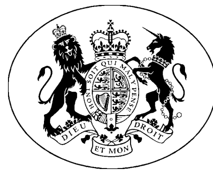

EMPLOYMENT TRIBUNALS

Claimants: Mrs A Ahmed & others

Respondents: (1) Sainsbury's Supermarkets Limited
(2) Lloyds Pharmacy Limited

PRELIMNARY HEARING

Heard at: Midlands (West) (in public; via CVP) **On:** 18 December 2020

Before: Employment Judge Camp

Appearances
For the claimants: Mr A Short QC & Mr B Williams QC
For the respondents: Mr D Martin QC

RESERVED JUDGMENT

(1) The respondents must pay 80 percent of any costs incurred in respect of and incidental to:

a. the "register issues" (as defined in paragraph 2 of the Case Management Orders made at the preliminary hearing on 14 November 2019), including the respondents' applications to strike out referred to in paragraph 4 of the Reasons for the Reserved Judgment sent to the parties on 8 June 2020;

b. the preliminary hearing between 28 February 2020 and 10 March 2020;

that were incurred between 22 October 2019 and 10 March 2020 inclusive by claimants represented by Leigh Day Solicitors who had presented their claim forms on or before 10 March 2020.

(2) If not agreed, the amount to be paid will be determined by way of detailed assessment, on the indemnity basis, carried out by a County Court in accordance with the Civil Procedure Rules 1998.

REASONS

Introduction & background

1. Following a preliminary hearing to deal with preliminary issues in February and March 2020, I gave a reserved decision in June 2020 that was largely in the claimants' favour.

Some of the claimants (who I shall simply call, for ease of reference, "the claimants") applied for their costs connected with what were referred to in the decision as the "*amendment issues*"[1]. They did so in a letter from their solicitors dated 25 June 2020. The basis of their application is, broadly, an allegation of unreasonable conduct under rule 76(1)(a) of the Rules of Procedure. This decision deals with that application.

2. By way of background, please see the Order, Judgment by Consent, and Reserved Judgment & Reasons signed on 5 June 2020 ("preliminary issues decision") and the Order and Reserved Reasons signed on 31 October 2020 ("provisional decision") that followed a preliminary hearing on 14 October 2020.

3. A list of issues to be dealt with at this hearing was agreed between the parties and endorsed by me in Autumn 2020 and is as follows:

    3.1 Have the conditions for the making of an order pursuant to Rule 76(1)(a) of the Employment Tribunals Rules of Procedure been met?

    3.2 If so, in principle, should the Tribunal exercise its discretion in favour of making an order for costs in favour of any of the Applicants?

    3.3 If so, should that order be an order for a specific sum of up to £20,000 or an order that costs should be payable following assessment, if the amount of costs cannot be agreed between the relevant parties?

    3.4 If it is appropriate to order that costs be assessed, if not agreed, in relation to which costs and on which basis of assessment (standard or indemnity) should the order be made?

    3.5 If it is appropriate to order the costs to be assessed, by whom should the assessment be carried out?

4. Issues 3.3 and 3.5 are not live issues, in as much as (as I made clear in the provisional decision), if I was going to make a costs order at all, it would be for costs to be subject to a detailed assessment in the County Court, preferably by a specialist costs judge. This is largely because of the amount of costs being claimed – the costs schedule totals over £350,000, excluding VAT – and because of how technical and complicated any assessment is likely to be.

5. There are also some issues about the wording of any costs order and, in particular, in whose favour it should be made, and around whether any costs order made should be for a percentage of costs and if so what percentage. I shall explain precisely what they are when I come to them.

6. In addition, there is a preliminary issue of principle. It was raised by the respondents and was dealt with on a provisional basis in the provisional decision. It is, effectively: do the claimants have to show that they have incurred at least some costs before any costs order can be made? The respondents say they do; the claimants that they don't. This is the "incurred costs issue".

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[1] When I refer to the "amendment issues" in these Reasons, I mean the same thing as the claimants' solicitors mean by the "Job Roles issues" in their letter of 25 June 2020 making the costs application.

7. Were I to have resolved the incurred costs issue in the respondents' favour, other issues would potentially have arisen that would need to be dealt with at a further hearing.[2] Most of those other issues relate to the damages-based agreements ("DBA"s) entered into between the claimants and their solicitors, Leigh Day. The hearing in October 2020 concerned the respondents' application for disclosure of the DBAs, which I refused, largely because I provisionally decided the incurred costs issue in the claimants' favour.

8. The respondents' concern behind the incurred costs issue seems to be that:

   8.1 the DBAs are, or might be, invalid;

   8.2 some feature of the DBAs might mean that if I make a costs order in the claimants' favour now, I might cause costs to be incurred that would not otherwise have been incurred;

   8.3 a costs order would in reality benefit only the claimants' solicitors, in breach of the indemnity principle and the so-called Lodwick principle[3];

   8.4 it might somehow be possible for me to make a costs order at this stage that would necessitate the respondents having to pay money now, when they would not have to pay anything if costs were dealt with at the end of the proceedings.

9. My view on this has always been that if I resolve the incurred costs issue in the claimants' favour, as I have done, the respondents can raise all of their concerns as part of detailed assessment. In particular, the Judge dealing with the detailed assessment can decide whether or not costs have actually been incurred by the claimants. Beyond briefly touching on the respondents' concerns when considering the wording of the costs order, I shan't address them, or the issues around the DBAs, further.

10. This decision is in two parts. The first deals with the incurred costs issue. The second, which begins with paragraph 44 on page 11, concerns whether, if the incurred costs issue is resolved in the claimants' favour, a costs order should be made; and if so what order.

The costs rules

11. The relevant parts of the costs rules are:

    74 Definitions

    (1) "costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party …

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[2] Some of those issues are listed in paragraph 10 of the provisional decision.

[3] See Lodwick v Southwark London Borough Council [2004] ICR 884, CA.

75 Costs orders and preparation time orders

(1) A costs order is an order that a party ("the paying party") make a payment to –

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative; …

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; …

77 Procedure

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

78 The amount of a costs order

(1) A costs order may –

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a County Court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

PART I – THE INCURRED COSTS ISSUE

May a costs order be made without deciding whether costs have been incurred?

