Appeal No. UKEAT/0229/19/AT

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 September 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MRS K KEIGHLEY — APPELLANT

AGE UK LEEDS — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MRS K KEIGHLEY (The Appellant in Person)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE

The Claimant was dismissed during her probation period. She claimed unfair dismissal for having made protected disclosures. The Tribunal found that she had made one protected disclosure, and assumed in her favour that she had made a second. It found that the dismissing manager was aware of at least one of these. But it concluded that the reason for dismissal was not any protected disclosure, but concerns about the Claimant's performance and conduct. The Tribunal awarded the Respondent the whole of its costs on the basis that the claim had no reasonable prospect of success from the outset. It alternatively held that the Respondent was entitled to its costs from the date on which a deposit order fell to complied with, on the basis that the Claimant had acted unreasonably by continuing with the litigation from that date.

The appeal against the award of costs from the outset succeeded. The Claimant had had an arguable case that she made protected disclosures of which the dismissing officer was aware, so that the matter turned on whether these were or were not the main influence on the decision to dismiss. Having regard to that, and to the high "no reasonable prospect" threshold, the Tribunal did not have a sufficient basis to conclude that the claim had had no reasonable prospect of success at the outset, and (at stage two) that the Claimant should have realised this, so as to make such an award appropriate.

However, the appeal against the alternative award of costs from the due date of the deposit order failed. The claim failed at trial for substantially the reason why the deposit order had been made. The Claimant's continuation of it was therefore rebuttably presumed to be unreasonable conduct. Having regard also to its overall findings, including that the Respondent wrote a costs warning letter following the making of the deposit order, the Tribunal had not erred by failing sufficiently

to consider whether the Claimant had rebutted that presumption. It properly exercised its discretion to award costs on that alternative, more limited, basis.

HIS HONOUR JUDGE AUERBACH

1. The Claimant in the Employment Tribunal ("the ET") worked for the Respondent from mid-August 2017 until she was dismissed on notice in mid-October 2017. Thereafter, she presented a claim to the ET that she had been unfairly dismissed for making a protected disclosure or disclosures. She also presented a claim for notice monies, that is, wrongful dismissal. She was throughout a litigant in person.

2. The Respondent defended the unfair dismissal claim on the basis that it did not accept that the Claimant had made any protected disclosures; and, in any event, maintained that the Claimant was dismissed because of matters to do with her behaviour and performance during her probation period. In its grounds of resistance, it invited the Tribunal to consider striking out the claim or, if the Tribunal was not prepared to strike it out, the Respondent indicated that further particulars should be required, and invited the Tribunal to consider in the alternative making a Deposit Order. The notice money claim was defended on the basis that the Claimant had been given sufficient notice, being a little more than the one week to which she was entitled.

3. The matter came to a Case Management Preliminary Hearing before Judge Jones in May 2018. The Judge identified that it was the Claimant's case that she had made disclosures concerning the health and safety of some service users and also in respect of breach of legal obligations. It was clarified that the Claimant was saying, more specifically, that she had made protected disclosures at two meetings, and that this had led the Respondent to dismiss her. She was directed to give more particulars of what she had said on these two occasions, and why they tended to show that there had been a breach of some legal obligation or health and safety being endangered. The Respondent was then directed to file an amended response if it wished.

4. The Judge also directed that there should be a further Preliminary Hearing to consider whether the claim should be struck out, whether a deposit should be ordered and/or to give further directions. At that further Hearing, on 26 June 2018, the ET made a Deposit Order in respect of the unfair dismissal claim. This was followed by a written Deposit Order and Reasons.

5. It is clear that the Judge did not, at that Hearing, strike out the whole of the unfair dismissal claim. In my bundle there was however a Strike Out Order made on the same occasion. However, on a careful reading of the documentation, including the case management directions made on the same occasion, it can be seen that what happened is that the Judge struck out *part* of the Claimant's claim, insofar as she was alleging that she had made disclosures tending to show a breach of some legal obligation, so that the basis of the protected disclosure claims going forward was narrowed to being that she had made protected disclosures on the two occasions she relied upon, tending to show that the health and safety of services users was endangered. See paragraph 2 of the case management summary arising from that same Hearing on 26 June 2018.

6. Accordingly, the matter went forward on the basis that the Claimant was relying on those protected disclosures, but also on the basis that she was required to pay a deposit as a condition of continuing with that claim. She indeed did pay the deposit and, accordingly, the unfair dismissal claim, as well as the notice money claim, came to a Full Hearing in October 2018 before Employment Judge Cox. That Hearing was completed over the course of three days. The Tribunal dismissed both the unfair dismissal and notice pay claims and ordered the Claimant to pay the full amount of the Respondent's costs of £9365.20 incurred in defending the claims, with the deposit to go towards discharge of that obligation.

