Case number. 2402530/2019

EMPLOYMENT TRIBUNALS

Claimant: **A McDermott**

Respondents: **(1) Sellafield Ltd.**
(2) Nuclear Decommissioning Authority
(3) H Roberts

AT A COSTS HEARING ON THE PAPERS

Heard at: **Leeds, in private by CVP video conferencing**

On: **7th February 2022**

Before: **Employment Judge Lancaster**
Members: **L Anderson-Coe**
K Lannaman

JUDGMENT

1. The applications for costs made by the First and Third Respondents succeed and the Claimant is ordered to pay £20,000 towards their costs.

2. The application for costs made by the Second Respondent succeeds and the Claimant is ordered to pay £20,000 towards its costs.

REASONS

The Hearing

1. The First and Third Respondents had made an application for costs dated 9th September 2020.
2. This followed an unsuccessful application by the Claimant to strike out the Response, which was heard by Employment Judge Batten at Manchester by CVP on 7th July 2020. The Claimant's application for a reconsideration of that decision was refused at a further hearing on 15th January 2021.
3. As directed at preliminary hearings by way of case management, heard remotely at Manchester before Regional Employment Judge Franey on 23rd October 2020 and 21st January 2021, that application was held in abeyance, initially to await the reconsideration decision and implicitly thereafter until after the end of the final hearing
4. The case was heard by us over 14 days, ending on 2nd July 2021. Written reasons for the decision were provided on 30th July 2021.
5. The First and Third Respondents made a further application for costs dated 27th August 2021, and renewed their application from 9th September 2020, which remained outstanding.
6. The Second Respondent also made a separate application for costs dated 27th August 2021.
7. The Claimant's application to stay proceedings pending an appeal was refused. Following directions given on 27th September 2021 the parties then confirmed that the costs applications could be dealt with on paper without an attended hearing.
8. In compliance with the directions timetable, the Claimant accordingly provided written submissions on 25th October 2021, the Respondents replied on 9th November 2021, and the Claimant then submitted her further response on 10th November, some two weeks before the deadline. All these representations have been considered.

The substantive issues

9. The substantive issues in this case were as set out in the liability judgment: -

> "*18. The claims are of being subjected to a detriment because of having made a protected qualifying disclosure under section 47B of the Employment Rights Act 1996, and/or having been victimised under section 27 of the Equality Act 2010. The protected act relied upon for the purposes of victimisation is, where applicable, the same as the protected qualifying disclosure.*
>
> *19. There are 8 alleged disclosures relied upon. Only the first 6 of those are in fact properly so described, because disclosures made to the Second Respondent cannot form the basis of any liability on its part for any alleged detriment to which it therefore subjected the Claimant.*

20. The Second Respondent will only be liable if in committing any act of victimisation the First Respondent was acting as its agent (section 109 Equality Act) or if it instructed, caused or induced an act of victimisation – the "basic contravention"- (section 111) or if it aided it (section 112).

21. The Second Respondent is not in any event liable in respect of any alleged protected disclosure detriment.

22. The issues in the case are therefore can the Claimant prove that she made a disclosure, and, if so, what were the precise terms? Does that disclosure amount to a protected qualifying disclosure (section 43B (1) of the Employment Rights Act) or the doing of a protected act (section 27 (2) of the Equality Act)? Was the Claimant subjected to a detriment? If so, was the making of a protected qualifying disclosure a material factor in her being subjected to that detriment, or has she proved facts from which we could decide in the absence of any other explanation that she has been treated unfavourably because of doing a protected act, in which case has the Respondent proved that the treatment in question was on no grounds whatsoever because of that protected act?"

10. Despite the prolonged and somewhat convoluted history before the tribunal, and the voluminous amount of paperwork generated in the course of proceedings, this case is in essence, therefore, relatively simple. At its core is the question of what the Claimant actually did or said on just six alleged occasions, does that act qualify for protection under the relevant statute, and was the Claimant subjected to a detriment because of it? The principal alleged detriment, and which is admitted to constitute disadvantageous treatment, is the termination on due notice of the First Respondent's contract with the Claimant's company, IDL.

The Application by the Second Respondent.

11. The claim was presented on 19th March 2019.

12. The Second Respondent applied on 22nd July 2019 that the claims against it be dismissed and that it be removed from the proceedings.

13. That application was considered at a private preliminary hearing by way of case management, conducted by Employment Judge Porter on 31st July 2019.

14. Although the Order records that the application to remove the Second Respondent from proceedings was refused, that is, in the context of the direction given for listing by Employment Judge Warren on 25th July 2019, simply a refusal to list further for a public hearing to determine the application on its merits. The summary reasons given by Employment Judge Porter were that the tribunal could not determine the merits of the claim without hearing evidence. That ruling cannot properly be taken as any expression of opinion as to the actual merits of the claim.

