimant knew of the reasons for her exclusion from the Whitley Council attendance and as such was either brought or pursued in bad faith.

95. Again, as with items 12 and 14 I agree with Mr. Southey that there is no express finding of bad faith in respect of this part of the claim and that had the Tribunal considered that to be the case then that finding would have been made as it was with the suspension of the London Officers issue. For the same reasons as I have already given above, I do not consider that it is for me to imply that that was the finding that they made or substitute that finding now.

96. Again, this is a matter of a finding of fact made by the Tribunal after the ventilation of evidence as to the real reason for the treatment complained of and I agree with the submissions of Mr. Southey that this is again simply a case that this aspect of the claim failed following the facts found by the Tribunal and for the same reasons as given in respect of item number two above, I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item nineteen

97. The Respondent's position is that bringing or pursuing a complaint in

reliance on detriment 9 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 489, 515, 516, 514 and 513 and that this detriment was at the core of the dispute.

98. The Respondent submits that the claim was out of time with no basis upon which it could be reasonably extended and that the actions of the London Respondents were not capable of amounting to the actions of agents on the part of the First Respondent.

99. I do not accept that the arguments that the Claimant advanced either as to agency or jurisdiction were misconceived as the Respondent asserts or, for that matter, that it was unreasonable to pursue them. As to the latter, the Claimant clearly set out her position as to jurisdiction and advanced a reason for the lateness of the claim – albeit as I shall come to at a very late stage after closing submissions. The fact that the Tribunal did not accept the Claimant's position is not a reason to say that it was misconceived or unreasonably pursued.

100. Similarly, the fact that the Tribunal refused the Claimant's arguments as to agency after reaching findings of fact on the evidence heard cannot be such as to render the inclusion of these aspects of the claim misconceived or unreasonably pursued.

101. I agree with the submissions of Mr. Southey that the Claimant was entitled to argue these points and, as to jurisdiction particularly, the Tribunal is frequently asked to determine "out of time" points. The fact that a Claimant ultimately fails on the issue does not mean that he or she has acted unreasonably or that those arguments had no prospect of success and that is the reality of the situation here.

Item twenty

102. The Respondent's position here is that bringing or pursuing a complaint in reliance on detriment 3(iii) was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 477 and 490. It is said that the Tribunal made an express finding in this paragraph that the Claimant knew of the reasons for her exclusion from the Whitley Council attendance and as such was either brought or pursued in bad faith.

103. Again, as with items 12 and 14 I agree with Mr. Southey that there is no express finding of bad faith in respect of this part of the claim and that had the Tribunal considered that to be the case then that finding would have been made as it was with the suspension of the London Officers issue. Again, I do not consider that it is for me to imply that that was the finding that they made or substitute that finding now.

104. This is again a matter of a finding of fact made by the Tribunal after the ventilation of evidence as to the real reason for the treatment complained of and I agree with the submissions of Mr. Southey that this

is simply a case that this aspect of the claim failed following the facts found by the Tribunal and, for the same reasons as given in respect of item number two above and issues as to findings of fact generally, I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item twenty-one

105. The Respondent's position is that bringing or pursuing a complaint in reliance on detriments 8 and 10 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 491, 495, 515, 516, 514 and 513 and that this detriment was at the core of the dispute.

106. Again, as with item 19 the basis of this ground arises largely with regard to jurisdiction and as to agency issues. I find it no more unreasonable or misconceived for the Claimant to have advanced these matters than I did for the reasons that I gave at item 19 above. The remaining matters related to factual findings and although those were against the Claimant, for the reasons that I have already given that does not render this aspect of the claim either misconceived or unreasonably brought or advanced.

Item twenty-two

107. The Respondents position is that bringing or pursuing a complaint in reliance on detriment 17 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 493. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that.

108. Again, I agree with the submissions of Mr. Southey that this is simply a case that this aspect of the claim failed following the facts found by the Tribunal and for the same reasons as given in respect of item number two above it was neither misconceived nor unreasonably brought or pursued.

Item twenty-three

109. As with item 22, the Respondents position is that bringing or pursuing a complaint in reliance on detriment 19 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 494. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that.

110. I agree with the submissions of Mr. Southey that this is again simply a case that this aspect of the claim failed following the facts found by the Tribunal and for the same reasons as given in respect of item number twenty-two above it was neither misconceived nor unreasonably

brought or pursued.

Item twenty-four

111. As with items 22 and 23, the Respondents position is that bringing or pursuing a complaint in reliance on detriment 7(v) was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 496. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that.

112. I agree with the submissions of Mr. Southey that this is again simply a case that this aspect of the claim failed following the facts found by the Tribunal and for the same reasons as given in respect of item number twenty-two and twenty-three above it was neither misconceived nor unreasonably brought or pursued.