7. The Claimant sought to appeal the Tribunal's Decisions in respect of both liability and costs. The Judge who considered her Notice of Appeal on paper did not think there were any reasonably arguable grounds, but at a Rule 3(10) Hearing, counsel who represented her under the ELAAS scheme persuaded me that certain amended grounds of challenge to the Costs Decision only were arguable. Other grounds of appeal relating to the Costs Decision, and all of the grounds relating to the Liability Decision, were dismissed by me. Thereafter, the Respondent tabled an Answer to the amended grounds. This set out the Respondent's reasoned case as to why all of those grounds should fail. In subsequent correspondence, the Respondent indicated that it would not be appearing at today's Hearing, but relied on the contents of the Answer.

8. The Hearing of this appeal was due to take place in March 2020 but had to be postponed owing to the lockdown. The Claimant has appeared in person and over the course of the morning has made extensive oral submissions. Although she became a little distressed at times, we had some breaks and were able to proceed and complete submissions satisfactorily after those breaks.

9. I will summarise the salient parts of the ET's Decision, its findings and conclusions.

10. The Respondent provides a transport service for patients aged over 60 who are discharged from a local hospital in Leeds, but have no one to take them home. The Claimant was employed in the provision of that service as a support worker. Support workers meet with the discharged patients at the hospital, physically take them home in the support worker's own car and settle them in at home. The Tribunal heard evidence from the Claimant and, for the Respondent, from Miss Clayton, who was the manager of her team, and Mrs Root, the Operations Director.

11. The occasions on which the Claimant claimed that she had made protected disclosures were two meetings with Miss Clayton, one on 18th and the other on 27 September 2017. The gist was that certain patients who she was asked to transport were being put at risk and/or that she was herself put at risk in being expected to transport them. This was disputed.

12. There was an issue as to what had actually been said at the first meeting on 18 September. The Claimant's case was that on that occasion she had raised concerns about five different patients. The Tribunal found her evidence to be confused and inconsistent, and, in relation to four of the five, it did not accept that such disclosures had been made. However, the Claimant had, the Tribunal accepted, made a disclosure in relation to a fifth individual, referred to as patient R, where her concerns were related to the fact that the patient was insulin dependent. The Tribunal went on to find that that disclosure amounted in law to a protected disclosure.

13. The second meeting, on 27 September 2017, was convened by Miss Clayton in order to review the Claimant's performance. The Claimant's case was that in the course of that meeting she had made disclosures about a large number of individual patients, but Miss Clayton's evidence was that she had only raised the case of one specific patient, namely patient R again. The Tribunal accepted that the Claimant had also raised some more generalised concerns, but considered it would need to have had clear evidence from the Claimant about who the individual patients were about whom she had spoken in generalised terms, what she believed about the circumstances of each of them and on the basis of what information in each case. The Tribunal said that the evidence the Claimant gave about that was so unclear that it would have taken a substantial amount of time to obtain all that information from her, which would not have been proportionate. Therefore, it had decided to proceed on the assumption that, by raising generalised concerns, she had made what amounted to a further protected disclosure.

14. The Tribunal found, on the basis, it said, of Mrs Root's evidence supported by documentary evidence, that from early on in the Claimant's employment, Mrs Root had received information from various colleagues that the Claimant's conduct and "attitude", by which it is apparent was meant her interactions with other colleagues, were unsatisfactory. There were ongoing and frequent discussions between Mrs Root and Miss Clayton about these concerns. Then, on 1 September, Mrs Root was told by the Senior Co-ordinator, Miss Dunill, that the Claimant had been unable to undertake her duties because she had no money for fuel, and Mrs Root then spoke to the Claimant about this. In addition, on 2 September, Miss Dunill sent Mrs Root a note raising a number of other specific concerns about the Claimant's conduct, which the Tribunal set out. These included failures to carry out home assessments in the clients' homes, rather than upon the Claimant's return to the office – something that the Claimant had disputed when the matter had been raised with her.

15. On 5 September Mrs Root met Miss Clayton. Notes were made of the meeting. They discussed whether the Claimant's probationary period should be extended and the possibility of drawing up an action plan for her to address the performance issues that had arisen. On 25 September Miss Clayton sent Mrs Root a proposed detailed action plan identifying a number of specific issues with the Claimant's performance and attitude; and that was approved by Mrs Root.

16. At a one-to-one on 27 September 2017 Miss Clayton discussed the Claimant's performance and the action plan with her, and a note was made. This, I interpose, was the same meeting at which the Claimant referred again to patient R and also, as the Tribunal found, raised generalised concerns about patient safety, which the Tribunal assumed amounted to a protected

disclosure. Mrs Root was sent a copy of the notes of that meeting, which the Tribunal inferred probably happened on 28 September.