12. The incurred costs issue is one of interpretation on which there seems to be no appellate authority. It is no more complicated than this:

    12.1 the respondents argue that the use of the words "*incurred*" and *"has incurred*" in rules 74(1) and 75(1)(a), rather than "*may have been incurred*", and the fact that a costs order is "*an order that a party … make a payment*", mean a Tribunal may not make a costs order unless it is satisfied that relevant "*fees, charges, disbursements or expenses*" have been "*incurred by or on behalf of*" the receiving party;

12.2 the claimants argue that –

12.2.1 those words are used merely to describe what any costs order that is made covers, i.e. that only costs the receiving party has incurred may be recovered on assessment;

12.2.2 an order for payment of costs to be assessed is no more than an order that the paying party should pay whatever relevant costs have been incurred by the receiving party (if any), does not incorporate a decision by the Tribunal that costs have been incurred, and has the effect that the amount of assessed costs will be a £nil if no costs have in fact been incurred.

13. Taking their submissions at face value, each side thinks that only their favoured interpretation gives the Rules their natural and ordinary meaning. The purely linguistic arguments are not, however, particularly compelling and – meaning no disrespect to leading counsel and the parties' legal teams – I won't be spending any significant time on them.

14. Any lawyer examining this issue with fresh eyes would probably have an instinctive preference for one interpretation over the other; but it is doubtful that every lawyer, or a great preponderance of lawyers, would have the same instinctive preference. Although I accepted the claimants' arguments in the provisional decision, I remind myself that other judges for whom I have the utmost respect have in the past taken a different view, for example Employment Judge Barry Clarke (as he then was), sitting with Members, in Barry & others v University of Wales Trinity St David 1603120/2013, 28 April 2014.[4]

15. In short, looking just at the words used, I think the issue is finely balanced and that both sides' interpretations are reasonably possible as a matter of language.

16. Given that neither side's interpretation is manifestly the correct one, the issue comes down to which interpretation best gives effect to the overriding objective in rule 2. By a considerable margin, it is the claimants' interpretation that does so. This is essentially for the reasons given in the provisional decision, but with some additions and clarifications that I shall explain below.

17. Before discussing specific points, I should like to address two interrelated, broad criticisms the respondents have made of the provisional decision. These are:

17.1 that the importation of the CPR into the Employment Tribunals Rules of Procedure ("Rules") was a "*central feature*"[5] of it;

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[4] I do, though, repeat the observations made in paragraphs 18 and 22 of the provisional decision: "*It is evident that* [the] *Tribunal was* [not] *faced with the argument advanced on the claimants' behalf at this hearing, to the effect that where the amount of costs claimed is so high that detailed assessment is the only realistic option, the question of whether any costs have been incurred should be dealt with at the assessment, and not before. I do not think there is any reliable basis for me to speculate as to how* [the Tribunal] *would have decided that argument, had it been advanced before them.*"; "*Normally in the Tribunal, if there is a costs hearing at all, it is a single hearing, at the end of which, if a costs order is made, it is made in a particular sum there and then. People tend not to think about whether particular issues properly 'belong' to different stages of the process if there is just one hearing where all the issues are addressed.*"

[5] Skeleton Argument of the Respondents for the Costs Hearing on 18 December 2020, paragraph 20.

17.2 that it overlooks the fact that rules 74 to 76 apply equally to Scotland as to England and Wales.

18. It is difficult for any Judge to approach their own decisions disinterestedly. The respondents are of course right that, in accordance with The Governing Body of St Albans Girls' School & Anor v Neary [2009] EWCA Civ 1190, the Tribunal should not seek to apply parts of the CPR as if they were within the Rules. The Courts of England and Wales and the Employment Tribunals of Great Britain are very different creatures. However, trying to be as objective as possible, the charge that the provisional decision featured, let alone featured centrally, the CPR being imported into the Rules is misplaced. Certainly, I am not suggesting in these Reasons that the costs provisions in the CPR should be read into the Rules such that costs should be dealt with, or that the Rules should be interpreted, in a particular way.

19. I am dealing with an interpretation point. There is no suggestion of anyone having to be an expert in civil procedure on either side of the Tweed in order to understand the Rules. I am not promoting the adoption of a strained interpretation of the Rules so as to ensure conformity of costs practice across different jurisdictions in England and Wales, and in the process ignoring Scotland. Instead, I am choosing between two potentially valid interpretations of the Rules and thinking about the factors for and against each of them.

20. The potential relevance of the CPR is threefold:

20.1 within the CPR the word "*incurred*" is used numerous times in connection with costs. How that word when used in the CPR in connection with costs has been interpreted may inform how it should be interpreted when used in the Rules. This is the point being made in paragraphs 26 and 27 of the provisional decision, which I adopt. I don't want to dwell on it, because I have already expressed the view that, linguistically, the incurred costs issue is not clear-cut. What it does do, though, is undermine the respondents' submission to the effect that if a rule or order provides that a party should pay costs that have been "*incurred*", this has to be interpreted as involving a decision of the Court / Tribunal that some costs have in fact been incurred;

20.2 just as CPR 3.9(1) (as it then was) continued to be useful in the Tribunal as a checklist even after the Court of Appeal's decision in Neary, practice in the Courts, particularly in relation to costs where they have considerably more experience and expertise than the Employment Tribunals do, may provide some assistance and guidance to the Tribunal as to how best to go about things in accordance with the overriding objective. This was a point behind various parts of the provisional decision and I adopt, in particular, paragraphs 28 and 29 of it;

20.3 every detailed assessment of Tribunal costs in England and Wales takes place in accordance with the CPR or applying CPR principles. It seemed, and seems, to me that adopting the respondents' preferred interpretation of the Rules would in certain cases result in there being significant differences between detailed assessment of Court costs in accordance with the CPR and detailed assessment of Tribunal costs. This is part of the strongest arguments in the claimants' favour on the incurred costs point and I shall go into it in more detail later in these Reasons.

21. The reason there was no mention of Court practice and procedure in Scotland in the provisional decision is that they were not mentioned by either side during the October 2020 hearing. I nevertheless agree that it is important not to forget that rules 74 to 76 apply in Scotland and are to be interpreted in the same way in England and Wales as there. However, that fact does not make Court practice and procedure on costs in England and Wales irrelevant to the incurred costs issue, any more than costs practice and procedure in Scotland is. Both are potentially relevant, for the reasons just given, in paragraph 20 above.

22. For example, the way in which taxation of costs is carried out in Scotland and the rules that apply to it may be more consistent or compatible with the respondents' preferred interpretation, or may in some other way strengthen the respondents' hand. No one has, however, suggested that it is or does; indeed, no one has suggested that the parts of costs practice and procedure in England and Wales that I identified in the provisional decision as being relevant to the incurred costs issue are materially different in effect from the equivalent parts of Scottish costs practice and procedure.