15. At a subsequent preliminary hearing before Regional Employment Judge Franey on 23rd October 2020, he invited the Claimant to consider simplification of the case by withdrawing her claim against the Second Respondent, and potentially also against the Third Respondent, and concentrating on the primary complaints against the First Respondent. The fact that the judge may, as alleged by the Claimant, have

made an observation that the First Respondent might therefore, "if at all possible", also consider admitting one or more protected disclosures and continue proceeding on the issue of causation only, was in the context of further anticipated "without prejudice" discussions. Any opinion expressed by the judge to the effect that it was unlikely that the Claimant had not made some protected disclosure, was clearly based on an assumption – without, of course, any consideration of the evidence – that the Claimant would have raised relevant matters of serious concern, because that was the context of her engagement as an EDI consultant. The First Respondent did not at that time consider that it was appropriate to make this concession as mooted by the judge, and in the event, it was, on the facts, right not to have done so. The necessity for, and the reasonableness of, pursuing the claims against the Second Respondent, as canvassed for discussion by the judge, was however a distinct issue from whether or not the First Respondent made any admissions.

16. On 26th April 2021 the Second Respondent made a further application for strike out.

17. On 15th May 2021, Employment Judge Lancaster directed that it was not practicable to list a public preliminary hearing to determine this application in advance of the listed final hearing. Similarly to the decision of Employment Judge Porter, it was also noted, as a provisional view, that the question of whether or not the Second Respondent actually did something to induce or aid or abet a contravention by the First Respondent was a matter of fact, which would require the hearing of evidence. In the event no renewed application for strike out was then made at the start of the final hearing.

18. However, the issues as against the Second Respondent were further clarified, so that at a preliminary hearing on 1st June 2021 it was confirmed, in particular, that any complaints of public disclosure detriment were dismissed upon withdrawal.

19. On the legal issue of whether the First Respondent was the agent of the Second Respondent, Employment Judge Batten had observed at the hearing on 10th August 2002 that the Claimant's contentions remained unclear, and Employment Judge Lancaster repeated that view on 1st June 2021.

20. On 11th June 2021 the Second Respondent made a without prejudice offer to pay the Claimant £160,000 in full and final settlement of the claims against all Respondents. That letter also operated separately as a costs warning if the Claimant did not withdraw against the Second Respondent in any event. The offer remained open until the first morning of the final hearing on 14th June 2021 but was declined.

21. The findings of fact which the tribunal made at the final hearing are clear in the judgment and though referred to in some detail below, are not repeated in full.

22. Unfortunately, it had become increasingly apparent throughout the hearing that despite the time and effort expended, the Claimant had never properly addressed her mind to whether and how she might prove the essential elements in the case.

23. To succeed in her claim against the Second Respondent the Claimant would firstly have had to establish that she had done a protected act. Of the six potentially

relevant allegations, two were abandoned very late in the course of proceedings, in the revised list of issues submitted in reply to the strike-out application of 26th April 2021 or at the hearing itself. Those specific allegations were properly withdrawn, because they clearly had never had any reasonable prospect of success.

24. Of the four remaining, one we found as a fact did not happen. This was not merely a case of the Claimant getting her dates wrong, and thereafter having to change her story to seek to explain away the fact that it could not have happened when, or in the circumstances, she had said it did. What in fact happened was that the Claimant quoted extensively in her ET1 from her notes of reported homophobic comments, when she knew full well that she had never previously disclosed these notes to anybody: this gave the wholly misleading impression that the First Respondent, in particular L Bowen, had been "sitting on" this information, when it was in fact the Claimant who had elected not to disseminate it so that further action might be taken if possible. Accordingly, we concluded that:

> "*235.Whilst the Claimant had her notes of the discussion with RS and JN, which certainly did identify allegations of homophobic abuse, she elected not to share that information with anybody until it was first quoted some 2 ½ months later in the particulars drafted in support of her claim for compensation.*
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> *236. Had the Claimant, as she initially alleged, indeed stated to L Bowen that "immediate action be taken, not least so as to avoid compounding the impression that systemic issues were ignored or mishandled", it is wholly implausible that she would not have also made available to her the material, namely her notes, which would have formed the starting point of any such investigation*."

