EMPLOYMENT TRIBUNALS

Claimant: Mr P Lawrence

Respondent: Charles Stanley & Co. Limited

HELD AT: Remotely by CVP **ON:** 21 October 2020
15 January 2021 (In Chambers)

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Ms J Connolly, Counsel
Respondent: Mr S Forshaw, Counsel

JUDGMENT ON COSTS APPLICATION

It is the judgment of the Tribunal that :

1. The claimant acted unreasonably in not withdrawing his disability discrimination claims until 30 January 2020, and the Tribunal is entitled to make an award of costs against him in favour of the respondent;

2. The Tribunal does so, and assesses those costs payable by the claimant to the respondent in the sum of **£576.00**.

REASONS

1.These claims were brought by claim forms presented on 5 March 2019 by this claimant and another , Jon Goldstone. Both claimants are legally represented by the same solicitors, and the respondent is legally represented. This application relates solely to the claimant Mr Lawrence.

2.The hearing was conducted remotely , by CVP, to which the code V in the header relates. A Bundle for the hearing had been provided by the respondent, and reference to page numbers are to that bundle. The claimant had also submitted a bundle for the costs hearing. References to that bundle will be preceded by the letter “C”, so as to differentiate between the two bundles.

3.The respondent's application for costs against the claimant is set out in its letter of 10 February 2020 (pages 95 to 98 of the bundle) . Attached to it, at pages 99 to 100 is a Statement of Costs.

The respondent's application.

4.The grounds of the application are set out in the respondent's letter of 10 February 2020, and are advanced in submissions by Mr Forshaw in his Skeleton Argument , to which he spoke in his oral submissions. For those reasons, and trusting that the Tribunal will be forgiven for not repeating what is available in those documents, the Tribunal will summarise the matters relied upon by the respondent.

5.The claimant made claims in his claim form of unfair dismissal, wrongful dismissal, direct age discrimination, disability discrimination , protected disclosure detriment and failure to pay holiday pay.

6.The conditions relied upon by the claimant as amounting to a disability , or disabilities, were psoriatic arthritis, hypertension, and idiopathic angioedema. Disability was not conceded by the respondent. A preliminary hearing was held on 26 June 2019 at which the final hearing was listed for 3 February 2020, for 13 days. Orders were made for disclosure, preparation of the hearing bundle and for exchange of witness statements on 10 January 2020. Those orders were sent to the parties on 10 July 2019.

7.The claimant provided disclosure, including his medical records, on 17 September 2019. The respondent provided its disclosure the same day. The claimant served a disability impact statement upon the respondent on 4 October 2019. The respondent did not concede disability, writing to the Tribunal and the claimant to that effect on 11 October 2019.

8.A further preliminary hearing was held on 14 October 2019. The respondent sought orders striking out (inter alia) the claimant's claims of age and disability discrimination. The Tribunal on that occasion did not strike out the claimant's disability discrimination claims, nor did it order a deposit in respect of those claims. Indeed, no orders were made in respect of any of this claimant's claims.

9.The claimant accordingly proceeded with all his claims. Witness statements were exchanged on 24 January 2020, the final hearing being listed to commence on 3 February 2020.

10.In para. 155 of his witness statement the claimant said this:

"Having reviewed the Respondent's disclosure, whilst the Respondent had knowledge of my disability I do not believe it played a part in the decision to terminate. As such , I do not intend to pursue this element of my claim."

11. The claimant formally withdrew his disability discrimination claims by letter to the Tribunal on 30 January 2020.

12.The respondent's application is relatively simple. It submits that in bringing the disability discrimination claims, *ab initio*, the claimant acted unreasonably. He did not need sight of the respondent's disclosure to be able to come to the view that his disability was not a factor in the respondent's treatment of him. These claims accordingly never had any reasonable prospects of success, and the claimant acted unreasonably in bringing these claims at all.

13.Alternatively, if not from the inception of the claims, certainly from receipt of the respondent's disclosure in September 2019, the claimant then acted unreasonably in continuing to prosecute these claims until right up to the end of January 2020, only days from the final hearing.

14.Much of Mr Forshaw's submissions relate to the unreasonable conduct of the claims as a whole, and indeed, of the response to the costs application itself.

15. Mr Forshaw submits that the claimant has acted unreasonably, and hence satisfies the threshold criteria for the making of a costs order under rule 76 of the rules of procedure.

16. In answering the claimant's response to the application, as apparent from the correspondence, he notes that the claimant appears to rely upon the respondent's allegedly incomplete disclosure as justifying his late decision not to pursue the disability discrimination claims.

17.He refutes this. He takes the Tribunal , in some detail, through the further disclosure provided by the respondent after the initial disclosure on 17 September 2019. He submits that none, or virtually none, of it related to the reasons for the termination of the claimant's employment. In short, therefore, there was no good reason why the claimant could not have come to his decision to withdraw the disability discrimination claims shortly after initial disclosure in September 2019, and certainly before the preliminary hearing on 14 October 2019.