23. If practice in Scotland meant that the claimants' preferred interpretation would cause confusion and/or a divergence in practice between what happens in Courts and Employment Tribunals in Scotland, I would expect to have been told as much and for the respondents to have explained to me why this was the case. I wasn't and it hasn't. What seems instead to be being said is that because Scottish Court practice may be different, I should ignore what happens in relation to costs under the CPR in England and Wales. If that is what is being said, I disagree. If Court practice in England and Wales means one interpretation of the Rules is more in accordance with the overriding objective than a competing interpretation, and court practice in Scotland is neutral on the point – or vice versa – then that is surely a relevant factor for me to take into account when deciding which interpretation is correct.

24. One specific point about Scottish practice and procedure that was raised by Mr Martin QC for the respondents is that DBAs were not permitted in Scotland prior to April 2020 and even since then have been subject to different rules north and south of the border. I am afraid I don't see how that makes a difference to the incurred costs issue. A DBA is just one type of funding arrangement. As I understand it, types of funding arrangement which are different from the traditional solicitor / client model and in relation to which the incurred costs issue might arise, such as 'no win, no fee' arrangements, have long been permissible in Scotland, just as they were permissible in England and Wales before DBAs came in here. An interpretation of the Rules should be adopted that makes the most sense across the board, whenever a question comes up in Tribunal proceedings as to whether costs have been incurred.

25. That leads me to a number of related, more specific points.

26. For me, the most compelling argument in favour of the claimants' interpretation remains the fact that if the respondents were right it would mean that, even where there was going to be a detailed assessment in the County Court (or taxation by the auditor of court), the prospective paying party's only opportunity to argue that no costs had been incurred would be at the Tribunal hearing where a costs order was being applied for. This is because (quoting from paragraph 31.1 of the provisional decision): "*If a judge cannot make a costs order at all and order a detailed assessment without having first decided that some costs have been incurred, then, logically, at any detailed*

assessment, the paying party must be precluded from raising any arguments to the effect that no costs have been incurred. In a case such as this one, where costs are claimed by claimants with DBAs, that would mean that it would not be open to the respondents during the detailed assessment to argue that the DBAs were invalid. This would be because the judge who made the costs order would necessarily already have decided that issue in the claimants' favour."

27. It remains unclear whether the respondents accept this point. Mr Martin QC would not concede it. However, the respondents did not argue against it or seek to explain why it was wrong, either at this hearing or the October 2020 preliminary hearing[6]. What the respondents did do at this hearing, through Mr Martin QC, was submit that (from page 13 of his skeleton argument): "*The Employment Judge should resolve all points that fall for resolution by him/her under the ET Rules. He/she is well-paced to do so. The resolution of the "incurred costs" point will not complicate any later detailed assessment process*". In oral submissions, he suggested, further, that the Employment Tribunal is better placed than a Court would be to resolve the questions about the validity of the DBAs that the respondents wish to run, and can do so quickly and easily.

28. By those submissions, the respondents are tacitly asking this Tribunal to assume that the present case is in some way representative or typical of Tribunal cases where a question arises as to whether costs have been incurred in the course of an application for costs that would be subject to a detailed assessment if the application were successful. I don't think that is a valid assumption to make. Such cases are incredibly rare. And I don't think these proceedings – exceptional as they are in so many ways – could fairly be described as a typical example, or as representative, of anything.

29. Based on my own experience and anecdotal evidence, most Tribunal cases where an application for costs is made which, if granted, would go to detailed assessment, involve a represented respondent claiming costs from an unrepresented claimant. The claimant's case will have been struck out or dismissed prior to the final hearing, for example for non-compliance with an unless order, or the claimant will have lost at the final hearing having previously paid a deposit. Whether or not a case like that is representative or typical, the Rules should be interpreted in such a way that unrepresented claimants – and the impression I have formed in 10 years as an Employment Judge is that most claimants are unrepresented – are not unduly disadvantaged if they find themselves facing such a costs application.

30. There are numerous situations where an argument about whether costs have been incurred could arise, and arguments of that kind come in all shapes and sizes, and will often be arguments of the most technical kind. Many applications for costs by successful respondents, particularly where the claimant has paid a deposit, are made and dealt with at the end of the final hearing, as soon as the judgment is given, rather than at a separate costs hearing. To require claimants in that situation – represented or unrepresented – to raise all those arguments there and then, or to expect the Tribunal to identify the arguments for the claimants, in accordance with its obligation to ensure so far as practicable that the parties are on an equal footing, would be unfair

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[6] In the provisional decision, I wrote in relation to this in paragraph 31.1: "*I made this point to Miss Ellenbogen QC and although she suggested that it was not a good one, I could not, and cannot, see where my logic is said to be, or is, unsound.*"

and unreasonable. Yet that would be the effect of the Rules if the respondents' interpretation of them were correct.

31. Even respondents like those in the present case could not be confident that they had picked up every relevant point at the costs hearing. All kinds of things might emerge on detailed assessment in a large multiple case. For example, if a costs order were made in favour of, say, 500 claimants, it might turn out that in relation to one or two of them there was some technical defect that arguably rendered their retainer invalid. Such a thing could very easily happen without the claimants' representatives having hidden anything or done anything else improper, and without the respondents' representatives having negligently failed to spot it before the costs order was made. If Mr Martin QC is right in his submissions on the incurred costs issue, in that scenario the respondents would have to apply for a stay on the detailed assessment proceedings and then make a belated application for reconsideration of the costs order on the basis of new evidence, with no guarantee that the Tribunal would accept that the evidence satisfied the Ladd v Marshall test.

32. In practice, the position of respondents in such a scenario could be even worse. If a Tribunal's costs order in the claimants' favour amounts to a decision that they have incurred costs, the respondents may well never get the chance to discover previously unnoticed technical defects in the claimants' solicitors' retainer during detailed assessment. This is because the claimants' representatives would legitimately say that the question of whether costs had been incurred had already been decided and was no longer a live issue, and therefore that further disclosure relating to it was inappropriate.

33. I should make clear I am not saying that where a costs application is made and a Tribunal foresees that a detailed assessment order is likely if the application is granted, the Tribunal is unable to deal with questions such as whether costs have been incurred if it wants to, just as a Court deciding whether or not to make a costs order could. I am merely saying that it does not have to; and also that it will usually, or often, be better to leave such questions to detailed assessment; and that, in any event, they are better left to detailed assessment in the present case.