Item twenty-five

113. The Respondents position is that bringing or pursuing a complaint in reliance on detriments 11, 20 and 21 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 497 to 489. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that.

114. I agree with the submissions of Mr. Southey that this is again simply a case that this aspect of the claim failed following the facts found by the Tribunal and it was neither misconceived nor unreasonably brought or pursued. I accept that it was an element of the claim that the Claimant was entitled to have determined by the Tribunal.

Item twenty-six

115. The Respondents position is that bringing or pursuing a complaint in reliance on detriment 22 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 500.

116. I have already dealt with this matter under “core allegations made in bad faith” above and so I do not repeat those issues here.

Item twenty-seven

117. The Respondents position is that bringing or pursuing a complaint in reliance on protected act number eleven was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 502 and 517.

118. I have already dealt with this matter under “core allegations made in bad faith” above and so I do not repeat those issues here.

Item twenty-eight

119. The Respondents position is that bringing or pursuing a complaint in reliance on detriment number 18 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 503 and 517.

120. I have already dealt with this matter under "core allegations made in bad faith" above and so I do not repeat those issues here.

Item twenty-nine

121. The Respondents position is that bringing or pursuing a complaint in reliance on detriment number 23 was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 504.

122. It is the Respondents position that this detriment is linked to the finding of bad faith made in respect of the suspension of the Section Committee. I agree with Mr. Southey's submissions that this is in fact not a detriment that is supported by the bad faith finding. The Tribunal found that the Claimant was turned away from the meeting because of the suspension of the Section Committee and that was therefore the "reason why" she was treated in the manner of which she complained but there was no finding of bad faith in respect of detriment 23. Again, this is a matter that the Claimant was in my view entitled to pursue in order for there to be a factual finding on the "reason why" question.

123. It follows that this part of the claim was neither misconceived nor unreasonably brought or pursued.

Item thirty

124. The Respondents position is that bringing or pursuing a complaint in reliance on detriment 12(e) was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 505. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that if she had made appropriate enquiries.

125. Again, as with other detriments which were dismissed on a factual basis it does not follow that this detriment was misconceived nor unreasonably brought or pursued. The Claimant was entitled to a finding from the Tribunal as to the "reason why" and I need not repeat all of the things that I have said previously regarding factual findings.

Item thirty-one

126. The Respondent's position here is that bringing or pursuing a complaint in reliance on detriment 12(a) was unreasonable or misconceived and

relies on the findings of the Tribunal at paragraph 506. It is said that the Tribunal made an express finding in this paragraph that the Claimant did not advance any basis to show that the explanations of the Fifth Respondent given at the time was unreasonable. It is said that this allegation was therefore either brought or pursued in bad faith.

127. I am satisfied that there is no express finding of bad faith in respect of this part of the claim and for the reasons already given above in respect of other matters I do not consider that it is for me to imply that that was the finding that they made or substitute that finding now.

128. Once again, this is simply a matter of a finding of fact made by the Tribunal after the ventilation of evidence as to the real reason for the treatment complained of and for the same reasons as given in respect of item number two and other detriments following factual findings made, I do not accept that that is sufficient to result in a conclusion that this aspect of the claim was either unreasonably brought or pursued or that it had no reasonable prospects of success.

Item thirty-two

129. The Respondents position is that bringing or pursuing a complaint in reliance on detriment 12(c) was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 507. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that if she had made appropriate enquiries.

130. Again, as with other detriments which were dismissed on a factual basis it does not follow that this detriment was misconceived nor unreasonably brought or pursued. The Claimant was entitled to a finding from the Tribunal as to the "reason why" and again I need not repeat all of the things that I have said previously regarding factual findings.

Item thirty-three

131. The Respondents position is that bringing or pursuing a complaint in reliance on detriment 12(b) was unreasonable or misconceived and relies on the findings of the Taylor Tribunal at paragraph 508. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that if she had made appropriate enquiries.

132. Again, as with other detriments which were dismissed on a factual basis it does not follow that this detriment was misconceived nor unreasonably brought or pursued. The Claimant was entitled to a finding from the Tribunal as to the "reason why" and I need not repeat

all of the things that I have said above regarding factual findings. The fact that the Tribunal were against the Claimant after all of the evidence had been tested does not mean that this aspect of the claim should not have been advanced or that the Claimant was wrong to do so.

Item thirty-four

133. The Respondents position is that bringing or pursuing a complaint in reliance on protected act number two in the second claim was unreasonable or misconceived and relies on the findings of the Tribunal at paragraphs 510 and 517.