18.Dealing briefly with the argument advanced by the claimant that the dismissal of the respondent's applications for orders striking out , or for deposit orders, in respect of the disability discrimination claims precludes this Tribunal from determining that the claimant had acted unreasonably in pursuing claims that did not have a reasonable prospect of success, Mr Forshaw submits that this is an erroneous argument. E J Humble who heard those applications did not , unlike the claimant and his legal advisors, have the benefit of the respondent's disclosure, so could not make that assessment based on that material.

19.In terms of the amount of any costs awarded, he points out the authorities which show that there need not be a precise causal link between the costs claimed and the unreasonable conduct.

20.In that regard, and in general in terms of the legal principles to be applied, Mr Forshaw cites ***McPherson v BNP Paribas [2004] IRLR 558*** and ***Barnsley MBC v Yerrakalva [2012] IRLR 78***.

The claimant's response.

21.For the claimant Ms Connolly started her submissions by identifying the grounds of the respondent's application, and directing the Tribunal's attention to the specific grounds relied upon. Whilst she accepted that other allegedly unreasonable conduct may be the context of the application, this was not the actual conduct relied upon. The focus must be upon the conduct prior to the withdrawal of the claims. She referred to paras. 28 to 30 in the judgment in ***McPherson v BNP Paribas [2004] IRLR 558*** , and how the approach was not the same as under the CPR. The respondent's case is that if the claimant knew in January 2020 that he had no case , he should have known that from the outset, or from the date of the respondent's disclosure.

22.There were, she submitted, four issues:

i) Can the respondent run the same argument on lack of reasonable prospects of success as it pursued before Employment Judge Humble?
ii) If it can, did the withdrawn claims have no reasonable prospects of success, which the claimant knew or ought to have known?
iii) If so, should the Tribunal exercise its discretion to make an award of costs?
iv) If so, in what sum?

23.She addressed first the issue estoppel point. She cited a passage from Halsbury (see below) and the principles of the rule against re-litigation of decided issues. There was a public interest behind this, as well as the interests of the parties.

24.Just as it was a necessary ingredient of the respondent's application for strike out that the claims had no reasonable prospect of success, so it is for this costs application. The wording is the same in both of the relevant rules.

25.There was an element of *déjà vu* when one considered para. 15 of the Reasons of Employment Judge Humble, and this application. In that hearing too the respondent had taken the Employment Judge through the documentary evidence supporting the true reasons for termination of the claimant's employment. The same matters were being relied upon, as they were in the response filed, and the respondent was treading the same path.

26.Employment Judge Humble did not, as had been suggested, run out of time to determine the application fully, the respondent failed to satisfy him that the claims had no reasonable prospects of success. The Employment Judge used standard wording in rejecting the application, and did not say he had not had enough time to make the determination. The respondent had used the best of its disclosure, and had "put its best foot forward", but had failed. In particular the Employment Judge had in para. 19 of his Reasons set out why he considered it was quite possible that there were non-discriminatory reasons for the dismissals of the claimants, but he had not been able to form a view of what those reasons were.

27.Ms Connolly referred to para. 16 of the Reasons, and the email correspondence that is referred to therein. The claimants' case was that there had not been a irreparable breakdown in trust between the parties .

28.The respondent was inviting this Tribunal to go behind the findings of the Humble Tribunal, and to re-open an issue that had been determined. Even if the Tribunal could go behind the judgment of October 2019 on that application, she invited it to nonetheless afford that judgment great weight on the issue of whether the disability discrimination claims had no reasonable prospects of success.

29.She accepted, however, that there may be a basis for a difference of approach to the events after October 2019. The claimant and Employment Judge Humble considered, up until then that the claims in question did have reasonable prospects of success.

30. Ms Connolly referred to para. 28 of Mr Forshaw's Skeleton, where he made reference to ***McPherson v BNP Paribas [2004] IRLR 558***. She would add that further relevant considerations would be the nature of the claims being made, and the evidence available to a claimant at the time. Here the Tribunal is dealing with a discrimination claim, where direct evidence of motivation would be rare.

31.She referred the Tribunal to the claimant's Skeleton Argument for the previous preliminary hearing (pages C75 to C88), and para. 2.4 thereof (page C77) in which the limited disclosure that the claimant says he had been provided with up until that time is set out.

32.All the claimants had got at the time of their termination is set out in para. 2.5 of the Skeleton. No reason was given, and the termination letters had cut and pasted content. As set out in para.2.11, all those with disabilities, and the oldest were included in the group to be dismissed.

33.The claimant's case on disability discrimination was set out in para. 7.2 and 7.3 of the Skeleton (pages C84 to C85). As ever in such claims, inferences would be required, on all the evidence. This was a reasonable approach for the claimant to take, and Employment Judge Humble agreed.

34.In relation to the s.15 claim, she referred the Tribunal to the claimant's Impact Statement (page C52) and that his condition was not merely psoriasis, but was arthritis. She referred to paragraphs 7 and 8 of the statement, and in para. 9 the claimant made reference to the effects of his condition, and how he was having one or two days a week off work because of it. This statement was not before Employment Judge Humble.