34. I note it is still common ground that (provisional decision, paragraph 30): "*the issues the respondents wish to raise … including whether* [the DBAs] *should be disclosed, could be raised during a detailed assessment. The arguments the respondents want to raise … are not a different species from the other submissions they will no doubt wish to make within any detailed assessment to avoid, or limit their, liability for costs.*"

35. That brings me to another strong argument in favour of the claimants' position on the incurred costs issue:

    35.1 that, all other things being equal, "*it must be desirable for all costs questions that can be dealt with as part of detailed assessment to be dealt with there, by the same judge and as part of the same process. Conversely … it would be undesirable effectively to have part of the process of assessing costs taking place within the detailed assessment and part of it taking place outside of it, beforehand, in front of another judge*" (provisional decision, paragraph 30); and

    35.2 "*The respondents' interpretation of the Rules would … lead to there being a different detailed assessment regime operating in connection with Employment*

Tribunal proceedings from that operating elsewhere, with certain issues being 'off limits' to the costs judge, even though the Rules state that detailed assessment "should be carried out in accordance with" the CPR" (provisional decision, paragraph 31.1).

36. Finally, I repeat the parts of the provisional decision to the effect that if I have a discretion as to whether or not to deal with them, and I think I do, it would be contrary to the overriding objective for me to decide the particular questions the respondents would like me to deal with as part of my decision as to whether an order for cost should be made, and would be better for them to be dealt with as part of detailed assessment: paragraphs 23 to 25, 31.2 and 31.3.

37. The main counter-arguments to those parts of the provisional decision are:

37.1 they ignore differences between costs practice in England and Wales and that in Scotland. I have already dealt with this. The essential points are that costs practice outside of the Employment Tribunals anywhere in Britain must be potentially relevant, and that the respondents have not highlighted any specific parts of Scottish costs practice that support their case on the incurred costs issue;

37.2 it is (the respondents argue) irrelevant, or unimportant, if resolving the incurred costs issue in the respondents' favour means that DBAs do not work well as a way of funding legal representation in this kind of case. I would not put the fact that problems are likely to be caused by a particular interpretation of the Rules to those who prefer to fund representation in the Employment Tribunals by DBAs at the top of my list of reasons for rejecting that interpretation. However, it definitely belongs in that list, and not at the bottom of it. If the respondents are right on the incurred costs issue, this would not just be a question of the Rules not being, "*a happy fit for Leigh Day's business model*" (respondents' skeleton argument for this hearing, page 13). DBAs were introduced in England and Wales and, more recently, in Scotland to increase access to justice. My understanding is that, in England and Wales at least, they are widely used in Employment Tribunals. An interpretation of the Rules that reduces their usefulness reduces access to justice. That would be contrary to the overriding objective.

38. In summary, rules 74 to 76 are not to be interpreted as requiring a Tribunal to decide whether any costs have been incurred before it makes a costs order. A costs order can only ever be an order for payment of whatever costs have been incurred, and if on detailed assessment it turns out that no costs have been incurred by the receiving party, they will not recover any.

Is the question of whether costs have been incurred by the claimants relevant to the Tribunal's discretion under rule 76(1)?

39. I have nothing to add to the answer I gave to this question in the provisional decision, and therefore substantially reproduce that answer here.

40. The respondents submit that even if the Tribunal may in theory make a costs order without answering the question "have costs been incurred by the receiving party?", that question must be answered before an order is made in practice, because the answer is relevant to whether the Tribunal should, in its discretion, make one. In particular, it is

submitted that the validity of the DBAs is a relevant factor that I am bound to take into account when I "*consider whether to*" make a costs order under rule 76(1).

41. That submission finds support from paragraph 22 of the decision of the Employment Tribunal in the Barry case. However, I note that the particular arguments that both sides have deployed before me at this hearing appear not to have been advanced before the Tribunal in that case. To the extent that the Tribunal in Barry thought that a breach of fundamental principles of costs recovery was relevant to the exercise of discretion under rule 76, I respectfully disagree. It is difficult to see how discretion enters into it if no costs are ever going to be recoverable because none have been incurred and/or because there has been some breach of the indemnity principle or (in so far as it is a separate thing) the Lodwick principle and/or some other fundamental principle a breach of which leads to zero costs recovery in any event.

42. Further, to talk about the discretion to make a costs order in connection with those kinds of things is to mix up the different stages of the costs process. On my reading of the Rules:

    42.1 the Tribunal should first ask itself whether rule 76(1)(a) is satisfied;

    42.2 it should then ask itself whether, in all the circumstances, it would be in accordance with the overriding objective to make an award of costs;

    42.3 next, it should ask itself whether to carry out a summary assessment or to send costs for detailed assessment;

    42.4 only at the stage when costs are actually being assessed, whether summarily or as part of a detailed assessment, do questions as to whether the retainer is enforceable, whether the indemnity principle has been breached, whether costs have been incurred, and so on, come into play.

43. Accordingly, I shall now ask myself whether rule 76(1)(a) is satisfied.

PART II – SHOULD AN ORDER FOR COSTS BE MADE?

44. From this point onwards, the reader is assumed to have read and digested the preliminary issues decision.

Has the respondent acted unreasonably?

45. There doesn't seem to be any disagreement as to the law I have to apply. It is helpfully summarised by Mr Short QC in paragraphs 11 to 19 of his skeleton argument, which I adopt.

46. Costs are exceptional in the Employment Tribunal. This is something that has been emphasised by the appellate courts time and again, for example by the Court of Appeal in Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255. That the Tribunal operates a no costs regime by default, and that anyone seeking costs here has to cross a high threshold, applies as much to claims for costs against large corporate respondents as to those against claimants acting in person.

47. The main point made by the claimants in this case is that the respondents pursued arguments that had no reasonable prospects of success. In such a case, it is not enough that the respondents should have lost, or even lost badly; nor is it enough to

be able to see with hindsight that the respondents were always almost certainly going to lose. The claimants' application is for costs incurred from 22 October 2019 onwards, and what I am looking at, essentially, is whether, at that time and with the information they then had, it was unreasonable for the respondents to pursue the amendment issues.

48. The thing I have been calling the amendment issues was the respondents' application to strike out the whole or parts of the claims of seven so-called 'test claimants'[7]. Had it been successful, at least hundreds of other claimants would have lost the whole or substantial parts of their claims.

49. Nothing compelled the respondents to make that application other than their desire to make it (and, presumably, to have claims for hundreds of years' worth of arrears struck out); there was nothing connected with the amendment issues that the Tribunal would have to have resolved come what may; nothing the claimants did substantially caused there to be a hearing to deal with the amendment issues.