134. I have already dealt with this matter under "core allegations made in bad faith" above and so I do not repeat those issues here.

Item thirty-five

135. The Respondents position is that bringing or pursuing a complaint in reliance on the detriment in claim number two was unreasonable or misconceived and relies on the findings of the Tribunal at paragraph 511. The Respondents submit that the detriment claimed did not occur and the Claimant knew or ought to have known that if she had made appropriate enquiries.

136. Again, as with other detriments which were dismissed on a factual basis it does not follow that this detriment was misconceived nor unreasonably brought or pursued. The Claimant was entitled to a finding from the Tribunal as to the "reason why" and I need not repeat all of the things that I have said previously regarding factual findings.

Item number thirty-six

137. This relates to the first of a number of grounds as to matters that arose during the proceedings before the Taylor Tribunal rather than the actual claim itself.

138. It is said that the Claimant disclosed excessive documentation during the process that was voluminous, irrelevant and unnecessary. The Respondents rely upon the comments made at paragraph 6 of the Judgment of the Taylor Tribunal that *"we were provided with voluminous documentary evidence".*

139. Whilst the documentation referred to in this section of the grounds can indeed said to be voluminous, given that I was not a part of the Taylor Tribunal I have no way of determining what was and was not referred to or who was responsible for disclosing it. What I can say is that given that this was a 25 day hearing dealing with multiple allegations of discrimination, I am not overly surprised that there would have been a considerable amount of documentation disclosed.

140. I therefore do not find any unreasonable conduct on the part of the Claimant in respect of this element of the application.

Item thirty-seven

141. The next part of the application relates to what is said to be "excessive prolixity" of the Claimant's witness evidence and the fact that, as recorded at paragraph 10 of the Judgment of the Taylor Tribunal the Claimant's witness statement alone ran to 234 pages.

142. Again, I remind myself that this was a hearing that occupied 25 days of Tribunal time and contained multiple allegations of discrimination. Whilst the statement was certainly lengthy, it does not appear to me to be something that could amount to unreasonable conduct. Particularly, I have not been taken to any part of the statement that is said to contain irrelevant or unnecessary detail nor was there any finding to that effect by the Taylor Tribunal.

143. I therefore do not find any unreasonable conduct in respect of this element of the application.

Item number thirty-eight

144. This part of the application related to what is termed by the Respondents as ambushing them with witness evidence as referred to at paragraph 12.1 of the Judgment of the Taylor Tribunal.

145. I can deal with this in fairly short Order given that I accept the submissions of Mr. Southey that the Taylor Tribunal permitted the statements in question to be admitted. I have no doubt that had the Tribunal been of the view that the conduct of the Claimant in not disclosing them in accordance with Orders made was unreasonable conduct, they would have refused to allow them to be adduced. That is with the exception of the evidence of Ms. Bamieh but I deal with that separately in respect of item number thirty-nine below.

Item number thirty-nine

146. This aspect of the application relates to what is said to be the Claimant seeking to adduce irrelevant and disproportionate witness evidence in respect of Ms. Bamieh.

147. I accept the submissions of Mr. Southey that simply because an application does not succeed does not mean that it amounts to unreasonable conduct. That is plainly the case here and this appears to me to be a routine issue that Tribunals are frequently asked to consider. In addition, it is difficult to see what additional costs the Respondents could have incurred in respect of this issue given that the

Tribunal refused permission to admit the witness statement in question.

Item number forty

148. The next ground of the application is referred to as the Claimant vexing the Tribunal with the same application twice. This related, as referred to at paragraph 12.4 of the Judgment of the Taylor Tribunal, to a request for disclosure that had already been refused at an earlier Preliminary hearing.

149. I am not satisfied that the revisiting of a disclosure application which has previously been refused can amount to unreasonable conduct. It is, in my experience, not uncommon. If that application was, in the face of refusal, continually revisited to the disruption of the hearing then that may well be a different matter but that was not the case here. This relatively minor issue cannot amount to unreasonable conduct and, further, given the application was refused it is difficult to see that it would have had any particular costs implications.

Item number forty-one

150. This part of the application relates to what is said to be the Claimant's objection to the introduction of a witness statement from a Wendy Jones in response to statements that the Claimant had been permitted to adduce late. The paragraphs referred to within the Tribunal Judgment do not appear to set out that objections were made but I take it from Mr. Southey's reply at page 110 that they were. I have not been taken to detail as to the basis of the objections and so it is difficult to know whether they may have been legitimate or not.

