EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mr A Tadros	BMI Healthcare Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING

HELD AT Bristol **ON** 24th November 2020

EMPLOYMENT JUDGE A Richardson

Representation
For the Claimant: Mr G Probert, Counsel
For the Respondent: Mr B Cooper QC

JUDGMENT

The judgment of the Tribunal is that

(1) The Respondent's application for costs against the Claimant fails and is dismissed.

(2) The Claimant's application for costs against the Respondent fails and is dismissed.

REASONS

Issues

1. The parties have made cross applications for costs against each other. The Respondent claims in excess of £35,000 limited to £20,000. The Claimant claims against the Respondent £5,436.50.

Evidence and Proceedings

2. The hearing was listed for two hours and proceeded on the basis of submissions only. I was provided with written submissions and also took a full note of the oral submissions of approximately one hour for each party.

3. I was provided with a hearing bundle and up to date schedules of cost. Reference was made to various authorities by both parties,

4. I reserved judgment.

Factual Chronology

5. I have made my findings of fact on the basis of the documentary evidence. There was little or no dispute regarding the factual chronology. The Claimant is a Consultant Ophthalmologist, specialising in cataract surgery at Winterbourne Hospital since 1997. He also works privately under the 'practising privileges' arrangement with the hospital. The Respondent is a private health care provider. The Claimant was provided with patients through the Respondent's call centre on a 'named' and 'no name' basis. A 'named' basis is when the caller, the patient, requests an appointment with a specific, named consultant. The 'no name' basis is when the caller requests an appointment without specifically naming his or her choice of consultant. The call centre makes the appointments, allocating them to the consultants of which the Claimant was one.

6. In 2016 and 2017 the Claimant on separate occasions raised health & safety concerns with the Respondent. The Claimant and another consultant about whom he had raised concerns, Ms R, were referred to the General Medical Council (GMC). No action was taken in respect of either consultant by the GMC although the claimant claims that an audit by the GMC is ongoing and the outcome awaited with reference to Ms R.

7. On 28th August 2019 the Claimant saw a patient who, he claimed, had informed him that on making contact with the Respondent's call centre in Glasgow on 27th August 2019, was initially only given the option of seeing Ms R. The Claimant understood that the patient had been 'steered' by the call handler towards an appointment with Ms R which could not be for about a month. The patient had insisted on an earlier appointment and had only then been allocated to see the Claimant the following day.

8. The Claimant had a concern about this for three reasons. First, because a delay of a month would have had serious consequences for this patient's sight, had he waited for an appointment with Ms R. The patient had required (and received) urgent medical intervention. Second, the Claimant believed that it was dangerous practice to subvert urgent medical attention to a process of appointment allocation and that this incident seemed, to him, to confirm the Claimant's suspicion that he was being overlooked in the allocation of certain types of work with the result that on some days the Claimant's clinic was empty when he was aware of the NHS being under pressure to provide appointments.

Third, he wondered if the issues about working practices raised in 2016/2017 were an underlying cause for not receiving an appropriate allocation of referrals.

9. These concerns prompted the Claimant to instruct Porter Dodson LLP solicitors to raise his concerns with the Respondent's Chief Executive Officer. The Respondent put the matter with its legal representatives, DAC Beachcroft.

10. On 11th September 2019 the Claimant via Porter Dodson wrote to the Respondent to inform them about his concerns. After initial information introducing the Claimant and referring to his credentials as a consultant surgeon, the letter informed the CEO that the Claimant had raised in the past with the CEO's predecessor, several concerns about how Winterbourne Hospital was run and he feared that in so doing it might have impacted on the current situation. He said he had also raised his concerns locally about the cataract surgery referral system on more than one occasion. He spelled out that he had found that in recent times his cataract appointments had declined to the point where his cataract clinics were practically empty when, due to the lack of capacity at the local NHS provider, Dorset County Hospital, the opposite should have been the case.