17. Also, on 28 September 2017, Miss Clayton sent Mrs Root a further email, again raising concerns about the Claimant's attitude and performance, and saying that she was responding aggressively to her Co-ordinator and that her behaviour was making other staff unhappy. In addition, on 29 September, Miss Clayton had a further discussion with the Claimant about her performance and attitude. That same day, Mrs Root phoned Miss Clayton, to discuss in more detail the contents of the email she had sent on 28th.

18. At this point, Mrs Root, the Tribunal found, decided to dismiss the Claimant, and contacted the HR department to get advice on how to take that forward. She then spoke to Miss Clayton again and told her that she had decided to dismiss the Claimant because of her capability, her attitude and performance, and the disruptive effect that was having on the team. The Tribunal found that there was then a further incident on 6 October in which the Claimant was involved in an altercation with a colleague, into which Miss Clayton was also drawn. This incident led to the implementation of the dismissal decision being brought forward.

19. At the Claimant's review meeting on 11 October 2017, Mrs Root told her that she was being dismissed because of her behaviour on 6 October and "the constant stream of calls and emails" that Mrs Root had received, complaining about her conduct, lateness, challenging of clinical decisions, an inaccurate expenses claim, refusal to transport a client who had a Zimmer Frame, refusal to answer the office telephone, reluctance to carry out certain transports and failure to organise that there was sufficient fuel in her car. The dismissal was confirmed in an emailed

letter of 12 October that gave the Claimant notice to 20 October and effectively placed her on garden leave in the meantime.

20. The Tribunal went on to say that it accepted that Mrs Root at least knew that the Claimant had raised concerns about patient safety at the 27 September 2017 meeting with Miss Clayton, because Mrs Root had seen the notes. There was no evidence, said the Tribunal, that Mrs Root also knew about the Claimant having raised concerns about patient R at the earlier meeting on 18 September; but the Tribunal stated that it was in any event in no doubt that the reason for the decision to dismiss the Claimant was in no way related to any protected disclosure. Rather, it was because of the many and varied concerns that the Respondent had about her performance and what was called her attitude. The notice pay claim was dismissed because the Claimant was entitled to only one week's notice and had been given and paid for more than a week's notice.

21. The Tribunal then turned to the question of costs. It said this:

> **"35. Age UK applied for an order that Mrs Keighley should make a payment towards their costs in defending the claim. Rule (76)(1)(b) of the Tribunal's Rules of Procedure provides that the Tribunal has power to make such an Order if it is satisfied that the claim had no reasonable prospect of success.**
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> **36. The Tribunal accepted that the claim had no reasonable prospect of success from the outset. On the evidence the Tribunal heard and read, it was apparent that Mrs Keighley was told on several occasions that there were issues with her attitude and performance. The Tribunal rejected as incredible her evidence that she was told her performance was "fine" and that she had good working relationships with all her colleagues in the team throughout her employment. Nor did the Tribunal accept Mrs Keighley's evidence that she was told that "everyone gets an action plan". She knew before she brought her claim to the Tribunal that Age UK had had substantial concerns about her attitude to her work and her performance during her time there. In 2015 she brought claim against another Respondent alleging unfair dismissal on public interest disclosure grounds, from which she would have known at the time she brought her claim against this Respondent that she had to establish that the reason she was dismissed was her protected disclosures. She also knew at the time she brought this claim that she had been given notice of her dismissal date and had been paid until the date of termination, making her claim for notice pay completely baseless.**
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> **37. The Tribunal also has power to make a Costs Order if a party has acted unreasonably in the conduct of the proceedings (Rule 76(1)(a)). On 26 June 2018**

Mrs Keighley was ordered to pay a deposit of £80 by 31 July 2018 in relation to her unfair dismissal claim, on the basis that she had little reasonable prospect of establishing that the principal reason for her dismissal was that she had made protected disclosures when there was a "documented history of concerns about her suitability which had be identified during her very short employment".

38. Under Rule 39(5), if a Tribunal decides an allegation against the paying party for substantially the reasons giving in the Deposit Order, the paying party is treated as having acted unreasonably in pursuing that allegation for the purpose of a Costs Order under Rule 76, unless the contrary is shown, and the deposit must be paid to the other party. On that basis, the Tribunal accepted that Mrs Keighley should be viewed as acting unreasonably in pursing the claim, at least from the date the deposit was due on 31 July 2018.

39. Age UKs legal representative sent Mrs Keighley a letter warning her that it intended to make an application for costs if she lost her claim. The letter highlighted, amongst other things, their concern that the evidence did not support her allegation that the main reason she was dismissed was any protected disclosure she had made. The Tribunal does not accept Mrs Keighley's evidence that she never received the costs warning letter. It was sent by recorded delivery.

40. In summary, the Tribunal considered that it had grounds for making a Costs Order against Mrs Keighley under Rule 76(1)(b) in relation to costs incurred from the outset and, in addition, under Rule 76(1)(a) in relation to costs incurred from 31 July onwards."