35.Disclosure had been substantial, as the Respondent's List of Documents at C21 to C51 shows, and had run to 6 lever arch files. Reviewing such material was an enormous task, and took time. The claimant then identified four categories of documents which were considered to be missing, and these were flagged up in the preliminary hearing.

36.Ms Connolly went on to refer the Tribunal to pages 122, 126 ,140 and 141 of the bundle, which deal with the claimant's requests for disclosure, and the respondent's response. In particular there were issues relating to the search terms that had been utilised, and reference to "Tombi", which the claimant had never seen before. The respondent had not said who the decision maker had been, The claimant had raised

four categories of documents that were outstanding, and which then led to the claimant's application of 6 November 2019.

37.The claimant's stance was reasonable in a highly regulated industry , he was entitled to expect that there was more documentation. She referred the Tribunal to the claimant's request for specific disclosure of 8 October 2019 , and the respondent's reply at pages 122 and 123 of the bundle. She also drew the Tribunal's attention to box 8, in which the respondent stated that there was no more documentation relating to the selection of brokers in the Manchester office.

38.She went on to refer to the claimant's further application of 22 November 2019 (pages 153 – 156 of the bundle), and , in particular, the entry in box 5, where the claimant raised a request in respect of documents between the period of August and October 2018, commenting that there appeared to be a gap between these dates.

40.The Bundle was provided on 26 November 2019. Whilst the respondent asserted that none of the further disclosures related to selection, it did contain scripts, and draft termination letters, which the claimant contends were disclosable at an earlier stage. The claimant had felt that there was a mysterious gap in the disclosure, and the disclosure of these documents showed that suspicion was justified.

41.Ms Connolly then took the Tribunal to pages 164 to 168 of the bundle, an application to the Tribunal of 12 December 2019. That letter helpfully tabulates the disclosure issues between the parties, with each party's position being set out. The Tribunal was then referred to page 169 to 170, in which the respondent gave further disclosure. There were ten further documents so disclosed, which Mr Forshaw had said related to the age claims, and queried whether they were disclosable at all.

42.This category of documents had been identified in para. 2.4.3 of the claimant's Skeleton for the preliminary hearing. It was relevant to the disability discrimination claim because it went to the date that the decision was taken to dismiss the claimant. The communications with Gary Teper started in July 2018, and it appeared that he was being lined up as a replacement in July 2018. This documentation had been sought in October 2019, but was not provided until December 2019. It was unacceptable that it was not part of the disclosure in September 2019. The respondent relied upon the age of the replacement, and the claimant wanted more documents about this.

43.The claimant was still "hopeful that he would uncover something more".

44.On 9 January 2020 the respondent wrote to the Tribunal (pages 176 to 178 of the bundle) setting out the history of the claimants' applications, what documents had been disclosed in response to those applications, and what documents were outstanding and would not be provided. That was a concession that some of the documents requested by the claimant were disclosable, and they should have been disclosed earlier in the proceedings.

43. Ms Connolly went on the refer the Tribunal to yet further disclosure given by the respondent on 9 January 2020 (pages 183 to 184) , which included minutes of a board

meeting from October 2018.This was further proof that as the claimants pushed, they got more disclosure.

44.There then followed the preliminary hearing before Employment Judge Ross, on 17 January 2020, at which the claimants' disclosure applications were considered. Whilst the Employment Judge's reasons were given orally, and hence are not set out in her Order (pages 324 to 325 of the bundle) , Ms Connolly, who represented the claimant at that hearing, and whose account of the oral reasons given by the Employment Judge has no reason to doubt, contended that the Employment Judge did express how the non – existence of the documents sought by the claimant would be a matter for inference, after cross – examination. As, however, the respondent , professionally represented, had maintained that it had no more documents, with some sympathy for the claimants, she had to accept that. The respondent did not seek costs after that hearing.

45.The claimant had come to the end of the road on disclosure, and had tried to piece together the reasons for his treatment from the disclosure he had received. At that point he acted reasonably, in concluding that he could not prove that his disability was the reason for his treatment.

46.She went on to explain the timeline, Gary Teper was recruited in July 2018, so the claimant now had that date as the date from which the respondent had been intending to dismiss him. His condition had become more noticeable from around June 2018.

47.When asked by the Employment Judge when the claimant had come to the decision to withdraw the disability discrimination claims, Ms Connolly informed him that it had been shortly after the further disclosure by the respondent on 19 December 2019. He had not, however, acted unreasonably in awaiting the outcome of the application before Employment Judge Ross on 17 January 2020.

48.The respondent had contended that the claimant must have , or ought to have, recognised that his disability discrimination claims were not to be pursued , either at the outset, or some time later.

49.The context was everything, there were also age discrimination and health and safety claims. There had been a gap in the documentary evidence which the respondent had obscured, but a series of supplementary disclosures did reveal some relevant documents.

50.It was regrettable that formal notice of withdrawal was not given until 30 January 2020, but explicable in the circumstances. She did not accept that the withdrawn claims had no prospects of success from the outset.