11. The Claimant referred to the 28th August incident when he had been informed by the patient that it was only because of the patient's insistence that he had obtained an appointment with the Claimant the next day when the call centre had attempted to give him an appointment with Ms R a month later. The Claimant explained that the patient had required urgent treatment for upper retinal detachment.

12. The letter went on to say that although the Claimant had been reassured on several occasions that the booking system was working fairly, the incident with the patient on 28th August proved that it was not and the Claimant believed that he was being subjected to treatment which placed him at a disadvantage compared to his colleagues by diverting referrals from him. The Claimant believed that the allocation of patients was being mishandled by the call centre, he confirmed that his primary concern was for patient safety within the process. He requested that the CEO investigate the underlying situation. He confirmed that he did not complain that he had been provided with no patients, but that the cataract patient bookings he had was received were inconsistent and evidence of less favourable treatment.

13. On 9th October 2019 the Respondent's solicitors DAC Beachcroft acknowledged receipt of the Claimant's letter and requested further information relating to his reference to having expressed unease with a few aspects at Winterbourne Hospital and how that might have impacted on his current

situation. The letter requests the Claimant to provide further information about the issues he had raised previously and what impact he considers his conversations had had on the treatment of him; effectively, what treatment by whom?

14. On 28th October 2020 Porter Dodson replied on behalf of the Claimant and set out the history of his conversations with the Respondent's then CEO in 2016 and his subsequent meetings with relevant managers. The Claimant confirmed that he did not see any relevance of going into the historic background except to say that he considered himself at that time as a whistle blower who had raised amongst other things, issues of malpractice. This had led to him being reprimanded and a complaint against him being raised with the GMC. The Claimant had subsequently been exonerated, he claimed. The letter concluded with a concern at the tone of the Respondent's letter and pointed out that the Claimant believed his initial letter had contained the necessary information; that he had little desire to enter into protracted correspondence and litigation. He hoped that matters could be dealt with internally to find an appropriate resolution to his concerns.

15. On 1st November 2019 DAC Beachcroft replied with an assurance that the Respondent took the allegations raised in the Claimant's 11th September letter very seriously. The letter confirmed that an inquiry had been initiated to look into patient safety issues raised by the Claimant concerning the handling of appointment requests by the call centre and to identify what evidence exits of the concern relating to malpractice which the Claimant raised with the former CEO and others and what if any connection there may be between such conversations (in 2016 and 2017) with the allocation of work to the Claimant by the call centre.

16. Porter Dodson sent a reply by return. Their letter stated that any investigation would be meaningless without the Claimant being interviewed. They wished to know if the Claimant would be interviewed and also informed the Respondent that the Claimant would most probably have to file a protective claim in the Employment Tribunal pending the outcome of the Respondent's investigation.

17. On 4th November 2019 Porter Dodson wrote again to the Respondent's solicitors. The Claimant had recently been questioned by a Ms S. The Claimant wished to know whether Ms S was the person appointed to investigate the concerns he had raised on 11th September because if so, Ms S had had been involved in the factual matters under investigation in 2016/2017 with the implication that she would not be independent. It was stated that therefore an independent investigator would be required for the investigation now underway. There was no reply to that letter.

18. On 18th December 2019 DAC Beachcroft wrote to the Claimant, in response to the Porter Dodson letters of 11th September and 28th October 2018, with the outcome of the Respondent's inquiries. The letter opens with a declaration:

> *"Our client has made enquiries into the allegations set out in these letters and has found no evidence that your client has been the subject of treatment regarding patient referrals that has placed him at a disadvantage compared to other ophthalmology consultants practising at the Winterbourne Hospital (the Winterbourne) or that he has been denied referrals."*

19. In respect of the Claimant's first concern relating to the handling of unnamed referrals by the call centre, the letter states:

> *"Having reviewed patient referral records to consultant ophthalmologists at the Winterbourne by the NEC between November 2018 and October 2019, it is clear that your client has not received detrimental treatment. Indeed, during this period, your client had the highest number of unnamed referrals of any ophthalmology consultants at the Winterbourne. He also had the joint highest number of named referrals (ie. where a patient specifically asked to be seen by him) and was the busiest of the ophthalmologists providing services at the site.*
>
> *The figures also clearly show that the number of unnamed referrals to [the Claimant] by the NEC did not decline. While there was some inevitable month on month fluctuation in the number of referrals your client received, the same was true of all consultant ophthalmologists providing services at the Winterbourne. There was certainly not a clear downward trend in unnamed referrals [the Claimant] was given."*

20. With regard to the Claimant's concern about the patient referral on 28th August, DAC Beachcroft state:

> *"Having reviewed the transcript of the call between the patient and the NEC call handler, it is clear that your client has an entirely inaccurate understanding of what actually occurred. When the patient phoned the NEC, he requested that he be seen by Ms Reck. He was informed that she was not available until 19th September 2019 and requested to see someone sooner. The call handler immediately offered him an appointment with your client the following morning, which he accepted."*

21. With regard to the Claimant's worry that the concerns he had raised some years ago might now have an impact on his current situation, DAC Beachcroft replied:

"Our client has made enquiries regarding these allegations and has identified concerns raised by your client about Ms R's performance as an ophthalmologist, and also claims made by Ms R against your client around the period of time identified in your October letter as the point that he made his disclosures. These complaints were dealt with appropriately by BMI at the time and were investigated by the General Medical Council, who took no action against either Ms R or your client. Our client has been unable to identify any other historical complaints made by our client around this period. It is quite clear that any discussions your client may have had with [the then CEO] have had no bearing on his subsequent treatment. As you will appreciate, our client takes the safety of its patients, staff and consultants seriously and any complaints or concerns about such matters are always encouraged and dealt with as a matter of priority."

22. The letter ended with what was effectively an admonishment - that the Claimant should have spoken first with the Respondent directly about his concerns rather than involving solicitors. It states that the issues raised of detrimental treatment had no factual basis and had simply resulted in unnecessary cost for both parties. This is the point at which the tone and content of the inter-solicitor correspondence starts to deteriorate.

23. On 20th December 2019 Porter Dodson wrote to DAC Beachcroft to request disclosure of three categories of documents to support the conclusions reached in their letter of 18th December 2019. The documents were:

- anonymised patient referral records between November 2018 and October 2019;
- a copy of the transcript between the patient and the NEC call handler; and
- copies of all documents considered by DAC Beachcroft/the Respondent in respect of the matters receiving comment under the heading in their letter: "*Your client's alleged disclosures".*

24. The letter also made a Data Subject Access Request of all data referring to the Claimant in whatever format since 1st January 2017 until the present day. Porter Dodson took the Respondent to task in respect of the statement that Ms R had been investigated and cleared by the GMC. It was stated that the assertion Ms R had been investigated and a decision not to take action by the GMC was wrong. The Claimant had submitted an audit outlining his clinical concerns and was awaiting a substantive response from the GMC.

25. Porter Dodson then take further issue with DAC Beachcroft's admonishment and retaliate by pointing out that the Respondent had not needed to instruct solicitors to deal with the Claimant's concerns; they could have dealt with it in-house. They reject as "*ludicrous*" the statement that the Claimant should consider carefully the evidential basis he had for any allegations of detrimental treatment he may seek to make. The Respondent had the evidence

in its possession, not the Claimant. However it was confirmed that the evidence referred to by DAC Beachcroft would be considered once it was disclosed to the Claimant. Finally, Porter Dodson considered DAC Beachcroft's reply was overly-defensive which, contrary to their assertion that they take complaints and concerns about [health & safety] matters seriously, suggested that they did not. Porter Dodson request DAC Beachcroft to moderate the tone of their responses in future, particularly in light of a notable Tribunal decision concern the Respondent's approach to such matters previously, implying the Respondent had not fared well in that case. Porter Dodson were referring to a recent Employment Tribunal judgment in the matter of **M Shoukrey v BMI Healthcare Limited.**

26. The letter finishes with a request for early disclosure of the documents requested in order to avoid a protective claim being filed with the Employment Tribunal by 11th January 2020.