151. What I can say, however, is that in closely fought claims of this nature with the clear strength of feeling that existed on both sides, it is not unusual for every point to be taken where a concession might otherwise be sensible. I do not find that that crosses into the threshold of unreasonable conduct and it is also difficult to see what that ultimately added to the Respondents costs given that the Tribunal resolved the matter in their favour.

Item number forty-two

152. This aspect of the application relates to what is said to be seeking to ambush the Respondent with new documentation during the witness evidence of the Fifth Respondent. As set out in paragraph 12.9 of the Judgment of the Taylor Tribunal, this related to the Claimant seeking to adduce late a compromise agreement which had settled an earlier claim between the Claimant and the First Respondent.

153. I accept the submissions of Mr. Southey that a failed application of this nature is not such that it can amount to unreasonable conduct. It is, in

fact, a rather unfortunate but typical feature of the types of cases that Employment Tribunals deal with and to characterise that as unreasonable conduct would result in innumerable costs Orders being made. In all events, it is also difficult to see what additional costs resulted from this issue given that the application was unsuccessful.

Item number forty-three

154. This aspect of the application relates to what the Respondents termed as tardily and after closing submissions applying to formally treat the Claimant's statement for an earlier Pre-hearing Review (as it then was) as part of her evidence on jurisdictional issues.

155. It appears to me that such a matter can simply be seen as an omission, and no doubt one by those instructed by the Claimant rather than by the Claimant herself. Applying to rectify such an error so as to act in the best interests of the Claimant cannot in my view amount to unreasonable conduct and, again, it is difficult to see how this matter had any impact on the Respondents costs.

156. It has to be said that, in reality, issues such as these which are not unusual in litigation, pale somewhat in significance with the disruption to the proceedings caused by the delay in disclosing the appointments of two of the Respondents as lay members of the Employment Tribunal and there is perhaps something of an irony in some of the points taken by the Respondents within this costs application.

Item number forty-four

157. This part of the application relates to what is said to be a manifestly futile application to review (as it was then termed) of the he decision not to admit the aforementioned witness statement as sworn evidence.

158. I can deal with this in short terms as it is clear that this application was made on the clear advice of the Claimant's solicitors. As I shall come to further below, disclosure has been made as to the advice that the Claimant received and it is plain from an email from the Claimant's then solicitors to her then legal expenses insurers dated 16th July 2010 that their advice was to pursue the review application.

159. It cannot be unreasonable conduct for the Claimant to have relied on the advice received from her solicitors in this regard.

Item forty-five

160. This part of the application relates to an out of time application for review made by the Claimant against the Judgment of the Taylor Tribunal.

161. This related to the fact that the Claimant believed – and still believes –

that the Taylor Tribunal was biased and that she did not receive a fair hearing. The Claimant has dedicated a significant amount of time and costs to seeking to establish that position and having observed the vehemence of her submissions on the subject, I have no doubt whatsoever that this issue is of the utmost importance to her.

162. Given that backdrop, I do not consider the Claimant's attempt, even at a late stage, to challenge what she believed to be an unfair and biased decision to be unreasonable conduct.

Item number 46

163. The final matter which is said to amount to unreasonable conduct is what is said to be the Claimant's manifestly futile application to extend time to bring her own costs application.

164. It is fair to say that the Claimant's application was brought substantially out of time. However, whilst I dismissed the application I did not make any determination – and I do not do so now – that it was "manifestly futile". It was not an application that was misconceived. In view of the background circumstances I also do not consider that it was an application that was made or pursued unreasonably. I say that on the basis that the Claimant had already set out her intention to apply for costs some years previously and she has a clear and strong sense of feeling as to the basis of the same.

165. I accept – as I have already remarked upon in the context of item number 45 above – that the Claimant strongly believes that she has not had a fair hearing; that there has been injustice and that her complaints and concerns about the legitimacy of the proceedings before the Taylor Tribunal have not been dealt with. The Claimant has a determination given her strength of feeling about the issue to take every course to bring that that she sees as having been unjust to the fore. The Claimant's costs application was a way of ventilating those issues and even had I found that an out of time application to do so was unreasonable conduct (and I have not) I would not have considered it appropriate to exercise my discretion to Order costs given the circumstances that I have described above.

166. Unless I have expressly said so, I therefore do not consider that, either singularly or cumulatively, the matters of which the Respondents complain of as taking place during and after the proceedings before the Taylor Tribunal amounted to unreasonable conduct.

Other matters

167. There are some other issues which are not expressly covered above which have been developed by Mr. Sethi during the course of oral argument. One of those matters is that it is said that the Respondent

had already conducted a substantial investigation using external Counsel. However, that is not unusual and it is not such that it should deprive a Claimant of having their claim determined by an Employment Tribunal who has had the benefit of hearing all relevant evidence and cross examination and whose very purpose is to determine claims of this nature.