50. If and to the extent the respondents are arguing otherwise, I reject the argument. I refer to paragraphs 74 and 75 of the preliminary issues decision. What should have happened, when the respondents suggested different or additional job titles to those in the claim forms and the claimants sought to accept the respondents' suggestions, is that the respondents should have allowed the claimants to do so. That was how the register was supposed to work – as a case management tool and as a vehicle for the provision of further particulars of the claimants' claims. Had the respondents done this at any stage in the 2 years or more between the amendment issues occurring to them and the hearing of February / March 2020 taking place, the amendment issues need not have troubled the Tribunal.

51. I also note that what is characterised by Mr Martin QC in paragraph 89(a) of his skeleton argument as the claimants' "*substantial acceptance of Rs' position as to the correct job titles*" was no such thing, at least not on the evidence before me. On the evidence before me, it was no more than the claimants being content to adopt the job titles being put forward by the respondents. Mistakes and disagreements about job titles are routine in Employment Tribunal proceedings. It is a rare case in which they make any difference to anything. No doubt there were some genuine mistakes about job titles in the claim forms. Given the number of claimants, it would be surprising if it were otherwise. But I did not have to decide the amendment issues because of them.

52. I assume good faith on the respondents' part. As part of that, I assume that they raised the amendment issues because they thought they had a reasonable chance of winning on them.

53. The amendment issues boiled down to: how should the claimants' claim forms be interpreted? There was never any way the respondents could win unless they persuaded me that the claim forms should be interpreted in a very particular way. This begs the question: how did the respondents think I was going to be persuaded of that? I am afraid I am unable to answer that question. I cannot see what, at any stage of the proceedings, gave them hope of success. With the possible exception of Mr Scholes's

[7] Not test or lead claimants under rule 36 – see paragraphs 41 to 50 of the written Reasons for the Case Management Orders made at and following the telephone hearing on 14 November 2019.

case[8], where the respondents' arguments were very weak but not quite as bad as in relation to other claimants, the merits on the amendment issues were so one sided in the claimants' favour that finding for the respondents might well have been perverse.

54. I refer to the parts of the preliminary issues decision relating to the individual test claimants, from paragraph 86. To decide the amendment issues in the respondents' favour, I would have to have made the following findings:

54.1 when a claimant used a particular job title in their claim form, they meant exactly what someone senior from the respondents' management or HR would have meant when using that job title;

54.2 to the claimants, particular job titles were always synonymous with particular job roles, namely the job roles that senior management or HR thought they were synonymous with;

54.3 this was so even though the respondents had little or no evidence that the job titles they were arguing should have been used – the supposedly correct ones – had in practice been used by or in relation to the claimants at any relevant time, and plenty of evidence that other job titles, including in many cases those used by the claimants in their claim forms, were used instead. See, for example, paragraphs 88 and 110 of the preliminary issues decision[9], which relate to Ms Froggatt and to Mrs Vaughan. I shall deal further with the evidential position below;

54.4 claimants who had only ever worked for the respondents in particular roles were not making claims relating to those roles but instead, "*have not, upon analysis, made any claim at all that the Tribunal could deal with; … they have made a nonsensical claim that does not relate to their own employment*" (paragraph 89)[10];

54.5 objectively, it was "*more likely that* [a claimant] *genuinely meant to make a claim she could not make, about a role she had never performed, than that either she (or her representatives) had made a mistake, or she genuinely referred to her own role by a different title from the one Sainsbury's used*" (paragraph 92);

54.6 because a claimant gave a particular job title in her claim form, it is to be construed as if it read, " *'The claimant is making her claim about any work she did at a time when, in Sainsbury's view, her official job title was* [that particular job title and] *not about any other work she did'* " (paragraph 93). And that it did so in circumstances where, "*Sainsbury's professed view* [is] *that her official job title was never* [that] *(which, if the respondents were right, would mean her claim form had to be read as meaning, "The claimant is not making any claim at all").*" (ditto);

54.7 "*despite* [a claimant] *stating* [in her claim form] *that she carried out work of equal value to comparators throughout her nearly 7 years of employment and …*

[8] See paragraphs 126 to 133 of the preliminary issues decision.

[9] From here onwards, references to numbered paragraphs are to the preliminary issues decision unless otherwise stated.

[10] Each quotation from the preliminary issues decision given in this part of these Reasons relates to a particular claimant's case, but much the same applies to all or most of the test claimants.

claiming a declaration and arrears of remuneration for an unspecified period, [her] *true intention was not to make any claim*" (paragraph 105);

54.8 the following sentence, which appeared in every claim form[11], was essentially meaningless and/or of no effect and should be ignored: "*In addition to the job titles provided, this claim relates to any jobs that the Claimant has held in the past 6 years that form part of a stable working relationship with the Respondent.*";

54.9 where the respondents believed claimants had changed job roles during their employment, and that the job titles used in the claim forms were not in their view the correct ones for all of the job roles the claimants performed in the 6 years prior to presentation of the claim forms, the claimants were limiting their claims to time periods during which they were performing the job role for which they had given the 'correct' job title. This was so despite:

54.9.1 there being no reference to those time periods or to any claim 'cut-off dates' in any relevant claim form, or anything else in it – beyond the job title given – hinting that, "*there was any relevant change in job title or job role at any relevant stage, nor that there might be two relevant periods of time during* [a claimant's] *employment: one in respect of which a claim is made and one in respect of which no claim is made*" (paragraph 108.2);

54.9.2 there being no obvious good reason why the claimants would want to limit their claims in this way and there being no need for them to do so (see, for example, paragraph 108.5);

54.9.3 the fact that for many claimants – all professionally represented by solicitors experienced in conducting equal pay litigation – to limit their claims in this way would potentially open the door to limitation arguments that in some cases would, if successful, wholly defeat the claim (ditto);

54.9.4 the fact that the claim forms of each relevant claimant whose claim was made on a multiple claim form included, "*a statement to the effect that – whatever the respondents might think – he* [thought] *his job title was*" the title given in the claim form "*from the start of his employment up to the date of presentation*" (paragraph 120.1);

54.10 in relation to a claimant like Mr Scholes, who in his claim form gave as the start date of employment a date significantly after the true start date, it was more likely that he meant to limit his claim to the period from the start date he had given than that he wanted to claim for the whole period of his employment and had just made a mistake with his dates. See paragraphs 128 to 132.