27. On 15th January 2020 Porter Dodson again wrote to the Respondent's legal representatives to confirm that an ET1 claim had been filed as a protective measure. Porter Dodson pointed out that within the grounds of complaint they had asked for an immediate stay of proceedings pending an order for the Respondent to provide the information which had been requested in the letter of 20th December 2019. Porter Dodson express the hope that the disclosure would be forthcoming to enable them to advise their client and if necessary resolve the claim early. The parting shot is that if disclosure of the three categories of documents are not forthcoming without further delay, the Claimant would have no alternative but to proceed with litigation.

28. On 22nd January 2020 the Respondent complied with the request of all data held about the Claimant in whatever format since 1st January 2017 and enclosed a copy of the personal data. It seems that there was nothing untoward within that disclosure exercise, as nothing arises out of it.

29. On 7th February 2020 in the absence of any response from DAC Beachcroft, Porter Dodson repeat the categories of documents they wish to see (as set out at paragraph 23 above). Within the grounds of complaint attached to the ET1 the Claimant had made a request for an order for disclosure of that information. They hoped that the Respondent would comply promptly in order to avoid the expense of filing an ET3. Porter Dodson were surprised the Respondent had not been receptive to the disclosure request given the "provocative remarks" made by [DAC Beachcroft] in their previous correspondence. The letter goes on to say that the ongoing failure of the Respondent to engage with the Claimant only raised their suspicion that the evidence DAC Beachcroft had referred to either did not exist, or did not portray the picture which DAC Beachcroft described in their letter of 18th December 2019.

30. Porter Dodson go on to say that in the last 3 – 4 weeks referrals from the Respondent's call centre in Glasgow had dried up, coinciding with the issuing of the Claimant's protective claim filed with the Employment Tribunal. They make a request for information relating to all local cataract enquiries made of the NEC call centre since the start of 2020 and to whom the referrals to Winterbourne Hospital had gone. The Respondent was reassured that the Claimant was not seeking the disclosure of confidential personal information, but merely the numbers of enquiries made and the details of the cataract surgeon instructed.

31. DAC Beachcroft reply on the Respondent's behalf on 2nd March 2020 acknowledging receipt of the Claimant's letters of 20th December 2019 and 15th January 2020 and notice of the issue of the ET1. DAC Beachcroft get straight to the point – they considered that the Claimant had confirmed by seeking an order for disclosure of documents in the ET1 that the Claimant was *not* entitled to receive, was evidence that the sole purpose of bringing his claim was to obtain disclosure of the documents. That was, in their opinion, a clear abuse of process and demonstrated the vexatious nature of the Claimant's claim.

32. The Claimant was invited to withdraw his claim to avoid further costs being unnecessarily wasted. The Claimant was given 7 days in which to withdraw otherwise a strike out application would be made, alternatively an application for a deposit order against the Claimant and an application for costs of that application. If the matter proceeded to a full hearing, the Respondent threatened to seek a costs order for fees and expenses incurred by the Respondent.

33. On 3rd March 2020 Porter Dodson replied claiming that requesting evidence upon which the Respondent based a significant part of its defence was not an abuse of process or vexatious; whereas threatening costs was an abuse of process, vexatious and wholly unreasonable, designed to warn off the Claimant from pursuing an increasingly likely meritorious claim given the Respondent's inadequate responses. Porter Dodson considered it (again) "*ludicrous*" that the Respondent refused to provide the evidence to support its contentions and it was essentially that which was keeping the dispute alive. It was asserted that that evidence was disclosable as matters proceeded in the Employment Tribunals and the stance taken by DAC Beachcroft was unfortunate. The Claimant could not see why the Respondent was attempting to perpetuate the matter needlessly by not providing disclosure and that forced the Claimant to conclude that DAC Beachcroft's assessment of the evidence was purposefully misleading. DAC Beachcroft were reminded of their own professional responsibilities under the Solicitors Code of Conduct and the Respondent's responsibilities in the context of the CQC and the duty of candour.