168. Mr. Sethi also points to the fact that the Claimant was clearly warned about pursuing a claim and the prospects of success of the claim in a costs warning letter from Messrs Russell, Jones & Walker dated 14th November 2008. That letter was despatched to the Claimant's then solicitors for presentation of the first claim in these proceedings on 8th December 2008. The Respondents rely particularly on the extracts which I have already set out above. I do consider that it would have been helpful for the Claimant's solicitors to have engaged in a more meaningful manner with the terms of that letter. However, as I shall come to below, I am satisfied that at all material times the advice that was being given to the Claimant was that she had good prospects of succeeding in her claims. I do not consider that the Claimant's actions in following that advice to have amounted to unreasonable conduct and I remind myself that the letter was not sent directly to the Claimant and there is no evidence that she directed her solicitors not to materially engage.

169. I should perhaps observe here that it is clear when reading the Judgment and the conclusions reached it is clear that the claim was not a strong one. However, it was not so hopeless that it would be properly categorised as being without any reasonable prospect of success (with the exception of the core allegation of bad faith and item number eleven above). Nor could it be said to be unreasonably brought or pursued and, particularly, there were elements that troubled the Tribunal as I have already observed; there were conflicting facts that needed to be tested and a full hearing was the only basis upon which those matters could be determined.

170. Finally, the Respondents raise the issue of proportionality in terms of the comments of Employment Judge Snelson, the numerous allegations in the list of issues; the fact that no allegations were abandoned and the value of the claim even if the Claimant was to succeed. I have dealt with that issue separately below.

171. Mr. Sethi also raises the fact that there was very little focus on one of the Respondents, Paula O'Toole, and that allegations against Ann Crighton were not particularised. I remind myself that this was a case largely about subconscious discrimination and the Claimant was entitled to test those matters against all Respondents. She could only do so in cross examination. The fact that some complaints were stronger or more forcefully advanced against certain Respondents does not in my view render it either misconceived or unreasonable to pursue the claim against all of them.

172. However, even had I reached a different conclusion I would not have exercised my discretion to Order costs given that, as I shall come to, the Claimant was at all material times being advised by specialist solicitors who assessed her prospects of success on the claim as a whole as 65% or above.

Discretion to make an Order for costs

173. I have found that the complaints of detriment relating to the suspension of the Claimant as a member of the Section Committee and item number eleven had no reasonable prospect of success for the reasons that I have given above and so the first strand of the test for costs is made out by the Respondents in respect of those particular matters.

174. However, that is not the end of the matter as I have to turn to then consider whether I should exercise my discretion to make an Order for costs.

175. A key to the Claimant's defence of the application in that regard is that at all times she was advised by her then solicitors that her claim had good prospects of success and that she relied on that. Similarly, her position is that the same solicitors advised her legal expenses insurers, to whom they also owed a duty, of the same level of prospects of success. The Claimant's case is that she was entitled to rely on that advice and did so when both bringing and pursuing the claim.

176. Mr. Sethi contends in short terms that the Claimant has been less than candid and selective in what she has disclosed; that it is inconceivable that all relevant advice has been provided by her and that, for example, not one piece of the advice goes to the merits of individual allegations as set out in the list of issues or the allegations against individual Respondents.

177. I have considered this point very carefully but ultimately I accept the Claimant's evidence that she has disclosed the entirety of the advice which she received during the course of the proceedings. Whilst I accept Mr. Sethi's position that it is unusual indeed for such scant advice to have been given about merits, there are a number of matters in support of the Claimant's evidence that this is the entirety of the advice. Those are as follows:

    a. The Claimant has disclosed documents which also contain more negative advice – such as an email to the Claimant's insurers of 2nd June 2009 advising that the Respondents had a slightly stronger argument to strike out the unjustifiable discipline claim on jurisdictional grounds than their argument on jurisdictional issues with regard to the discrimination complaints[9]. If, as Mr. Sethi

[9] That application was in fact never determined by the Tribunal.

suggests, the Claimant was cherry picking advice then I have no doubt that she would have omitted that note or redacted that section[10];

b. Similarly, a file note dated 14th October 2009 referred to a concern of Mr. Sutton of Counsel (who was to represent the Claimant at the hearing) that "the Tribunal may regard this as a case about union politics rather than race". The same is true of a similar file note of 1st December 2009 and 10th February 2010. Again, had the Claimant being cherry picking I doubt very much that she would have included that part of the advice;

c. The attendance notes are surprisingly scant on detail – for example the attendance note of 1st December 2009 which appears to be a note of a conference with Counsel designed to discuss prospects of success runs only to three short paragraphs. The same is true of a conference with Counsel with a file note that I would have expected to run to several pages based on my own in practice experience, running to four short paragraphs at less than half a page of A4. That is in keeping with the lack of specific detail on merits that appears to have been given to the Claimant; and

d. The Claimant indicated at the point of closing submissions that, if I might make a finding that she had been dishonest in respect of disclosure she wished to instruct a firm of solicitors to prepare a report to confirm that she had complied with her disclosure obligations. If the Claimant was being less than candid about disclosure, I find it highly unlikely that she would have proposed such a course.