22. The Respondent claimed costs for the whole of the litigation, of £9365.20. Having analysed how that broke down, the Tribunal concluded that that amount was reasonable, as such. The Tribunal indicated that in exercising its discretion as to whether to award costs it would take into account the Claimant's ability to pay. It took into account that she had a house worth substantially more than the mortgage, and what it had heard about her other means and debts. The Tribunal had heard additional evidence from the Claimant, asserting that her husband was entitled to half the proceeds of the house, but for reasons its explained, it did not find that evidence credible, and it concluded that the Claimant did have sufficient assets to meet the costs in the amount sought in full. However, it postponed the payment date by six months to enable the Claimant to make the necessary arrangements to meet the award.

23. The relevant costs rules in the **Employment Tribunals Rules of Procedure 2013** are as follows:

> **"76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—**
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> **(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.**
>
> **84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.**
>
> **39.—(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—**
>
> **(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and 17**
>
> **(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.**
>
> **(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."**

24. The amended grounds of appeal are that, in respect of costs, the Tribunal erred:

> **" [i] in concluding that the claim had "no reasonable prospects of success from the outset "in the sense required by rule 76(1)(b) of the Tribunal's Rules of Procedure (paragraph 36 of the judgment). The Tribunal found at trial the Claimant had in fact made qualifying protected disclosures very shortly before being dismissed, and the Tribunal dismissed the claim at trial on only on the basis that the reason for dismissal (i.e the operative reason in the subjective mind of the Respondent's manager) was not in fact, the making of those disclosures. That was an issue which could only properly be tested at trial (and much of the material relied upon by the Respondent was not disclosed to the Claimant at the time of her dismissal), and there was adequate basis upon which the Claimant could reasonably, properly and genuinely bring her claim from the outset, such that it could not properly be said that there was "no reasonable" prospects of success.**
>
> **And/or**
>
> **[ii] in not considering whether, under rule 39(5) of the Tribunals Rules of Procedure, the Claimant had displaced the burden upon her such that she should**

have been viewed as acting unreasonably in pursuing the claim (paragraph 38 of the judgment). The Appellant repeats the points made in [i] above.

And/or

[iii] in not confining the costs which the Claimant should be ordered be ordered to pay only to such costs as the Respondent incurred after the date of the Deposit Order or some later date."

25. I turn to the principal arguments. The Claimant is a litigant in person. She has set out her arguments in a written skeleton and, as I have said, I heard extensive oral argument from her.

26. It is clear to me, from everything I have read and heard, that the Claimant's perspective throughout has been that, as someone with a nursing background, she was always actuated by a passionate and legitimate concern for the health and safety and welfare of the service users with whom she interacted. Her case was that she had been punctilious about raising matters of concern whenever there appeared to her to be an issue about the health and safety of a user, and in particular about whether they could be safely transported or safely left at home, and that she had been properly punctilious in following the Respondent's policies.

27. Her case was that this behaviour did not commend her to the Respondent because it meant that it interrupted the smooth operation of their business; and that they expected her not to raise so many issues, but simply to transport the people that she was asked to transport – just to act, as she described it, as a glorified taxi driver – and to do it in a timely fashion. Her belief is that the Respondent took against her because of her raising concerns when she saw them, and in particular that this was because this behaviour impacted on their financial model.

28. The Tribunal rejected that case in its Liability Decision, and it is not open to the Claimant to seek to reopen it at this Hearing today. It is nevertheless apparent to me that the Claimant remains of the view that she was right in her approach to all of this, that the Respondent was

wrong, and that this was indeed, notwithstanding the Tribunal's Decision, the true reason why she lost her job. Quite a bit of what she wrote in her skeleton argument, and of her oral submissions this morning, were about this aspect of her case.

29. However, I do not say that these submissions are *entirely* irrelevant, because one of the things I have to consider is the challenge to the Tribunal's view that the claims had no reasonable prospect of success from the outset, and that she ought reasonably to have appreciated that. The strength and basis of her conviction from the outset, that her claim was a good one, is therefore in a general sense relevant context and background to that. Nevertheless, my focus has to be on the specific grounds of challenge to the Costs Order in the amended grounds of appeal.

30. In summary, and leaving aside some of the points she raised that were simply not relevant, it seems to me that the key points that the Claimant sought to advance were these. She relied on the fact that the Tribunal had found that she *had* made protected disclosures, and she had done so relatively shortly in point of time before her dismissal. She particularly relied on what she said was the important disclosure, that the Tribunal accepted that she had made, in relation to patient R, and which she said had not, in so many words, endeared her to the Respondent. She maintained that it was reasonable for her to have fought her case to a Hearing on the basis that she believed, reasonably, that the Respondent had taken against her for making such disclosures, in particular about patient R. She had only ultimately lost because the Respondent, with the benefit of representation, had persuaded the Tribunal at the full Hearing that the disclosures had not affected Mrs Root's thought process when she made her decision to dismiss.