55. I need to do my best to put myself in the respondents' position in late summer / early autumn 2019. This was when they must have been making the final decision as to which issues to pursue at the hearing in February / March 2020, which was originally going to be to deal with comparability issues. Doing so, even looking at things purely prospectively, it ought to have been clear to them that the Tribunal was highly unlikely to make any of those findings, and that the chances of the Tribunal making all or most

[11] The only difference is that some claim forms have "Claimants" plural.

of them, and therefore of them being successful on the amendment issues at that hearing, were negligible.

56. I turn to the evidential matters I earlier mentioned I would be dealing with.

57. The respondents' entire case on the amendment issues was built on an assertion of fact to the effect that the job role or roles of every claimant had an objectively correct job title. All of the respondents' arguments on those issues depended in practice on that factual premise. It was therefore incumbent on the respondents to ensure that that factual premise was correct, or at least that there was substantial evidence to support it, before committing everyone to significant time, trouble and expense by pursuing an application to strike out a large number of claims.

58. One reason I am going into this is to counter something that seems to be being put forward in defence of the costs application, namely: that the respondents' witnesses' evidence on this point perhaps did not go to plan, and this was why the respondents changed their minds about wanting the claimants' witnesses to be called to enable them to be cross-examined (see paragraphs 78 and 79); and that this was the kind of set-back that happens from time to time during court and tribunal hearings; and it does not mean the respondent had gone into the hearing adopting an unreasonable position in relation to evidence. A point along those lines was made by Mr Martin QC with particular reference to a submission from Mr Short QC (see paragraph 49 of the latter's skeleton argument) that the respondents' approach at the hearing to the admissibility of witness statements from the claimants was unreasonable, but there is a more general argument being advanced about the unpredictability of litigation and avoiding the benefit of hindsight when thinking about the reasonableness of what the respondents did.

59. That more general argument is valid in principle, but not so in practice in this instance. What was significant about the respondents' witnesses' evidence was not that they did not come up to proof – it was (whether they came up to proof or not) that what they had to tell me from their own knowledge was almost entirely irrelevant.[12] Given the respondents' failure to provide relevant evidence, I can only assume they did not have any, and that they decided to make their strike out application despite not having any. That was an unreasonable decision.

60. The respondents' witnesses gave evidence that could well have been relevant if I decided that they needed to amend their claim forms. But that was a big 'if'. Their evidence supposedly on the central issue of whether they needed to amend them was in fact directed at other issues, namely how job titles tended, in their experience, to be used in Sainsbury's stores they were familiar with, and what job roles those job titles related to (again in their experience, and in such stores). The respondents also relied on a finding I made in a previous decision relating to a particular group of 122 claimants, "*that the work the claimants did … was typical of the work done by those with their job titles, as described by* [the respondents' witnesses]".

61. All of that was rather missing the point. The respondents seem to have approached the amendment issues as they did because they genuinely thought the only question that had to be asked was: what was the claimant's 'correct' or 'official' job title?; and was it

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[12] "*all of their evidence that consisted of something other than describing the contents of documents relating to individual test claimants (documents* [they] *had not themselves created or had anything to do with) could fairly be described as generic*": paragraph 79.

different from that given in the claim form? If that is what they thought, they were fundamentally in error, and unreasonably so. As the respondents themselves had been submitting in relation to the rule 9 / rule 6 issue[13] earlier in these proceedings, it is job roles and not job titles that are important in relation to equal pay.

62. The point they were missing was (paragraph 84.1): "*what claimants meant when they used particular job titles in their claim forms, not what the respondents meant by them, and not what job roles the respondents' preferred job titles equated with*". As I touched on in paragraph 92, even if the respondents' evidence had been immaculate – if it showed that the claimants' job roles had never in practice been referred to by anything other than their 'correct' job titles and if the official paperwork only ever used those titles when referring to the test claimants – their approach to the amendment issues would still have been flawed. It would still have been flawed because they were simply not asking themselves what the claimants meant in their claim forms, or if they were asking themselves that question, they were providing fanciful answers.

63. However, if the respondents' approach had not been flawed in theory, the evidential inadequacies would really have come to the fore. What the respondents appeared to be trying to prove was that there were such things as correct job titles that were applied and used universally. To prove this, what was needed – no doubt amongst other things, but still – was evidence giving some kind of official status or provenance to the job titles they were putting forward. Without that, all we had was the respondents asserting that a particular job title was the right one and anecdotal evidence from the respondents' witnesses about the use of job titles. That was never going to answer the obvious question: why are those job titles 'correct', and the ones used by the claimants' in their claim forms 'incorrect'?

64. The claimants had been pressing the respondents to explain where their job titles came from for some time. I recall Mr Short QC saying at one or both of the June and August 2019 hearings that the claimants believed the respondents' job titles were simply the job titles shown on the respondents' HR computer system, with no more status than that. There was further discussion about this at the hearing in November 2019 and the respondents, through Miss Ellenbogen QC (as she then was), said definitively that they were in fact the titles given in Employment Rights Act 1996 ("ERA"), section 1 and section 4 statements.

65. Had the respondents shown that that was indeed the case, it would have gone a long way to establishing what they were trying to establish. Indeed, bearing in mind employers' obligations in ERA sections 1 and 4 to give job titles and changes to them, it is difficult to see how any job title could be deemed correct if it didn't appear in a section 1 or section 4 statement. Moreover, if the respondents had failed to comply with their obligations to tell employees what their job titles were, the respondents would arguably be seeking to profit from their own wrongdoing by arguing that claimants had given incorrect job titles in their claim forms.

66. Distinguished leading counsel do not say things about their clients' positions on the facts in Tribunal other than on instructions. And the suggestion that the respondents' job titles were those appearing in the claimants' section 1 and section 4 statements can only have come from instructions originating with the respondents. Yet when it came to

[13] The issue dealt with in Brierley & Ors v ASDA Stores Ltd [2019] EWCA Civ 8.

the February / March 2020 hearing: there was no evidence at all from the respondents to support the suggestion; all the evidence there was pointed to the suggestion being untrue. See paragraphs 81 to 83.

67. What this means is:

67.1 there was no proper factual basis for the respondents' whole approach to the amendment issues;

67.2 the respondents went ahead with the strike out application despite being aware of this or – more likely – without bothering to check either way;

67.3 at best, the respondents gave their legal team important information to be passed onto the Tribunal that, for all they knew, could be false.

68. There has, to my knowledge, been no attempt by the respondents to explain themselves or to put forward a plea in mitigation.

69. The unreasonableness of the respondents' conduct in this respect was compounded by them persisting with the strike out applications even after they had obtained the documents relating to individual claimants, which showed unequivocally just how inconsistent with the evidence their position on the facts was. See, once again, paragraphs 81 to 83.