25. Two of the remaining allegations were substantially limited in potential scope by the actual evidence which the Claimant gave as to their content, so that we concluded that in this form they did not in fact constitute the doing of a protected act at all. This view was particularly reinforced by the context, and what the Claimant did or did not do after making those single alleged disclosures, which she relies upon as the doing of a protected act. So, in relation to the "Safecall" issue the Claimant, after expressing her provisional opinion as to the process, but without knowledge of the facts, nonetheless went on to conduct her own investigations as requested whilst making no protestation whatsoever that this was not now in fact an appropriate course to take:

> *"218. All the Claimant was saying was that if, conjecturally, there were in fact serious allegations they ought to be formally investigated. There is nothing to suggest that had substantiated allegations come to light they would not then indeed have been subject to a formal process.*
>
> *219. The Claimant was not pressurised into setting up the Facilitated Feedback Sessions. She had almost complete autonomy as to their format and content.*
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> *220. In the event, although the Claimant was clearly aware of the importance attached to these sessions as a means of eliciting any*

information which corroborated the potential allegations of "sexual harassment" against VC she chose instead to focus upon negative criticism of the style of the lead team and in particular of the Third Respondent.

221. When the Draft Report was presented the Claimant then chose not to include, within or without the main body of the report, any information which would assist – one way or another - in evaluating whether the anonymous "Safecall" allegations had any substance. She did, however, expressly acknowledge that the issues regarding VC were still outstanding. The one potential line of further inquiry which she did report in connection with this matter, though without any detail, was then promptly followed up by the Third Respondent."

26. In relation to the briefly expressed concerns about the health of CL this was not something which the Claimant followed up in any way. So, we concluded:

"238. The passing comment to L Bowen about CL, asking her to "explore" if everything appropriate was being done did not disclose information about what had actually been done as the Claimant admittedly did not know the situation.

239. Nor, even though CL was disabled, does it amount to the doing of a protected act. It does not allege any discrimination as the Claimant did not know of any, and it is at most an exhortation to ensure that the sickness management procedures are being fully and properly followed.

240. This was evidently not a significant conversation that registered in the mind of L Bowen at the time.

241. That this comment was also not in fact particularly significant in the mind of the Claimant is clear from the fact that in the context of her exchanges with A Rankin at this time it is not mentioned at all.

242. In any event, in her own case, the Claimant suffered no detriment. She was reassured by L Bowen and had no reason to doubt that she would indeed look into it as she had said she would."

27. In relation to any alleged potential protected act comprised within the submission of the Draft Report, it was not until closing submissions that this was actually identified. When it was eventually so clarified it did not however bear scrutiny:

"245. The single allusion to CL in one of the many quotations is not properly construed as the doing of protected act just because CL is disabled. The allegedly inappropriate comments about CL are not particularised, and, in any event, they are not stated to be related to his disability but to the fact that he is apparently disliked. It is primarily a concern on the part of the interviewee that if they too were absent through illness comments might be made about them. It is a complaint about someone being spoken about behind his back, not anything obviously related to discrimination."

28. The Claimant would then have had to establish facts from which we could have concluded that there was a causal connection between her expressing a provisional view about the "Safecall" investigation, her asking L Bowen to "explore" what was being done for CL or her inclusion in the Draft Report of a comment about CL being

spoken about behind his back, and any detriment to which she was subjected. She adduced no such evidence whatsoever.

29. On the evidence therefore the Claimant failed to establish any basic contravention on the part of the First Respondent for which lability might have then attached to the Second Respondent.

30. Nor on the facts did the Claimant establish any possible basis for concluding that the Second Respondent did anything which might have amounted to an inducement to dismiss as an act of victimisation, nor anything which aided or helped the dismissal as victimisation, nor the inducing or assisting in subjecting her to any other detriment. That is without our having to consider whether, under section 111 (7) of the Equality Act 2010, the Second Respondent was in fact in a "position to commit a basic contravention in relation to" the First Respondent.

31. Nor has the Claimant ever set out any proper basis in fact or law for attributing liability to the Second Respondent under section 109 of the Equality Act 2010.

32. The Claimant had been given the benefit of the doubt in permitting these matters to go to trial on her assertion that there were substantive issues of fact to be decided. However, on the facts that were actually put before the tribunal she comprehensively failed to make out any of the elements of her claim against the Second Respondent.

33. On this ground we unanimously conclude that this claim had, in fact, no reasonable prospect of success.

34. Whilst there is a strong suspicion that in bringing this claim also against the Second Respondent the Claimant is pursuing some ulterior motive related to her desire to position herself as the champion of equality within the nuclear industry and to court publicity accordingly, we do not need to go further so as to conclude that it is actually vexatious.

35. However, the Claimant has been on notice throughout the entirety of this long case of the strong defence advanced by the Second Respondent, culminating in the costs warning of 11th June 2021, and has chosen to pursue it, without as we have said ever properly addressing her mind to the essential issues. That we further find to have been unreasonable conduct of proceedings.

36. The preconditions under both rules 76 (1) (a) and (b) are therefore made out. We must, therefore, consider the making of a costs order. In all the circumstances of this case, especially given the extent to which the Respondent, a publicly funded body, has been exposed to the expense of defending an unmeritorious claim we do exercise our discretion to make an award.