178. The firm of solicitors that the Claimant engaged is a specialist firm of employment lawyers. She was also advised and represented by Mr. Mark Sutton of Counsel who at that time sat as a fee paid Employment Tribunal Judge. Whilst she is herself a barrister, she is not an employment lawyer. She was in my view perfectly entitled to rely on the advice that she was receiving as to merits. That included during the course of the hearing and I accept her position – which is clear from the last report from Cater Leydon Millard to her legal expenses insurers – that that advice never fell below an assessment of prospects of success of 65%. In short, she was being advised that she had a good case and it is clear from the documentation that that advice was intended to apply to the claim as a whole. There was no carve out for certain allegations or allegations against certain Respondents.

179. Whilst Mr. Sethi points to the fact that the advice given would be based on the instructions given by the Claimant, by the time that the hearing came around her solicitors and Counsel had the witness statements of

[10] There are in this regard parts of the documents that the Claimant has redacted.

all witnesses and even after the hearing, when all of the evidence had been heard and ventilated, the assessment as to prospects of success had not changed. Of particular note in that regard is advice given to the Claimant on 19th January 2010 when discussing witness statements which recorded that:

"So far my view was the statements did not depart radically from the statements to the Amanda Hart investigation and did not negatively impact on my view of prospects of success at 65-70%.

180. It is clear that that was designed to be advice as to the claim as a whole and regrettably there did not appear to be engagement with the merits of the individual allegations.

181. Similar assessments as to 65% prospects of success were made by the Claimant's solicitors on 23rd February 2010 shortly after the conference with Counsel and when all pre-trial preparation had been completed.

182. Moreover, the Claimant was given advice by both her solicitors and Mr. Sutton part way through the hearing on 26th March 2010 that was supportive of the claim and the merits of it. Of particular note, the solicitor's attendance note in that regard records this:

"At the conclusion of the first part of the Tribunal hearing Counsel's view is that Uma gave her evidence well and that the Claimant's evidence went well generally.

He feels that we got more out of the Respondent's witnesses than we might have expected. He felt that the answers given by Guy Davis, Ann Crighton, Stuart Sampson and Paula O'Toole were particularly helpful to us. He feels that the Tribunal are listening to our case and are with us at the moment."

183. Also of note is a further advice given to the Claimant's insurers on 1st July 2010 before the hearing was due to resume. The key parts of that advice said as follows:

"Although it is always very difficult to accurately predict how the Tribunal are responding to the evidence put to them my view is that the Claimant's case is going well.

The three named London FDA Respondents, Ann Crighton, Stuart Sampson and Paula O'Toole came as close as it is possible to do in cross-examination to making admissions that they lodged formal complaints against the Claimant in direct response to the complaints of race discrimination which she had made. Such quasi admissions are likely in my view to lead to a finding by the Tribunal in support of one of Ms. Bhardwaj's central complaints that she was treated less favourably as a result of having raised complaints of race discrimination.

Ms. Bhardwaj's evidence on her complaints relating to exclusion by the London Branch has gone well."

My assessment of the evidence heard to date is that the answers by the Respondent's witnesses to cross examination serve to ***increase rather than decrease*** (my emphasis) *the prospects of success which I have already advised*[11].

184. There is nothing of course to suggest that the advice given to the insurers was not a genuine reflection of the advice on merits held by the Claimant's legal advisers and I accept the Claimant's representations that those same advisers owed a professional duty to the insurance company in question.

185. As I have already observed, I am satisfied that the Claimant was advised that she had a good claim and it was that which formed the basis of her pursuit of the matter. She was not advised to abandon any aspect of the claim (and I say more about proportionality below) and I do not find that it is appropriate in circumstances where the Claimant was relying on specialist legal advice from solicitors and Counsel to exercise discretion to Order costs in respect of those elements of the claim that I have found to be misconceived.

186. I should say that had I found any of the other grounds of the Respondents application for costs to have reached the threshold test of amounting to unreasonable conduct or that the claim had no reasonable prospects of success, I would have similarly declined to make an Order for costs arising from the same basis that the Claimant was relying on specialist legal advice.