70. In conclusion, the conditions for the making of an order pursuant to rule 76(1)(a) of the Rules have been met. The respondents conduct in relation to the amendment issues was unreasonable in at least the following respects:

70.1 making an application to strike out that had no reasonable prospects of success because in order to succeed it required the Tribunal to interpret the claimants' claim forms in a way that bordered on the absurd;

70.2 making that application on the basis of a factual premise – that particular job titles were the only objectively correct ones – with no substantial evidence to support it;

70.3 giving the Tribunal and the claimants false information about the basis of that factual premise, namely that the respondents' job titles were those given in ERA section 1 and section 4 statements;

70.4 continuing to pursue the strike out application even when it became clear that the only objective, documentary evidence gave it no real support and in fact supported the claimants.

71. The first two of the above four instances of unreasonable conduct are relevant from well before 22 October 2019, the date from which the claimants are seeking their costs.

In principle, should the Tribunal exercise its discretion in favour of making an order for costs?

72. The situation is that: I have rejected the respondents' arguments on the incurred costs issue; the respondents conducted themselves unreasonably; if relevant costs were incurred by the claimants, they were incurred from well before 22 October 2019 because of the respondents' unreasonable conduct; the respondents are not

impecunious. In those circumstances: it would normally be in accordance with the overriding objective to make a costs order; it is for the respondents to come up with a good reason for me not to make one.

73. I have already considered and rejected the main reason put forward on the respondents' behalf for not making a costs order: an allegation that it is substantially the claimants' fault that the amendment issues were raised and argued and/or that they needed to be resolved by the Tribunal in any event. I repeat paragraphs 49 to 51 above. One specific argument put forward on the respondents' behalf is that they had to take the points they took, otherwise the claimants would be able to "*change the register at will*", as it was put by Mr Martin QC in oral submissions; see also paragraph 89(d) of his skeleton argument. That argument confuses the register with a pleading. It also mischaracterises what the claimants were doing, which was simply seeking to accept job titles put forward by the respondents where the respondents disagreed with the job titles used in the claim forms. This should not have been controversial. It is how the register was supposed to be used.

74. Conceivably, there might be situations where the claimants sought to change the register in a way the respondents could legitimately object to. I gave an example of just such a situation in paragraph 131.4 of the provisional issues decision. None of the test claimants' cases fell into that category, though, nor have the respondents told me about any such case. I can see that the respondents might legitimately have wanted some guidance around this, but that could and should have been dealt with as part of case management. It certainly did not necessitate anything remotely like the strike-out application the respondents made.

75. Mr Martin QC also highlighted in submissions instances of what could fairly be characterised as the claimants and/or their solicitors making mistakes in the course of dealing with the amendment issues, for example in relation to a claimant called Dawn Ball (see paragraph 89(a) of his skeleton argument). However:

   75.1 had the respondents acted reasonably, the claimants would not have had to have dealt with those issues in the first place;

   75.2 they are counterbalanced by mistakes made on the respondents' side;

   75.3 all or almost all of them fall into the category 'vicissitudes of litigation', to borrow a phrase Mr Martin QC used in oral argument.

76. Another question I have asked myself is whether other things that have happened during the litigation make it inappropriate to make an award of costs in relation to the respondents' unreasonable conduct that I have identified. My answer, in short, is: no. The costs I am proposing to award concern the amendment issues. The respondents have not alleged that the claimants' conduct on other issues has been unreasonable. Indeed, without prejudging things that have not been argued and without having any desire to encourage further applications and satellite litigation, I can more readily see a basis for saying that parts of the way the respondents have approached or argued other issues has been unreasonable than for saying something similar of the claimants.

77. In conclusion, it is in accordance with the overriding objective to make a costs order in the exercise of my discretion.

Standard or indemnity basis?

78. I award costs on the indemnity basis. There is no injustice done to the respondents by making that the basis of assessment where costs have been incurred dealing with something that, in my view, would never have to have been dealt with had the respondents not conducted themselves unreasonably. This is particularly so when, generously to the respondents, the claimants are limiting their costs claim to costs incurred from 22 October 2019. Even with an indemnity costs order, costs will not be recoverable if they were not reasonably incurred.

79. There are two factors that I think take the respondents' conduct well "*out of the norm*"[14] even for conduct that satisfies the conditions in rule 76(1)(a). They are:

    79.1 the respondents making and persisting with an argument to the effect that claimants' claim forms should be interpreted as them making no claim at all. In particular, it was at the extreme edge of what was properly arguable to say, as the respondents did, that using the 'wrong' job title in their claim forms meant that certain claimants were not making a claim about the only job role they had ever performed for the respondents;

    79.2 the respondents providing false information to the Tribunal about the factual basis of their argument that there was such a thing as a correct job title, in circumstances where, at best, they did not know whether the information they were providing was true.

Issues-based or percentage costs order?

80. Before the costs hearing, I had assumed that if I was going to make any costs order, it would be an issues-based one. At the hearing, somewhat to my surprise, not even the respondents – on my understanding of the submissions of Mr Martin QC – were saying that any costs order should definitely not be a percentage one.

81. I have been troubled by this question of whether I should make an issues-based costs order or a percentage one, and, if the latter, what the percentage should be. What I should be compensating the claimants for is any costs they have incurred from 22 October 2019 of and incidental to dealing with the amendment issues. What I therefore need to do is make the order that best captures all those costs, but nothing else.

82. The inevitable consequence of making a percentage-based order is that claimants end up being over- or under-compensated. The inherent problem with making an issues-based costs order is the impossibility of assessing accurately which costs are attributable to which issue. The fact that it wouldn't be my problem would not make it any less of one. For example, even if I made an issues-based costs order, many items, for example leading counsel's brief fee, would have to be apportioned, in practice on a percentage basis. It seems to me that even with an issues-based order, over- or under-compensation is an inevitability.

83. On balance, I have decided to make a percentage order. It is, I think, the least worst option. I am in a better position than any costs judge would be of estimating: what percentage of the material that that was before me at the hearing in February / March

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[14] Excelsior Commercial & Industrial Holdings v Salisbury Hamer Aspden & Johnson [2002] EWCA Civ 879, per Woolf LCJ at para 19

2020, and what percentage of that hearing, related to the amendment issues; what percentage of the time spent by the claimants' legal team from 22 October 2019 related to that material and those issues. My estimate is necessarily going to be 'rough and ready', but that is permissible in Employment Tribunals, which do not have, "*to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed*"[15].