31. The Claimant argued, more broadly, that she ought not to have been ordered to pay costs when she had only ever acted with patient care concerns in mind. It was right that she had raised

these concerns and wrong that the Respondent had put profit before safety as indeed she submitted it had done in making its costs application. It did not follow from the fact that she had lost that therefore she had acted unreasonably in maintaining her case. Not all the material relied upon by the Respondent at trial had been disclosed to her at the time of her dismissal. The making of the Costs Order had itself caused her and her family considerable stress and anxiety.

32. As I have said, during the course of her oral submissions, the Claimant developed these arguments, as well as her general case as to why she maintained that she had been dismissed for whistleblowing. She also told me that it came as some surprise to her when she received the Deposit Order with Reasons shortly after the Hearing at which it was made, as she, and the person who accompanied her at that Hearing, had been under the impression that the Judge had said that in fact her case had reasonable prospects of success; and they had made notes to that effect.

33. However, when we discussed this this morning, the Claimant acknowledged that, having received the Deposit Order and Reasons, she had not taken any steps to raise with the Tribunal that this conflicted with her understanding of what had happened at the Hearing. Nor had she raised this as a reason why she had continued with the litigation after the Deposit Order, when costs came to be considered by the Tribunal. The Claimant told me that she had not appreciated that it would have been open to her to do so, and she had struggled to be heard at the Costs Hearing. However, a proposed challenge to the effect that the Liability and Costs Hearing had not been fairly conducted, was rejected by me at the Rule 3(10) stage. Nor do I think that the Tribunal can be criticised, as such, for having relied at the Full Hearing on the clear contents of the Deposit Order and the Written Reasons that accompanied it.

34. The Claimant reiterated in oral submissions her case that she had been dismissed because she had made one or more protected disclosures, and that it was reasonable for her to have pursued that case, bearing in mind that the Tribunal did find that she made protected disclosures. In addition, it was not fair for the Tribunal to have expected her to have realised the strength of the Respondent's case, particularly, she said, given that their claimed concerns about her were not raised with her before she blew the whistle, that she had not had as full an induction as she might have had, and that she was initially told by managers that she was doing well.

35. The principal points raised by the Respondent in the Answer were as follows. As to ground 1, it noted that there was no challenge by the Claimant to the various specific findings that the Tribunal had made in paragraph 36. Whilst it had found that the Claimant had made a protected disclosure about patient R on 18 September, there was no actual finding that she had made further disclosures on 27 September. Rather, this had just been assumed in her favour.

36. The Respondent accepted that the disclosure or disclosures came a short time before the dismissal, but there was a chronology of events relating to the Claimant's performance going back to 1 September; and findings made by the Tribunal that she had been spoken to, and was aware of the Respondent's concerns, during employment, starting from before she made the first disclosure. The Respondent submitted that the Tribunal was entitled to conclude on this basis that she could not reasonably have believed that her claim had reasonable prospects of success.

37. Further, although she was a litigant in person, the Tribunal was entitled to conclude that she knew, or ought to have known, what was needed as a matter of law for her to succeed in a claim of this type. The Tribunal, the Respondent's Answer concluded, did not err in considering

A that her claim was "doomed to fail" from the outset. Its conclusion that her notice money claim was entirely without merit was also unimpeachable.

B 38. In relation to ground 2, the Tribunal had identified that the burden was on the Claimant to show that she had not acted unreasonably, at least in carrying on from when the deposit payment was due. Her claim was dismissed for precisely the same reasons that the Deposit Order had been made. Her evidence had been almost entirely rejected by the Tribunal. It considered C other material factors, specifically the costs warning letter, in deciding whether to exercise its discretion to make a Costs Order. The exercise of that discretion was not specifically challenged by these grounds of appeal. There was no basis on which it could have been found that the D Claimant was *not* acting unreasonably in carrying on after the Deposit Order was made, for the purposes of displacing the Rule 39(5) presumption.

E 39. In relation to ground 3, there was no reason to say that the Tribunal should have confined the costs period to any date later than that on which the payment of the deposit was due. It could not be said that the Tribunal's exercise of its discretion was perverse.

F 40. I turn to my conclusions. First, I agree with the Respondent that the Tribunal was entitled to take a view that the notice money claim was unreasonably pursued from the outset. The Claimant clearly knew what notice she was in fact given and what she was paid, and it was not G suggested she had any reason to believe that she had a longer notice entitlement than one week. However, plainly, the costs incurred in defending the notice money claim, as such, must have been minimal. No doubt reflecting that fact, the substantive challenge raised by these grounds of appeal is to the making of the costs award of the whole of the Respondent's costs by reference to H the position in relation to the unfair dismissal claim.