51.In the alternative, even if the gateway condition of unreasonable conduct was established, no award of costs should be made. It is rare in discrimination claims for there to be direct evidence of the reason for the treatment. The absence of any plausible reasons at the time, and the letter that the claimants received fuelled their suspicions that the reasons were discriminatory ones. The claimant's failure to take a realistic view of these claims was not stark , or prolonged. The highest the respondent can put the case is that the claimant ought to have realised sooner. These were

complex proceedings, with overlaps with the age, and protected disclosure claims, all of which will require evidence of the reasons for the claimant's treatment.

52.Ms Connolly then went on to deal with quantification of the costs claimed, in the event that the Tribunal acceded to the respondent's application to make any award of costs.

The respondent's reply.

53.Mr Forshaw addressed three elements in his reply. Firstly, in relation to the estoppel argument, he contended that this should not trouble the Tribunal. The Humble Tribunal's decision could give rise to no issue estoppel on the issues before the Tribunal in this application. This was a very late plea raised by the claimant. The caselaw goes back to 1884, but is no answer to this application. That is because, firstly, the same issue was not before the Tribunal in the previous preliminary hearing, and secondly, there was no final determination in the previous preliminary hearing, which was only an interlocutory hearing, to which the principles of issue estoppel do not apply. Thirdly, there was a change of circumstances, as the claimant himself in his witness statement , which was new evidence, accepted that his disability discrimination claims had no reasonable prospects of success. In fact, these claims never did. The issue before this Tribunal was whether gateway condition for the making of a costs order was met, that is not the same issue as was before the Humble Tribunal.

54.Turning to disclosure, it was somewhat surprising on this costs application to hear, for the first time since March 2020 , what decisions the claimant took, and why, especially when there was no witness statement to establish this. Significant submissions had been made about what the claimant took from the disclosure of 19 December 2019, without any witness statement in support, and these points were not made in the claimant's response to the application in correspondence.

55.The submissions made were in effect that the claimant looked in difficulty in December 2019, and in January 2020 , after the judgment of Employment Judge Ross he knew he was getting no more disclosure. His solicitors were told on 8 October 2019 that there were no more specific documents addressing the selection of the brokers for redundancy. That is not surprising, as the respondent's case was that the claimant and his colleagues were self employed. That contention was one to be pursued in cross – examination, but the claimant chose to go on a fishing expedition.

56.The claimant had looked at the disclosure of 19 December 2019, page 169 of the bundle, and claims that he saw there was a discussion on 1 July 2018, which made him aware that there had been discussions at this time about his possible redundancy.

57.This had been disclosed long before October 2019. He referred the Tribunal to response at page 74 of the bundle, wherein, at para. 15, there is express reference to a memo of 1 August 2018 produced by Gary Teper about the proposals. The disclosure of 19 December 2019 told the claimant nothing he did not already know. Nothing changed between 19 December 2019 and the claimant's witness statement of 24 January 2020, but a whole month elapsed before the claimant recognised that he had no case on disability discrimination.

58.Witness statements would be taken and formulated some time before that. Counsel would be briefed and prepared for the hearing well in advance, this was not a case to be prepared over the weekend before the hearing started. At the very latest the claims should have been withdrawn a month before they were. There is a gap as to, and no witness statement dealing with, what happened in that period between December and 24 January 2020.

59.Mr Forshaw went on to address issues of quantification of the costs to be awarded.

60. In conclusion , in response to the argument raised about the lack of a witness statement, Ms Connolly replied that for the claimant to make one would be likely to involve the need to waive privilege, and such a statement would not be normal on an application such as this. The claimant was only seeking to highlight what documentation was disclosed between September and December 2019, and to establish that the documentation disclosed was rather more relevant than the respondent contended.

The Law – (i) costs in the Employment Tribunal

61. The relevant provisions in the rules are to be found in rule 76, which provides as follows:

"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.

(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) to (5) N/a"

62.Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Unreasonable conduct includes conduct that is vexatious, abusive or disruptive. When making a costs order on the ground of unreasonable conduct, the discretion of the Tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as

unreasonable (***McPherson v BNP Paribas (London Branch)*** cited above) In ***McPherson***, Mummery LJ stated (at para 40):

"'The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred."

63.In a subsequent case, Mummery LJ stressed that this passage in ***McPherson*** was never intended to be interpreted as meaning either that questions of causation are to be disregarded or that Tribunals must 'dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect"' (***Barnsley Metropolitan Borough Council v Yerrakalva*** also cited above. In ***Yerrakalva*** his Lordship stated (at para 41):

"The vital point in exercising the discretion to order costs is to look at 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 if had".

64.In ***Yerrakalva*** Mummery LJ also pointed out (at para 42) that, as with any decision based on the exercise of a discretion, a decision on costs only stands as authority for what are, and are not, the principles governing the discretion and serves only as a 'broad steer on the factors covered by the paramount principle of relevance'. Thus, 'a costs decision in one case will not in most cases pre-determine the outcome of a costs application in another case: the facts of the cases will be different, as will be the interaction of the relevant factors with one another and the varying weight to be attached to them.'