187. It is clear that little thought was given to the question of proportionality from the outset. Indeed, the initial case report from the Claimant's solicitors to her legal expenses insurers set out that quantum was limited to injury to feelings only and provided for a somewhat optimistic assessment that the Claimant would recover the then maximum amount under the **Vento** guidelines of £25,000.00. The costs estimated at that stage to a presumed 10 day hearing (the matter did in fact in the end occupy 25 days of Tribunal time) were some £30,000.00 of solicitors fees and £20,000.00 to £40,000.00 of Counsel's fees. That placed the costs of the proceedings at twice what could possibly be recovered by the Claimant if she was successful. I find it regretable that the comments of Employment Judge Snelson at the Preliminary hearing on 8th September 2009 were not taken more seriously.

188. However, those are matters on which the Claimant was not advised. She did not receive specific advice on the individual claims other than a brief word regarding the "out of time" aspects of the claim on 16th July

[11] The last assessment given to the legal expenses insurers prior to that point was 65%.

2010 to which I have referred above; whether to limit those to certain allegations or to withdraw claims against any individual Respondent. That is a matter which provides significant mitigation and weighs heavily against the making of a costs Order in respect of the proceedings before the Taylor Tribunal.

189. As I have already observed, the Claimant was entitled to rely on the advice that she was receiving as to prospects of success from specialist employment solicitors and Counsel. The fact that she was advised in the terms that she was and that she had more than reasonable prospects of succeeding in my view provides an answer to the second strand of the test for Ordering costs to be paid and therefore I am not prepared to exercise my discretion to make a costs order as sought by the Respondents.

190. Moreover, I also accept the submissions of Mr. Southey that race discrimination is an extremely serious societal issue and those who have or consider that they have been subjected to race discrimination should be entitled to have those matters determined by the Tribunal. In discrimination claims it is not an unusual feature for parties to lose sight of the wood for the trees and for multiple allegations to be made – particularly where unconscious discrimination is said to be at play. It is often difficult without the ventilation of evidence and determination by a Tribunal for an aggrieved Claimant to determine if the treatment of which they complain is less favourable treatment. That is of course why discrimination claims are rarely apt to be struck out without the benefit of a full hearing.

191. Therefore, on the proportionality point I am not satisfied that there was unreasonable conduct on the part of the Claimant in pursuing matters that she was advised had good prospects of success and not withdrawing allegations before the claim came to trial. To any extent that I had found that there had been unreasonable conduct in that regard, I would not have made any Order for costs as the fact that the Claimant was following specialist legal advice and relying on the same mitigates entirely against that.

192. For all of those reasons, the applications of the Respondents for costs arising from the proceedings before the Taylor Tribunal is refused.

<u>The costs of the February 2020 proceedings and adjournment</u>

193. I turn then to the application arising from the adjournment of the proceedings on 5th February 2020. That adjournment arose solely from the Claimant having elected, on the day that I was reading into the papers, to serve an unsolicited witness statement advancing an argument in reliance on specific advice received from her solicitors and disclosing a single email from her solicitors to her then legal expense

insurers in support of the proceedings before the Taylor Tribunal with regard to percentage prospects of success.

194. That had the entirely unsurprising result that it opened up from the Respondents position an application for access to the remainder of the legal advice that the Claimant had received.

195. I am satisfied that the threshold for unreasonable conduct was met in relation to this particular course of action.

196. There has never been anything approaching a reasonable explanation for the Claimant choosing only during the morning of the reading day to take the step of disclosing a witness statement and singular supporting document raising taking a new point in defence of the costs application which had never been taken before (in this regard the nearest that the Claimant had previously come to that was asking the Tribunal to infer what might have been the position on legal advice).

197. Whilst the Claimant has been at pains to stress that she is a litigant in person without experience of employment law, she is of course a barrister of some 25 years standing. Even without any detailed knowledge of employment law, she is of course familiar with legal principles and, in fact, the question of privilege was a matter raised by the Claimant in detail in written submissions for an earlier Preliminary hearing. She cannot, in my view, have been under any illusion that disclosing the material that she did at such a very late stage would have significant implications. They may not have been the implications ultimately that she wanted, but they were obvious for all to see.

198. Her actions placed the Respondents in a very difficult position in either having to proceed with the hearing as listed without the benefit of the disclosure to which they were entitled and thus be placed at a disadvantage or to make an application for additional disclosure with the inevitable consequence that the hearing could not proceed. The Claimant cannot fail to have been alive to that position and I am satisfied that it amounted to unreasonable conduct for her to have left matters to the eleventh hour to say the least to raise this new point.