41. Turning to ground 1, the Tribunal had to decide under Rule 76(1)(b) whether the unfair dismissal claim had no reasonable prospect of success from the outset. If so, the costs threshold would be crossed, regardless of whether the Claimant appreciated or ought to have appreciated that. However, in then deciding, at stage 2, whether to make an award of costs, a highly relevant consideration would be what the Claimant appreciated, or ought reasonably to have appreciated, about the prospects of success when she embarked upon her claim. Although these are distinct decision points, there is some interaction between them, the Tribunal's conclusions on these two points are effectively all embodied in paragraph 36, and ground 1 effectively attacks them both.

42. The Claimant is right, as such, when she says in her skeleton that it did not merely or automatically follow from the fact that she ultimately lost, that costs should have been awarded against her. The Tribunal, when considering costs under this route, should not act with hindsight. It must consider whether *at the outset* the claim had no reasonable prospect of success, and, if so, whether the Claimant reasonably ought to have realised that *at the outset*. On the face of it, the Tribunal did not, however, fall into that error, as such. It considered in the course of paragraph 36 what the Claimant knew at the time when she brought her claim, both about the facts and circumstances of the case, and as to what the law required in order for her claim to succeed.

43. As to the law, and notwithstanding that the Claimant was a litigant in person, I consider that the Tribunal was entitled to proceed on the basis that she understood, or reasonably ought to have understood, from the outset, that in order to succeed she had to establish not merely that she had made a protected disclosure or disclosures, but that that was also the reason (or at least the principal reason) why she was dismissed. The Claimant had very short service, and she had been involved in bringing a previous similar claim based on having made a protected disclosure. She

also, in terms, advanced this claim as specifically being an unfair dismissal claim for having made a protected disclosure. The Tribunal was entitled to take the view that she knew, or ought to have known, that the success or failure of her claim turned on establishing this.

44. As to what she knew or should have known about the facts and circumstances, as I have recorded, the Tribunal found that she had made a protected disclosure on 18 September 2017 and assumed in her favour that she had done so again on 27 September. It found that Mrs Root knew of the second disclosure, and, whilst not finding that she knew of the first one, effectively assumed that in the Claimant's favour as well, when it came to the conclusion that *in any event* such disclosures or Mrs Root's knowledge of them were not the reason why she was dismissed.

45. In principle, it therefore seems to me that the Tribunal was bound to treat those as points in favour of the Claimant's case that she reasonably pursued her claim, when considering whether or not to award costs by this route. However, the focus then fell on whether she nevertheless knew or should have known from the outset that there were no reasonable prospects of the Tribunal finding that it was what Mrs Root knew about the actual or assumed disclosures that was the reason or main reason for her decision to dismiss. While the burden was on the Claimant to make good her case, that threw the spotlight on what the Claimant knew, or should have appreciated, about the strength of the Respondent's case as to the true reason for dismissal being concerns about the Claimant's performance and attitude.

46. It seems to me that the Tribunal, in deciding whether there were no reasonable prospects of success of the claim from the outset and whether, if so, the Claimant ought to have appreciated that, needed to give some consideration to the *overall* picture at the outset, available to the Claimant, as to the strengths or weaknesses of these competing explanations for the decision to

dismiss. The Tribunal had to consider in particular what the Claimant knew about *all* these matters from the outset and about what evidence there might be to support the rival cases.

47. As to that, the Tribunal, as I have described, found that the Claimant was spoken to about the Respondent's concerns a number of times. It identified that she was spoken to about the fuel issue at the start of September 2017, and challenged early on about not completing home assessments at the home. She was given the action plan on 27 September. Further concerns were raised with her on 29 September. Finally, at the meeting at which she was dismissed on 11 October, the incident of 6 October was raised, as were the various other matters that Mrs Root indicated had been the subject of numerous concerned communications from colleagues. The Tribunal was therefore correct to say that these issues had been raised on several occasions.

48. In the course of this paragraph, the Tribunal also rejected the Claimant's evidence that she had been told that her performance was "fine" and that she had good working relationships with all of her colleagues and that "everyone gets an action plan". The Tribunal was entitled, in short, to consider that she was unreasonably seeking to downplay these matters.

49. All of that said, it is true that *not all* of the matters of stated concern were raised with the Claimant in point of time before she had made her first protected disclosure. It would also appear that she did not, when she embarked on her Tribunal claim, have available to her all the *documentary* evidence which the Tribunal later had, that colleagues had indeed been raising concerns with managers about her behaviour and attitudes, from a very early stage. That is because, as the Tribunal found, in the initial weeks these matters were only discussed between the two managers, and, when they began to be raised with the Claimant, it appears that not all of that material was shared with her at that time. This feature does not necessarily mean that the

Tribunal was *bound* to take a view that the Claimant had a reasonable basis for believing that her claim was arguable and ought to be tested at a full Hearing, but it was a factor to weigh into the balance.