65.Summing up the above principles in ***Raggett v John Lewis plc [2012] IRLR 906***, EAT Slade J said that the proper approach to costs under the vexatious/unreasonable conduct limb is as follows: (a) the tribunal need not identify the particular costs incurred by particular conduct; instead it should look at the whole picture and the overall effects of the conduct; (b) the tribunal may also take into account the conduct of the party applying for costs; (c) rejection by a claimant of a ***Calderbank*** type offer may be taken into account if that rejection was unreasonable; (d) although the CPR do not apply directly to tribunal proceedings, in general the tribunal should follow their general principles (though not necessarily to the letter in all cases).

The Law – (ii) res Judicata

66.In addition to the law on costs, the Tribunal has also had to consider the effect, if any, of the previous dismissal by E J Humble of the respondent's applications to strike out the claimant's disability discrimination claims on the basis that they had no reasonable prospects of success. Ms Connolly's argument is that having made that determination at that stage, it is not open to this Tribunal to come to a different conclusion in respect of the gateway requirement of unreasonable conduct in pursuing the claims up until withdrawal.

67.The law of res judicata, or issue estoppel , is, of course, not confined to Employment Tribunal claims, but is of general application. It is summarised in this passage from Halsbury's Law/Civil Procedure (Volume 12A (2015) para. 1568) thus:

The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel', which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or their privies), and having involved the same subject matter. However, res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue. For this reason, res judicata has been described as a portmanteau term which is used to describe a number of different legal principles with different juridical origins upon which the courts have endeavoured to impose some coherent scheme only in relatively recent times.

Cause of action estoppel is absolute only in relation to points actually decided on the earlier occasion and there is no justification for the principle applying in circumstances where there has been no actual adjudication of any issue and no action by a party which would justify treating them as having consented, either expressly or by implication, to having conceded the issue by choosing not to have the matter formally determined. Equally, an exception to issue estoppel arises in the special circumstance where there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings.

The purpose of the principle of res judicata is to support the good administration of justice in the interests of the public and the parties by preventing abusive and duplicative litigation, and its twin principles are often expressed as being the public interest that the courts should not be clogged by re-determinations of the same disputes; and the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter. A distinction is often made between the doctrine of res judicata and the wider rule (alternatively seen as an extension of res judicata) that precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised, in the earlier ones for the purpose of establishing or negativing the existence of a cause of action ('abuse of process'), although the policy underlying both principles is essentially the same.

68.There is, a qualification to this principle, however, in relation to interlocutory or interim applications. The Tribunal has been referred to a passage from *Phipson on Evidence*, 19th Edition, at Chapter 43, para 43-05, which it adopts as an accurate statement of the law, as follows:

"*The rule that a judgment is open to challenge unless final is of importance principally in other proceedings on different substantive questions between the same parties. It also has the important practical effect that the failure of an interim application is no bar to its renewal. Thus, the fact that an application for summary judgment has failed does not mean that the claimant is forever barred from renewing his application, at any rate if further material is put before the court. The rule that interim applications can be renewed is quite general."*

Discussion and ruling.

i)The res judicata/issue estoppel argument.

69.The first argument to be addressed is that considered immediately above, the claimant's contention that the effect of the Humble Tribunal's ruling dismissing the respondent's application to strike out the claimant's disability discrimination claims is to deprive the respondent of the right to argue that the claimant should be made the subject of a costs order on the grounds that he has pursued claims which had no reasonable prospects of success, as there has already been a binding determination that these claims did have a reasonable prospect of success.

70.Ms Connolly's argument is that once a Tribunal has so determined, the issue has been determined, and this Tribunal is barred from re-determining it in the course of this application.

71.With the utmost respect to Ms Connolly, the Tribunal cannot agree with her. There are a number of reasons why that is so. The first is that , as is clear from the passage cited from *Phipson* above , the rule has application only to final judgments or determinations. The application to strike out these claims as having no reasonable prospects of success was not a final judgment. Rather by analogy with applications for summary judgment in civil proceedings, such applications are interim, interlocutory, applications, which do not result in final judgments, particularly when such applications fail. That alone is sufficient to dispose of the claimant's argument.

72.Secondly, even if that were not so, the Tribunal has to examine what has been determined by any previous judgment or decision. Ms Connolly submits that what the Humble Tribunal decided was that these claims did have a reasonable prospect of success. That is not, however, what it determined. It determined that the respondent had not persuaded it that these claims had no reasonable prospect of success. That was not a positive finding that they did, it was a declension to find that they did not, which is not the same thing. On all such applications the Tribunal has a discretion, and the Humble Tribunal was not persuaded that it could find , the bar being very high, of course, that these claims had no reasonable prospects of success. It considered that a final hearing was the appropriate means to determine whether the claims did or did not have merit. There is no express finding in the Tribunal's judgment that the claims did have reasonable prospects of success, there was merely a refusal to find the converse.

73.Thirdly, as pointed out by Mr Forshaw, the principle of issue estoppel or res judicata is subject to the exception of new material becoming available since the previous determination , which could justify the re-opening of the previous determination. In

these proceedings that has occurred, in the form of the claimant's concession in his witness statement that he could not maintain that disability discrimination was the reason for his treatment, and his subsequent withdrawal of these claims. That, in an event, would amount to new material or circumstances which would justify this Tribunal going behind the previous determination , even if the rule were to apply.