199. Whilst Mr. Southey points to the fact that it was a difficult decision for the Claimant to take to waive privilege and that it would take time for her to take that course, I cannot agree that that either explains the position; results in it not being unreasonable conduct or mitigates the Claimant's actions. Particularly, Orders were made as early as July 2019 for preparation for the costs hearing and for the Claimant to set out her full position on the application by no later than 9th September 2019 (albeit that was later extended to 18th September 2019). That gave the Claimant almost two months in which to consider her position and her defence to the application. The issue of legal advice and reliance

thereon was mentioned in the Claimant's reply but it was clear that she was not waiving privilege at that stage. There has been no explanation for the eleventh hour change of position and I remind myself again that the Claimant was a barrister and also that she had on hand the ability to seek expert legal advice from Mr. Southey.

200. Moreover, those same Orders made provision for disclosure of relevant documents upon which the parties relied and the exchange of witness statements. The dates for compliance with those Orders were to 25th September 2019 and 9th October 2019. The Claimant did not disclose the email between her solicitors and her insurers on which she later sought to rely nor was any reference made to legal advice in her witness statement made at that time.

201. There has been no reasonable explanation why the Claimant waited a period of almost a further four months until the very morning that the hearing had commenced (albeit for reading in time) to serve a further witness statement and disclose a single email in support.

202. As I have already observed, the Claimant cannot have failed to appreciate the impact that that would have and I am satisfied that that amounted to unreasonable conduct.

203. That is not the end of the matter, however, as I must also satisfied that it is appropriate to make a costs Order. For the reasons that I have already given, there has been no reasonable explanation or adequate mitigating factors raised by or on behalf of the Claimant for her unreasonable conduct and accordingly I am satisfied that it is appropriate to make a costs Order.

204. I have heard no argument from the parties as to the quantum of costs but given the limited nature of the costs Order that I have made – i.e. the costs thrown away by the wasted day on 4th February and the adjournment on 5th February 2020 – it should be a matter capable of agreement between the parties without the need for any further expense incurred in yet another hearing day.

Costs of the recusal application

205. Finally, I turn to the application for costs arising from the Claimant's recusal application. That costs application was made within the Respondent's reply to the recusal application.

206. Whilst the recusal application was ultimately refused, I am not satisfied that it amounted to unreasonable conduct to have made it. Whilst it is fair to say that the Claimant again left matters to rather the eleventh hour to make the application, ultimately that did not impact on the ability of the resumed hearing to proceed. Moreover, it is abundantly clear that

the Claimant was, and continues to be even a decade later, very severely impacted by her perception that she did not receive a fair hearing before the Taylor Tribunal. Given the invidious position in which she found herself with disclosure of the appointments of the relevant Respondents coming only in the midst of the hearing, I have a not inconsiderable degree of sympathy for her position.

207. Those events have infected the proceedings since and I have no doubt whatsoever that the Claimant genuinely believes that she can never receive a fair hearing within the Tribunal system. Whilst I must respectfully disagree with her perception, it is nevertheless one which I accept that she genuinely holds.

208. Every decision made adverse to the wishes of the Claimant is seen by her as evidence of bias. The trigger for the Claimant's recusal application was the decision taken by me at the Preliminary hearing on 8th April 2020 that I would not accede to her position that the costs hearing should only proceed by means of CVP if the strict parameters that she believed were necessary were put in place and which deviated considerably from the timetable which had already been agreed by Mr. Southey on her behalf at an earlier hearing.

209. Whilst the Claimant's stance given the agreement to the timetable previously appeared to be somewhat irrational, I am alive to the fact that the Claimant sees any failure to agree with her and accede to how she believes that matters should proceed to be evidence of bias.

210. With all that in mind, I do not consider it unreasonable conduct that the Claimant made the application given that I am satisfied that she was and is genuinely of the belief that she would not receive a fair hearing. The application of the Respondents for costs on that basis is accordingly refused.

<u>Costs relating to an alleged failure to comply with disclosure obligations</u>

211. Finally, the Respondent set out in a letter to the Tribunal dated 2nd April 2020 that they advanced a further costs application on the basis that it was said that the Claimant had failed to disclose all legal advice received in accordance with Orders that I made on 5th February 2020.

212. I can deal with that part of the costs application in fairly short order given that I am satisfied that there has not been any non-disclosure for the reasons that I have given above. This aspect of the application is therefore not well founded and accordingly it is dismissed.

213. I should observe on a final note that this litigation appears to have become as toxic as it is protracted. I can do little better than to urge all parties to focus their efforts on moving on from these matters rather than continuing with the present state of protraction and toxicity in a case which was begun well over a decade ago.

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Employment Judge Heap

Date: 18th July 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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