34. The Claimant asserted that unless the Respondent was prepared to be reasonable and engage constructively in substantiating the findings made in the letter of 18th December 2019, the Claimant would make his own costs application whether or not successful in his substantive claim.

35. On 9th June 2020 Porter Dodson wrote on a Without Prejudice Save as to Costs basis to DAC Beachcroft referring to the Case Management Preliminary Hearing list for 25th June 2020. The email refers to the improvement in the relationship between the Claimant and the Respondent and his hope that matters could be concluded. The Claimant had instructed Porter Dodson to withdraw his claim, conditional on there being no application for costs from the Respondent.

36. In response, on 12th June 2020 DAC Beachcroft wrote to the Tribunal making an application under Rule 37 to strike out the Claimant's claim or alternatively for a deposit order under rule 39 of the ET Rules and the application to be heard on 25th June 2020.

37. The Respondent's letter set out the background to the case and commented that there was no obvious connection between the Respondent's call centre in Glasgow and the Respondent's previous CEO based in London (who left the business in 2017) and the Claimant's concerns about reduced referrals. Inquiries had shown the Claimant's concerns to be unfounded and not supported by the statistical evidence. This had been imparted to the Claimant by letter on 18th December 2019. He had not considered the explanation sufficient and had requested disclosure of documentation which the Respondent had relied on in reaching its conclusions. The Respondent did not believe that the Claimant had any legal entitlement to these documents as the data relating to patient referrals is commercially sensitive to the Respondent and the other consultants engaged at Winterbourne Hospital through practising privilege agreements. It was asserted that anonymisation would not prevent the other consultants being readily identified by the Claimant.

38. The Respondent further asserted that it was clear from the Claimant's own correspondence and the claim form that the real purpose for bringing his claim was to obtain documents he was not otherwise entitled to, and that he refused to provide full particulars of his claim until such documents had been disclosed. The Claimant had made an application for early disclosure and had stated that he may "*have no wish to continue to litigate against the Respondent*" should it provide those documents.

39. The Respondent submitted that it was the "*very essence of vexatiousness*" for a claimant to litigate simply to seek disclosure of documents relating to others that they have no legal right to see. It alleged that the current claim was an abuse of process and should be struck out.

40. On 15th June 2020 Porter Dodson wrote to the Tribunal to express puzzlement at the Respondent's correspondence coming at a point in time of apparent reconciliation between the parties in the work place when in the intervening months, there had been a significant improvement in relations between the Claimant and the Respondent. Porter Dodson wondered, in view of the assurances given to the Claimant by local BMI management at Winterbourne Hospital in recent days, whether wires had become crossed in the instructions given by the Respondent to their solicitors. They suggested that this could be discussed at the Case Management Preliminary Hearing.

41. Porter Dodson explained the Claimant's position to the Tribunal.

"The Tribunal will note that the claim was made on a protective basis. Our client's concerns were genuine and evidenced by his own experience, including what he was told by the patient in question. We have accepted that an investigation has been undertaken and have repeatedly asked that the Respondent provide evidence on which its conclusions are based. The Claimant has been clear throughout that on consideration of such evidence, if that evidence confirms the situation as portrayed by the Respondent's representatives, he would be disinclined to continue with his claim. Unfortunately, this matter has needlessly been prolonged by the repeated refusal of the Respondent to share that evidence, expecting the Claimant to take its word for it. Given that if the litigation is to continue such information would be disclosable, such a request by the Claimant is not unreasonable. The Claimant has already confirmed that he is quite prepared for such evidence to be suitably redacted to protect the third party interests referred to. The Tribunal will perhaps understand that the apparent refusal of the Respondent to allow this to occur has only served to raise suspicions in the mind of the Claimant.