50. Similarly, it is true as such that, given that the Tribunal found (or assumed) that the Claimant had made protected disclosures about which Mrs Root knew, the matter ultimately turned on its assessment at trial, of whether it was what she knew about that, or what she knew about the performance concerns, that was the whole or main reason why she decided to dismiss the Claimant. Once again, however, that does not mean that, as a matter of law or logic, the Tribunal was bound to conclude that the Claimant must have had a reasonable basis for pursuing the claim all the way to a full Hearing, in order to hear Mrs Root's evidence tested under cross-examination. Even a litigant in person has a responsibility to take a realistic view of their case, and the prospects of success, bearing in mind what they know when they embark upon it. Even a litigant in person cannot expect to be permitted to proceed with a claim all the way to a Hearing, if they are setting unrealistic store by the hope that an opponent's case, which otherwise looks very strong, will suddenly crumble when the key witness or witnesses are tested at trial.

51. I have not found it easy to reach a decision in respect of this ground. I have borne in mind that the Tribunal's Decision must be respected unless it has made an error of law or otherwise, in the legal sense, come to a view that is perverse. However, the legal test of this costs gateway – that a claim had no reasonable prospect of success – (in this case, from the outset) is a very high threshold. It would not be enough to conclude that the claim was plainly more likely to fail than to succeed. In order for costs to be awarded from the outset through this route, the Tribunal must come to a reasoned conclusion that there was *no reasonable prospect* of success; and, at stage two, that the Claimant from the outset appreciated or ought reasonably to have appreciated that.

52. In this case, it was a significant feature that the Tribunal did find or assumed in the Claimant's favour that there were protected disclosures about which the Respondent knew, and that the dismissal happened relatively soon after those matters were raised. On the other side of the scales was the Respondent's case that there was a lot of evidence about entirely separate and distinct, serious concerns about the Claimant's conduct and behaviour building up, and that the Claimant had herself been acquainted with these well before she embarked on her Tribunal claim. The Tribunal had to embark on a careful assessment of how the picture on both sides of the scales looked at the outset, before coming to the conclusion that the Claimant should have appreciated that there was *no* reasonable prospect of success.

53. But it seems to me, ultimately, that the Tribunal did not sufficiently weigh up all of these factors in paragraph 36. It focused there on what the Claimant knew, or reasonably ought to have known, was the legal position; and what she knew, or reasonably ought to have known, about the Respondent's concerns and the seriousness of them. However, it did not weigh into the balance there, the fact that she was also entitled to be taken to have reasonably pursued her case that she had made protected disclosures about which the Respondent knew, at any rate when she began her claim. It seems to me that, if the picture relating to both sides of the argument had been weighed up, and consideration had been given to whether the Claimant had a reasonable basis for thinking at the outset that her claim's prospects were not as very bad as no reasonable prospect of success at all, the Tribunal ought to have concluded that at that stage that she did.

54. Ultimately, therefore, I have concluded that ground 1 succeeds and that the Tribunal ought not to have awarded the whole of the costs incurred from the outset on the basis of Rule 76(1)(b). I have considered whether that is something that should be remitted to the Tribunal for a fresh

decision. In accordance with the guidance in **Jafri v Lincoln College** [2014] ICR 290, I am bound to do that if more than one outcome is possible. However, the EAT can, and should, sometimes take a robust view of that; and, given the reasoning I have set out, I do not think that the Tribunal properly could award the whole of the costs incurred from the outset. Therefore, I will not remit that issue.

55. However, that is not the end of this appeal, because the Tribunal made an alternative finding that the Claimant at least unreasonably pursued her claim following the making of the Deposit Order, and specifically from the date on which the deposit fell to be paid, of 31 July 2018; and that in all the circumstances it was reasonable in the alternative to order her at least to pay the Respondent's costs incurred from that date. This alternative basis for the Tribunal's Decision is the subject of ground 2.

56. Ground 2, rightly, does not seek to challenge the Tribunal's Decision as such that Rule 39(5) was engaged, that is to say, the Tribunal's conclusion, having read the Deposit Order Reasons, that the reasons why the Claimant had lost were substantially the same. That was clearly right. I note in particular that the Judge who made the Deposit Order observed in the course of their Reasons that "most significantly, there is compelling contemporaneous evidence" supporting the Respondent's case as to the reason for the dismissal, and that the Respondent had shared its concerns with the Claimant, including in the action plan and at the dismissal meeting, and that this followed a further serious incident with a colleague on 6 October.