74.For all these reasons, the Tribunal finds that it is not precluded from considering as part of the respondent's costs application whether the claims the claimant withdrew had no reasonable prospects of success, or, even more so, whether he acted unreasonably in pursuing them after 17 September 2019, or up until 24 or 30 January 2020.

ii)The merits of the application: was there unreasonable conduct within the provisions of rule76(1)(a) ?

75. This is the nub of the application. The claimant contends that he acted reasonably in bringing the disability claims. Thereafter, he acted reasonably in not withdrawing them until just before the final hearing. He did so at that juncture because he had accepted, after further disclosure had been given by the respondent, in response to his applications for further disclosure, that nothing in what had been disclosed, or which could legitimately be required to be disclosed , was likely to add to his case on these claims, which he recognised, and accordingly withdrew.

76.The Tribunal is deeply conscious that , as observed in ***McPherson*** , it should be wary not to penalise late withdrawals of claims. A claimant who withdraws an unmeritorious claim will rarely be acting unreasonably in doing so. Rather, the focus has to be upon whether in bringing the claim, or in prosecuting for as long as he did, the claimant acted unreasonably.

77.Did the disability discrimination claims have no reasonable prospects of success *ab initio*? The Tribunal considers that, whilst not binding in the manner in which the claimant has argued, the Humble Tribunal's judgment is of some relevance, as it clearly was not persuaded that this was so.

78.It is instructive to consider the basis upon which the respondent contends that these claims had no reasonable prospects of success, and the basis upon which the claimant withdrew them.

79.Disability was not conceded, and it has been suggested that the claimant would have been in difficulty in establishing disability. The Tribunal does not agree, having seen the claimant's impact statement, and his medical evidence. It considers that, once it is appreciated that the main disabling condition is an arthritic one, and not a psoriatic one, the claimant had reasonable prospects of establishing that he was a person with a disability. The letter of 11 October 2019 in which the respondent informed the Tribunal that disability was not conceded explained that the basis upon which it was not was that the respondent did not consider that the condition had the necessary substantial and long term effects upon the claimant's day to day activities. That would have been an issue in the final hearing, but the respondent has not satisfied the Tribunal that the claimant had no reasonable prospects of establishing that he had a disability.

80.The respondent disputes that it had the requisite knowledge , but this too would have been a matter for evidence. The claimant claims (para. 9 of his Impact Statement) he was off work once or more a week by June 2018, which may have imputed the necessary knowledge, actual or constructive, upon the respondent.

81.Rather the real issue, which the claimant recognised may be difficult for him to prove, was causation. In the end , and late in the day, he decided that he could not establish that the reason for his treatment was his disability, and so withdrew those claims.

82.It is not to be overlooked that the claimant brought not only disability discrimination claims, but also age and protected disclosure claims. He thus was contending that there were three possible reasons for his treatment. It is trite to observe that in all discrimination claims, and also protected disclosure claims, which are very like discrimination claims, a claimant will rarely have a "smoking gun" , a piece of compelling direct evidence from which the alleged discriminator's motivation can clearly be seen. Such claimants are often left speculating whether their treatment has been by reason of any protected characteristic, and , if they have more than one, which. The possibility of multiple discrimination, of course, is recognised in s.14 of the Equality Act 2010.

83.Thus the Tribunal is not satisfied that the disability discrimination claims had no reasonable prospects of success from the outset, and does not consider that bringing such claims was in itself unreasonable conduct.

84.Thereafter, the Tribunal appreciates, there may have been an element of Micawberism – the claimant waiting to see if something turned up in the respondent's evidence, particularly upon disclosure.

85.Was that unreasonable? Much has been made of the history of disclosure in these proceedings. The claimant (and his co-claimant) made a number of applications for specific disclosure. Not all succeeded, but the Tribunal notes that there was a stream of continued disclosure provided by the respondent. Whilst its relevance may have been disputed, the fact remains that as late as January 2020 the respondent was providing yet further disclosure.

86.Given that some of this disclosure was quite historic, and should (at least arguably) have been provided from the very first disclosure exercise, the Tribunal can appreciate the claimant's lingering suspicions that the respondent may be holding some disclosable material which may advance his case. Mr Forshaw's submission that, for example, in relation to Gary Teper, the later disclosed documents told the claimant nothing new, with respect, misses the point. The issue was not what was the respondents' case, but what documentary evidence did they have that either supported it or undermined it? That minutes of a board meeting in October 2018 were not disclosed by the respondent until 9 January 2020 is a further example of late disclosure which understandably led the claimant to question whether the respondent really had given full disclosure.

87.With respect to Mr Forshaw, the fact that the further disclosure given by the respondent between September 2019 and January 2020 did not contain any material which went to the disability discrimination claims is not the pertinent issue. What is pertinent is that the respondent was still providing any further disclosure at all.

88.When, therefore, the claimant's final application for specific disclosure came before Employment Judge Ross, although it was dismissed, it was not dismissed with costs, and, the Tribunal has no reason to doubt Ms Connolly's account, some sympathy was expressed for the claimant's position.