The Respondent's application for strike out and deposit order is misconceived in that clearly to make such a finding the evidence in question would need to be considered. Otherwise the Respondent will presumably also be expecting the Tribunal to take its word for it. Moreover, there are no grounds for a costs award to be made against the Claimant given his pragmatism and the reasonableness of the requests for evidence made. If there is to be a cost award, we would submit that this should be in favour of the Claimant given the Respondent's representatives repeated and aggressive refusals to take the opportunity provided to resolve matters before now. That conduct alone would appear unreasonable and vexatious and it is therefore our intention to make a counter costs application as and when the Respondent's own application is made. To be clear, the Claimant's preference is for any and all such applications to be avoided by the process of reconciliation underway being

allowed to continue in the absence of the inflammatory applications before the Tribunal today."

42. There then followed between 19th – 24th June 2020 correspondence between the parties on a without prejudice save as to costs basis where the parties' solicitors continue to 'slug it out' through correspondence which is then extended to the Employment Tribunal, each side claiming reasonable conduct for itself and unreasonable conduct by the other. The Claimant' proposed terms for a "hands down" withdrawal was unsuccessful.

43. On 25th June 2020 the parties were listed to appear before the Employment Tribunal for a case management preliminary hearing. The day before, on 24th June 2020 the Claimant wrote to the Tribunal to withdraw his claim.

44. On 25th June 2020 the Respondent's solicitors made an application for costs under Rule 76(1)(b) no reasonable prospect of success and Rule 76(1)(a) that the Claimant and / or his representatives have acted vexatiously, disruptively and unreasonably in bringing the proceedings. The application filled five pages of narrative setting out the background and grounds for the application. The Respondent refers to there being no obvious connection between the Respondent's call centre in Glasgow and their previous CEO. The Respondent complained that despite its assurances from the Respondent and their lawyers, the Claimant had demanded evidence to support the position taken by the Respondent when he had no legal entitlement to do so. The Respondent believed that the sole purpose of filing proceedings had been a fishing expedition to obtain documents he was not otherwise entitled to. The Respondent objected to the Claimant's application for directions, being "disappointed" that the Claimant had not sought to agree the directions with them first. The Respondent then sought additional directions.

45. The Claimant made his own application for costs against the Respondent on 26th June 2020.

Submissions

46. I have read the parties' written submissions (in total some 40 pages) and my 26 pages of typed notes of their oral submissions. I have also read the authorities that were referred to.

The law

The ETs (constitutional &Rules of Procedure) Regulations 2013 Schedule 1 states at Rule 76:

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

(1) A Tribunal may make a costs order or a preparation time order and shall consider whether to do so, where it considers that –

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

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

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

77 Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

Conclusions

47. I remind myself that an award of costs in the Tribunal is the exception, not the rule. I am permitted to make an award of costs if I find that a party has acted frivolously vexatiously or otherwise unreasonably during the course of the proceedings.

48. I am required to look at the whole picture: **Barnsley Metropolitan BC v Yerrakalva [2012] IRLR 78.** I must ask myself whether there was unreasonable conduct by the claimant in bringing the claim and conducting the case – I am required to identify the conduct; identify what was unreasonable and identify what effect it had: **McPherson v BNP Paribas (London Branch) [2004] ICR 1398).** Conduct before the commencement of proceedings can be relevant to make a costs award if that prior conduct is relevant to the assessment of whether it was reasonable to bring or defend the claim, but it cannot be treated as the act of vexatiousness or unreasonableness upon which an award of costs can be founded: **Davidson v John Calder (Publishers) Ltd and Calder Educational Trust Ltd** [1985] IRLR 97.

49. I have stepped back and I have looked at the situation as a whole. I readily acknowledge the clever arguments and counter arguments, and use of articulate language by both Counsel in their submissions. Essentially the situation which arose between the parties was not complicated or difficult or unusual. The situation arose in the Employment Tribunals not the Commercial Division of the High Court.