84. On any sensible view, the great majority of preparatory work for the February / March 2020 hearing on the claimants' side related to the amendment issues rather than to anything else dealt with at that hearing[16]. The other substantial thing dealt with at that hearing was early conciliation issues, which were questions of pure law. To deal with those issues, the only evidence that needed to be gathered and considered was the claimants' claim forms and the early conciliation certificates. Had the amendment issues not been dealt with, there would in all likelihood have been no need for the case management hearing in November 2019, for any witness evidence, or for any disclosure. Although the hearing ended up taking place over only 5 days, it was listed for 9 because of the amendment issues[17] – and the number of witnesses potentially giving evidence in relation to them – and had those issues not been in play, it would probably have been listed for just 2.

85. Given it is the claimants who are pressing for a percentage order and have specifically asked me not to make an issues-based order, I am inclined, when assessing the percentage, to err on the side of caution in the respondents' favour. Doing so, I think 80 percent is the appropriate percentage. I think there is very little chance indeed of the percentage of costs incurred[18] from 22 October 2019 onwards connected with the amendment issues being less than that.

Costs of dealing with costs

86. I endorsed directions agreed between the parties for the costs hearing which stated that it was, "*to resolve the Claimants' application for costs against the Respondents, dated 25 June 2020, relating to the period spanning 22 October 2019 to 10 March 2020*". At this hearing, the claimants, through Mr Short QC, sought not only those costs but also costs of and incidental to considering the preliminary issues decision and the application for costs itself.

87. I am not going to deal with costs incurred after 10 March 2020, for the following reasons:

    87.1 there was no indication until just before this hearing that such costs were being claimed;

    87.2 I do not accept any suggestion being made that costs of and relating to costs automatically flow from whatever unreasonable conduct has led to the costs order

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[15] Yerrakalva, paragraph 41.

[16] There was a case management hearing on 11 March 2020, immediately after the hearing on preliminary issues, but no costs are claimed for that.

[17] It was (as mentioned above) originally listed to deal with comparability issues, but at a hearing on 30 August 2019 it was decided that those issues ought not to be dealt with pending the decision of the Supreme Court in Asda v Brierley and it nevertheless remained listed for 10 days, including 1 day for case management.

[18] This is, of course, assuming any costs were incurred.

being made. If that were so it could cause considerable unfairness to the paying party and encourage inflated costs demands;

87.3 in the present case, although I have decided costs in the claimants' favour, my provisional view is that the respondents were well within their rights to oppose the claimants' application, including, in particular, by raising the incurred costs point.

Costs for and against whom?

88. The respondents are making common cause and have the same legal representation. To avoid a conflict of interest, they must have an agreement either that one indemnifies the other or that costs and any damages and so on should be apportioned between them in a particular way. They have not told the Tribunal what their agreement is, nor have they put forward any concrete proposals for the apportionment of any costs order. In those circumstances I am simply going to make the whole order against both respondents, leaving them to deal with apportionment themselves.

89. The last question I need to consider is in favour of which claimants should I make the costs order.

90. The claimants are asking for an order in favour of all claimants whose claims had been presented on or before 10 March 2020, the last day of the hearing. The respondents position is considerably less clear to me, but, from what I can glean, seems to be that the Tribunal should decide, in relation to every claimant, what costs they have incurred as an individual and precisely how "*any costs order should be distributed across the claimant cohort*" (paragraph 94 of the skeleton argument of Mr Martin QC).

91. This is one of the areas where the respondents' concerns that I referred to in paragraph 8 above come into play. Although Mr Martin QC did not say so, I am sure that one thing troubling the respondents is the fact that the England and Wales DBA regulations[19] cap costs at 35 percent of damages. This means it is in the claimants' representatives' interests to maximise the number of claimants in whose favour any costs order is made and in the respondents' interests to minimise it.

92. The claimants' legal team has a duty to act in the claimants' best interests rather than their own. An unspoken allegation behind many of the respondents' submissions is that they are not doing so. But – putting to one side the lack of evidence to support any such allegation – if they are not doing so that will affect costs recovery come what may.

93. The likelihood is that at least hundreds of claimants will benefit from my decisions on the amendment issues. The beneficiaries will include many claimants who were not amongst the 865 claimants who were nominally the subject of the February / March 2020 hearing. The whole point of having a hearing to deal with the amendment issues, and of having test cases of a sort, was for me to make decisions that would in practice determine all similar issues to do with the register that might arise in any claimant's case. Further, a likely feature of the retainer between the claimants and their solicitors is a form of costs sharing, under which all claimants are liable for the costs of dealing with matters that advance the litigation overall, regardless of whether they themselves directly benefit. If such an arrangement as between solicitor and client is permissible,

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[19] Damages-Based Agreements Regulations 2013, SI 2013/609

it is not for this Tribunal to limit any costs order to claimants who directly benefitted from the February / March 2020 hearing.

94. This question has in my view been made to seem more complicated than it really is. I should be making the costs order in favour of the claimants who have incurred costs of and incidental to the amendment issues. It is impossible for me to identify who they are without extensively delving into matters to be dealt with as part of detailed assessment; in accordance with my decision on the incurred costs issue, I do not have to identify them; and no prejudice to the respondents is caused by my making the order the claimants are seeking because, necessarily, whatever order I make, only claimants who have incurred costs can recover them.

SUMMARY

95. The Rules do not require the claimants to show they have incurred costs before a costs order can be made. See paragraphs 12 to 38 above.

96. Whether costs have been incurred is not relevant to the discretion to make a costs order in rule 76. See paragraphs 39 to 42.

97. The conditions for making a costs order in rule 76(1)(a) are satisfied. See paragraphs 47 to 71.

98. It is appropriate to make a costs order in the exercise of my discretion under rule 76. See paragraphs 72 to 77.

99. Costs should be subject to a detailed assessment in the County Court on the indemnity basis. See paragraphs 78 to 79.

100. The order should be for 80 percent of any costs incurred by the claimants of and incidental to the "*Register Issues (including the Application) and the Hearing*", to adopt the terminology in paragraph 68 of the skeleton argument of Mr Short QC. See paragraphs 80 to 85.

101. The order should be for costs incurred between 22 October 2019 and 10 March 2010 inclusive. See paragraphs 86 to 87.

102. The order should be against both respondents, jointly and severally, and in favour of all claimants whose claims had been presented on or before 10 March 2020. See paragraphs 88 to 94.

EMPLOYMENT JUDGE CAMP 16/02/2021

SENT TO THE PARTIES ON

18/02/21.

....

FOR THE TRIBUNAL OFFICE