89.It was shortly after that the claimant withdrew his disability discrimination claims.

90.The Tribunal, in all these circumstances, does not consider that the claimant acted unreasonably in making that decision until he had exhausted all his avenues to seek disclosure, given the respondent's piecemeal and continuing provision of further disclosure between September 2019 and January 2020, largely in response to pressure from the claimant . That minutes of meetings in 2018 were still only disclosed in January 2020 rather explains the claimant's continued scepticism.

91. When pressed, and without waiving privilege, Ms Connolly told the Tribunal that the claimant was considering withdrawing his disability claims from 19 December 2019, but was awaiting the outcome of the application on 17 January 2020 before making a final decision. That is understandable, but leaves, however, the fact that , after the hearing on 17 January 2020, at which an oral decision was given, rejecting the claimant's application, no withdrawal of the disability claims was made until 30 January 2020. Frankly, it could, and should , have been made the following working day (which was Monday 20 January 2020).

92.It is true that the claimant in para.155 of his witness statement , served, it would seem on 24 January 2020, intimated that he was withdrawing these claims. No prior warning, or covering email , or letter, from the claimant's solicitors drew the respondent's attention to this change in the claimant's case, which would not be apparent until any reader had got to the end of that 27 page witness statement.

93.The Employment Judge, though provided in the hearing with the relevant paragraphs and concluding section of the witness statement, did subsequently, before concluding this reserved judgment, bespeak a copy of the full witness statement, and one was helpfully provided by the claimant's solicitors. He did so to see whether any other parts of the witness statement contained any reference to the disability discrimination claims. None do. Thus the entire statement , which makes no refence to the claimant's health, absence from work, or anything remotely connected with the disability claims, was prepared on the basis that no such claims were being made. This was not, therefore, a sudden *volte face* hastily added in the final draft at para. 155 withdrawing the disability discrimination claims, the witness statement was prepared on the basis that no such claims would be made.

94.That rather gives rise to a question as to when, precisely, the claimant took the decision, or had taken the provisional decision, dependent upon the application for specific disclosure on 17 January 2020, to withdraw these claims. On any view it was

no later than 24 January 2020, and may have been earlier than that. Leaving the decision until then, was not, in itself unreasonable, for the reasons set out above.

95.What was unreasonable, however, was not to inform the respondent as soon as that decision had been taken, especially as the final hearing was imminent. There is no explanation as to why this was not done, and no explanation as to why the respondents were expected to find this out from the reading the claimant's witness statement. It was then not for another 6 days that the claimant formally withdrew the claims by writing to the Tribunal, and copying the respondent's solicitors.

96.All that was unreasonable conduct, and entitles the Tribunal to consider making an award of costs. In terms of what costs were incurred by reason of this late notification of withdrawal of one of the heads of claim, it is unlikely that any can be identified. Counsel's brief will have been delivered, and, even if it had not, the Tribunal doubts that the withdrawal of this particular , and relatively minor, aspect of the claims would have had any impact upon the brief fee negotiated.

97.Similarly, it is impossible to discern what additional solicitors' costs were incurred in this very brief period between when the claims were withdrawn, and when they should have been withdrawn, a matter of some 14 or so days at most, less, if one counts from 24 January 2020.

98.That, however, is no reason for an award of costs not to be made. As ***McPherson*** makes clear, there is no need for a direction causal correlation between the unreasonable conduct found, and the costs incurred. That said, costs are not meant to be punitive, and some sense of proportion must be observed.

99.In overall terms, consideration of, and preparation for, a hearing where disability discrimination claims were being made, in the run up to a final hearing, which then became unnecessary because of late withdrawal must have taken up some time on the part of the claimant's legal team. The claimant's disability discrimination claims were framed as both direct, s.13, and "arising from", s.15, claims. The respondent pleaded to those claims (in the alternative to its primary plea that the claimant was not an employee for the purposes of the Equality Act 20201). The right to plead a justification defence to the s.15 was "reserved", but it does not seem that one was ever in fact advanced.

100.The disability discrimination claims, therefore, in two forms, were still live claims up until 30 January 2020, with the only intimation they would not be being given on 24 January 2020. Preparation for the hearing would therefore require consideration of, and preparation of cross – examination upon , the issue of disability, in this claimant's case, and for evidence to be prepared by the respondent in response to those claims.

101.Mr Forshaw's submissions at para.20 confirm that the bundle was prepared with the relevant evidence relating to the claimant's disability included, and that three of the respondent's witnesses dealt with the issue in their witness statements.

102. No precise quantification of this wasted time is possible, but the Tribunal considers that it is entitled, in its broad discretion to make a notional award representing some element for the unnecessary work done after 17 January 2020 , by

which time the claimant ought to have informed the respondent that he was withdrawing the disability claims .