50. I deal first with the Respondent's application for costs against the Claimant, being the larger sum. What was the offending conduct on which the Respondent bases its claim for costs? In the Respondent's letter to the Tribunal dated 12th June 2020 it states that the Claimant had no legal entitlement to be provided with copies of the transcript of the call between the patient and the call handler on 27th August 2019 and the allocation of calls to other consultants. The reasons given were that the patient referral data is commercially sensitive to the Respondent and the other Consultants and that they would be readily identified despite the data being anonymised. The Respondent submitted tht the real purpose for bringing the claim against the Respondent was to obtain documents he was not otherwise entitled to see. The Claimant's stated intention that he would have no wish to continue to litigate against the Respondent provided it disclosed the requested documents was an illustration, it was claimed, not of the Claimant being reasonable, but of being vexatious and unreasonable. That (purported) reason was an abuse of process.

51. Those grounds were expanded by Mr Cooper who submitted that the Claimant, having raised his concerns about patient safety and perceived detrimental treatment for having raised concerns in 2016/2017 and subsequently, was given a written response by the Respondent's solicitors, before he presented his claim. That response was the *total* answer to the Claimant's concerns. The Claimant:

a. knew, on the basis of the material reviewed by the Respondent's solicitors, that his allegations of whistleblowing detriment were unfounded;
b. had at no time any grounds (reasonable or otherwise) on which to contest that response (18th December 2019 letter);
c. had presented his claim for the sole purpose of obtaining disclosure on the basis that unless the disclosure contradicted the Respondent's solicitors, he would then withdraw his claim;
d. and/or his solicitors had impugned the honesty and integrity of the Respondent's solicitors;
e. knew that his claim could only have a realistic prospect of success if the Respondent's solicitors had deliberately misrepresented the position "purposely misleading" the Claimant;
f. had no grounds for doubting the word of the Respondent's solicitors.

52. Essentially the Respondent's position is summarised succinctly in paragraph 2.6(c) of Mr Cooper's written submissions as the Claimant's claim being vexatious and an abuse of process because a baseless dispute cannot be converted into a reasonable claim simply by demanding voluntary disclosure and then seeking to rely on a refusal to provide it as itself setting up an implication of impropriety.

53. The escalation of this situation and the litigious, testy inter-solicitor correspondence had the flavour of High Court litigation prior to the 1999/2000 Woolf reforms and the introduction of the overriding objective. It is not what is wanted or required in the Employment Tribunals.

54. The first question I ask myself was whether the Claimant's conduct was vexatious, unreasonable, and /or an abuse of process. I find that it was not. The Claimant had genuine concerns having been (1) informed by a patient of the treatment that the patient had experienced when making his call to the call centre; there was a genuine potential health and safety issue had what the patient was purported to have said been accurate; and (2) there were occasions when the Claimant's clinics were empty when he believed they should not have been, given the pressure on the NHS. He feared this may have had something to do with the issues he had raised in 2016/2017 although it is clear from the correspondence that the Claimant was not focussing on that historic situation, but on the other two more recent issues.

55. The Claimant was informed by the Respondent's solicitors in a relatively short letter, that his fears were completely unfounded. The transcript of the telephone conversation between the patient in question and the call centre, was not factually as the Claimant understood it to have been and the statistical date showed that he was not in receipt of fewer referrals than his colleagues, in fact he had had a greater percentage than they had.

56. The Respondent's solicitors expected the Claimant to accept that letter as an end to the situation - an immediate end to the Claimant's concerns. That was not a realistic or reasonable position to take given the history of the parties and their relationship. A request for documentary support for the findings of the investigation should have been anticipated by the Respondent and I do not find an initial polite request for it, to have been vexatious, unreasonable or an abuse of process.