57. The basis of this ground is, rather, that, having found that the burden had shifted to the Claimant, the Tribunal did not, in terms, consider whether she had discharged the burden, and demonstrated that, nevertheless, she had *not* unreasonably carried on with the litigation following

the making of the Deposit Order. I note that, even where that burden is not discharged, the Tribunal also always still needs to consider whether to exercise its discretion to award costs. However, as the Answer correctly points out, this ground is only confined to the issue of whether the Tribunal sufficiently considered whether the Claimant had discharged the burden of showing that she had not carried on unreasonably. It is not asserted by this ground that the Tribunal either then failed to exercise its general discretion, or did so in some way wrongly.

58. The Tribunal's reasoning at paragraph 38 correctly set out the effect of Rule 39(5) including identifying that the burden shifted "unless the contrary is shown." It then stated that on that basis the Claimant should be viewed as acting unreasonably in carrying on with the claim at least from the date that the deposit fell due. It can be said that the Tribunal has not, in terms, said here that it separately considered whether she had discharged the burden on her to show that she had *not* acted unreasonably in carrying on, and not separately set out the conclusion that she had not discharged that burden. However, its express reference to the words in the Rule "unless the contrary is shown" does suggest that it cannot have overlooked this issue entirely, but rather that its reasoning was compressed.

59. I also bear in mind that the Tribunal had already, in the earlier part of its Costs Decision, made fairly full findings about what the Claimant knew or ought to have known and understood about the Respondent's case. Importantly, it also referred to the terms of the Deposit Order itself, which were full and explicitly and carefully reasoned. Also importantly, the Tribunal also went on in the next paragraph, paragraph 39, to refer to the costs warning letter, which itself highlighted the Respondent's case that the evidence did not support the Claimant's allegation that the main reason she was dismissed was any protected disclosure. Further, though the Claimant denied it, the Tribunal found that she did receive that letter, which was sent recorded delivery.

60. It is also, I think, significant background that, between the two Preliminary Hearings, the Claimant had given Further Particulars of her case about the disclosures, to which the Respondent had replied. In addition, at the Hearing when the Deposit Order was made, the Tribunal had also identified, and somewhat narrowed, by its partial Strike Out Order, the basis of the protected disclosures on which the Claimant could rely going forward. The Tribunal also, in the Case Management Order it made at that stage, identified *in terms* that those particular protected disclosures had to be the sole or principal reason for the dismissal, in order for the Claimant's claim to succeed. The Claimant was then, before the date on which the Deposit Order fell to be paid, in possession of a letter from the Respondent spelling out its case as to the state of the evidence, and issuing a costs warning.

61. These were all significant developments. It seems to me that, taking them all into account, the Tribunal was not only entitled to proceed on the presumption that the Claimant had not reasonably pursued her claim after the date when the Deposit Order fell to be paid; but also to take the view, which it can be inferred it did implicitly, though not explicitly, that she had not demonstrated, despite the burden shifting to her to displace that presumption, that she *had* reasonably carried on after that date. As I have said, there is no challenge to the exercise of the Tribunal's discretion then to make a Costs Order on that alternative basis.

62. Accordingly, I have come to the conclusion that, although it might have been better for the Tribunal to spell out its reasoning more fully, it did not err by failing to take account of the possibility that the Claimant might have discharged the burden created by Rule 39(5); and did not err in its alternative conclusion that she should pay costs incurred from 31 July 2018 onwards, the date on which the Deposit Order fell to be met. Ground 2 therefore fails.

63. I have therefore concluded that, whilst the Tribunal's Decision to award the costs incurred from the outset cannot stand, its Decision in the alternative to award costs incurred from 31 July 2018 onwards does stand. I can see no arguable basis for concluding that it should have limited the costs awarded by it to those arising from some later date or stage, a possibility raised by ground 3, and therefore, to that extent, ground 3 is dismissed. However, because I have upheld ground, but not ground 2, I uphold ground 3 insofar it asserts that costs should have been confined to those incurred from 31 July 2018, when the Deposit Order fell to be paid.

64. Putting it all together, this appeal has partially succeeded insofar as I quash the Tribunal's Order that the Claimant should pay the whole of the Respondent's costs in the sum of £9365.20, incurred from the outset of the litigation. However, I substitute an Order that she should pay the amount of the Respondent's costs that were incurred from 31 July 2018 onwards. I am not in a position to ascertain the precise amount of those costs. However, the Tribunal has assessed the underlying amount of costs incurred as reasonable, as such, and therefore, all that remains is to ascertain, as nearly as possible, how much of that total amount was incurred after 31 July 2018.

65. I will remit the matter to the Tribunal in order to determine that figure. I observe that the Tribunal no doubt will want to give some direction which might facilitate the process, perhaps by having the Respondent set out its breakdown and analysis for the Claimant to consider. However, ultimately, I must leave it to the Tribunal to give directions as to the way forward and, in particular, if the parties cannot agree the figure, as to whether it will deal with the matter on paper or may consider that a further Hearing is required.