101.The respondent's solicitors fee earners' hourly rates are set out in the Statement of Costs (page 100 to 101 of the cost bundle). That has been prepared on the basis of the total costs to the respondent of defending the claimant's disability discrimination claims. It is in two sections. The first is the work done by the respondent's solicitors, in total, in considering responding to these claims specifically. That is, in total (though not totalled on the Statement) a total of 18.2 hours , spread across 4 grades of fee earner. It includes, however, 2.2 hours work for a costs draftsman, so that was work related solely to this application, bringing the total of hours for the whole disability response to 16.00. Removing the costs draftsman's time produces a total of £3607.00 for solicitors' costs.

102.The respondent, however, additionally, seeks an award based on 3% of the generic costs of the action, on the grounds that addressing the disability claims required input at each and every stage of the Tribunal proceedings. The sum claimed is therefore £5280.02

103.The Tribunal will not be awarding any costs on a per centage basis. That is for two reasons. Firstly, as held above, the Tribunal does not consider the bringing of the disability discrimination claims to have been unreasonable *ab initio*. It is only awarding costs in relation to the late communication of the decision to withdraw those claims. Secondly, in any event, having identified the hours of work which are attributed to the disability claims, the Tribunal considers that the respondent cannot then also seek a per centage of the overall costs of defending the claims as a whole. The latter approach may be attractive where it is impossible to identify what work was done in respect of which claim, but the respondent has done precisely that. It cannot have both, and in any event, the Tribunal will not award the costs of defending these claims *ab initio*.

104. Turning to specific challenges to the sums claimed, Ms Connolly's first point for the claimant is that the respondent has instructed London solicitors, whose rates are higher, when a local firm could have carried out the same work. Secondly, she challenges the level of fees generally, and makes the point that there is also a claim for the costs of a costs draftsman for 2.2 hours work, which she challenges.

105. For the respondent, Mr Forshaw contended that as the respondent is based in London, it was reasonable to instruct London solicitors. He contends that the level of costs claimed is reasonable, and proportionate.

106. On the first point , the only justification advanced by the respondent for using London solicitors was that the respondent is based there. That may be so, but these claims relate to its office in central Manchester, which the Tribunal understands still to be functioning. Further, the respondent's solicitors themselves have a substantial Manchester office.

107.The issue of the reasonableness of instruction of solicitors outside the area of the court (or Tribunal) where the claim is proceeding was considered by the Court of Appeal in ***Trusscott v Truscott, Wraith v Sheffield Forgemasters [1998] 1 All E R***

82 . The test to be applied is whether the successful party had acted reasonably in instructing those particular solicitors. Given the absence of any explanation other than geographic convenience, itself questionable in these days of remote meetings and little need for in person meetings, and the fact that the respondent's solicitors actually have a Manchester office, the Tribunal considers that the respondent has failed to show (the benefit of the doubt being given in costs assessments to the paying party) that it was reasonable to instruct London solicitors. The Tribunal will only allow costs at the applicable local hourly rates.

108. Those are (and have been since 2010) for Manchester Central, National Grade 1:

Band A (Solicitors/Legal executives 8+ years experience)	£217
Band B (Solicitors/Legal executives 4+ years experience)	£192
Band C (Other solicitors or fee earners)	£161
Band D Trainee solicitors/paralegals etc.)	£118

109. Most of the work appears to have been done at Band B or C level. The Tribunal would consider it reasonable for the work , or supervision of the work, being done in January 2020 to be at Band B level. Ms Connolly submitted that 8 hours at most should be allowed, but that was in relation to the whole of the response to the disability claims.

110.Given that only 16 hours of solicitors' time is attributed to the response to the disability claims as a whole, the Tribunal cannot see how more than a few hours was wasted on these claims in the period between 17 January and 30 January 2020. Taking a broad view, and allowing for some unnecessary preparation , and the disruption that this late communication of withdrawal doubtless occasioned, the Tribunal cannot see how any more than three hours in total of the solicitors' time in this period can be attributed to this aspect of the claims. The Tribunal therefore proposes to allow the costs claim, and to assess the sum payable at 3 hours at the hourly rate of £192.00, a total of £576.00.

111.In terms of counsel's fees, these had doubtless been incurred, and as observed above, were highly unlikely to have been any different whether the withdrawal of the disability claims had been notified before the brief fee had been agreed. The Tribunal makes no award in respect of counsel's fees, and the cost of a costs draftsman is wholly disproportionate, and unnecessary.

112.This will therefore be the award of the Tribunal. The costs are, of course, payable by the claimant. As between him and his solicitors , of course, where responsibility for late notification of the decision to withdraw the disability claims truly lies, the Tribunal need not, and does not, enquire.

113. The total award of costs is therefore £576.00. The Tribunal assumes that the respondent is VAT registered, and hence can recover VAT on legal fees, which is therefore not added to the amount that the claimant is ordered to pay.

Outstanding matters

114. The claims require re-listing. The Employment Judge has, since the preliminary hearing, raised with the parties the possibility of the issue of the claimants' employment status being considered at a preliminary hearing. After discussion, however, this was not agreed, and will not be directed by the Tribunal. The parties are therefore to liaise with Listing for a re-listed full final hearing.

Employment Judge Holmes

Date: 5 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 February 2021

FOR THE TRIBUNAL OFFICE