57. The Claimant was surprised by the Respondent's solicitors lack of cooperation to resolve the situation. I have some sympathy with that approach given the continuing employment relationship between the parties and the usual frequent desire of the parties to preserve it. That does not excuse the Claimant's

solicitors' rapid descent into language of an irritable and immoderate nature which inevitably met reciprocation in like tone from the Respondent's solicitors and a deterioration of what had already become a regrettable situation. The documents in question could have been presented, had the parties' solicitors been able to speak to each other in a cooperative frame of mind from the start, in such a way that only the relevant part of the patient/call handler transcript relating to allocation of the appointment was legible. Any personal and sensitive information disclosed in the transcript by the patient as to the reason why he was calling, ie. his eye problem and a description of it, could have been easily redacted to comply with GDPR. I find that the Respondent's solicitors would have more likely than not been met with a satisfactory response on this from the Claimant had they responded in this way. Clearly there had been a misunderstanding between the Claimant and the patient about the call handler's conduct. I have considered what order I would have made, had I been hearing the Claimant's application for disclosure at a case management hearing in respect of the transcript. That would have been my order.

58. With regard to the statistical evidence of referrals made to the entire team of ophthalmic consultant surgeons who worked with the Claimant and the Respondent's claim that it was commercially sensitive because the Claimant's colleagues would have been identifiable and their income therefore identifiable, from even anonymised data, I find that the Respondent's solicitors could have discussed presentation of the data in a different way - totals of the entire referrals to all of the consultants at Winterbourne Hospital and the Claimant's referrals as a percentage of the total. Had I been hearing such an application for disclosure at a case management hearing, that could also have been an order subject to hearing presumably the same submissions from the Respondent as I heard in this costs hearing. I would have expected the parties' representatives to cooperate in finding a way of meeting a reasonable request for disclosure if possible. It is not clear to me that the Respondent could not have provided any of the relevant information without breaching GDPR.

59. Had the Claimant continued to a case management hearing, it is more likely than not that the Respondent would have been required to disclose the documents. I find that the Claimant's request that they do so, prior to an order of the Tribunal was not vexatious conduct whether pre filing or post filing. Nor do I find that the Claimant filed proceedings for the sole purpose of finding evidence to support an unmeritorious claim. A neutral reading of the correspondence between the solicitors results in an opposite view. The Claimant wanted early and targeted disclosure because he wanted, first, to avoid, and then to withdraw from proceedings. He wanted clarity. The Claimant was never invited to participate in and contribute to the Respondent's investigation. He was expected to accept without challenge what the Respondent's solicitors told him.

60. I find that the Claimant's conduct in filing proceedings, seeking early disclosure in the hope that early disclosure would mean proceedings could be discontinued was not vexatious and was not an abuse of process. His intention was not that attributed to him by the Respondent – he was not on a fishing expedition to find any cause of action. I find he had a reasonable expectation of receiving the relevant transcript evidence and some adjusted statistical data in support of the Respondent's letter of 18th December 2019.

61. The issue is not whether the Claimant proceeded on little or no basis in law to file a claim - I find he had a genuine concern, and he followed it through on an openly stated a protective basis; he was open to avoiding proceedings altogether. I find that he did not file proceedings with the intention of inconveniencing and harassing the Respondent or causing them inconvenience. He wanted clarity on issues of concern. The request for early disclosure in the Employment Tribunals was not unreasonable and could have been ordered by an Employment Judge within the Rules. The Respondent had the documents in their possession. They could have been disclosed with some adaptation and minimal cost. Relying on the statement that the Claimant had no legal entitlement to see the documents as justification for the refusal to disclose and lack of cooperation, was not persuasive. The refusal to cooperate in Employment Tribunal proceedings where cooperation between the parties is expected, was not satisfactorily explained. The expense that arose out of all proportion in regard to the Claimant's request for disclosure was the Respondent's lack of a voluntary cooperative response from the commencement, and a refusal to re-consider and move from that position when it has not been shown that it could not.

62. In the circumstances, the Respondent's application for costs against the Claimant fails.

63. Despite my criticism of the Respondent's conduct of the pre and post filing of proceedings, I find that the Claimant's solicitors contributed sufficiently to it in a manner and tone of correspondence, such that I make no order for costs against the Respondent.

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Employment Judge Richardson
Signed on 17th December 2020