37. The exercise of that discretion is a matter for the tribunal and does not require direct apportionment of costs incurred to the unreasonable conduct: *McPherson v BMP Parabas [2004] ICR 1398* . In any event the application is limited to £20,000 under the summary assessment in rule 78 (1) (a), although the total costs incurred are said to be £197,867.50 excluding VAT.

38. Though we may take into account the Claimant's ability to pay we are not necessarily required to do so under rule 84.

39. Whilst the Claimant has asserted that she has health issues and has not worked since the termination of the contract between the First Respondent and IDL, she has provided no actual information as to her means or assets. We bear in mind that she has evidently had a long career, latterly attracting a significant salary, and that £20,000 represents only some 10 percent of the costs actually incurred, though admittedly those are necessarily as yet untaxed, and will not be so. In the circumstances it is not appropriate to take any further account of any unquantified alleged inability to pay the sum claimed.

The Applications by the First and Third Respondents

First Application

40. The Claimant's strike out application was categorically dismissed by Employment Judge Batten following a hearing by CVP on 7th July 2020.

41. There was then a reconsideration, heard on 15th January 2021 to consider whether alleged difficulties in communication with her counsel throughout the earlier remote proceedings had prevented the Claimant from having a fair hearing of her application, and whether "fresh evidence" should be admitted. Employment Judge Batten dismissed the application fairly shortly. She also refuted any suggestion that the conduct of the Respondent's legal representatives, particularly that of Mr Panesar QC as counsel for the First and Third Respondents, had been improper or that they had misrepresented information to the tribunal.

42. The first application for costs was made, however, on the grounds that the application as originally made on 4th February 2020 had contained serious allegations of fabricating evidence, falsely representing evidence in the ET3, and misleading the tribunal which were only withdrawn on the eve of the hearing. It is that late withdrawal of extremely serious accusations which is said to be unreasonable conduct of proceedings.

43. That initial allegation of falsification of evidence relates to the letters of complaint that were provided to the Third Respondent by members of her leadership team, shortly prior to her decision to terminate the IDL contract. We dealt with this issue in the course of the final hearing, recorded as follows:

> "*168. Following this meeting four members of the lead team, independently of each other, contacted the Third Respondent further to express their opinion that the Draft Report did not represent a balanced picture of the department because the quotations selected for inclusion were predominantly negative, did not reflect the fairly even split between those who expressed satisfaction with the lead team or the Third Respondent and those who did not, in particular that it did not record positive things which they themselves had said in their interviews, and to express their concerns as to the way the Claimant had conducted the process. These were L Bowen, E McDonnell, A Thompson and T Morris.*
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> *169. Three of these people put their concerns in writing as follows. T Morris's email dated Thursday 18th October 2018: (doc 1004). A Thompson's letter dated Friday 19th October 2018: (doc 998). E*

McDonnell's email dated 22nd October 2018: (doc 1002). Although they had each spoken to the Third Respondent to some extent before delivering their written concerns, in each case the initial approach was unsolicited by her.

170. Although the Information Commissioner's Office has criticised the fact that these letters were produced outside of the First Respondent's computer or email system hard copies were properly delivered into the control of T Houghton on 30th October 2018.

171. These letters are not fabrications, as had previously been asserted by the Claimant but which allegation is sensibly not now maintained. They were prepared on the dates shown and represent the genuine views of the authors."

44. These letters were also, however much the Claimant may not wish to acknowledge the fact, a correct evaluation of the deficiencies in her methodology and the lack of objective impartiality in the preparation of her Draft Report.

45. We are satisfied therefore that the attack upon the provenance of this evidence expressed in the language of an asserted deliberate fabrication, only to withdraw it at the last minute after some 4 months of preparation by the Respondents to defend the allegations is unreasonable conduct of the proceedings. In retrospect we can and do have regard to the findings at the final hearing, that the Claimant had already formed a view that the Third Respondent was "not up to the job", that she took advantage of the autonomy she was given in setting up focus groups to elicit adverse comments on the leadership team and the Third Respondent in particular, and that although it was overall expressing criticisms of the HR function her Draft Report was nonetheless "anodyne". The Claimant was well aware, therefore, that there were in fact valid criticisms to be made of this piece of work yet nonetheless made a strike out application alleging fabrication when contemporaneous evidence of those criticisms was produced. Whilst late withdrawal of itself would not necessarily found an application for costs, coupled with the nature of the allegations so withdrawn it does require us to consider making an order in these circumstances.

Second Application

46. We repeat our observations at paragraphs 21 to 29 in respect to the victimisation claims.

47. Similar criticisms of the Claimant's failure to engage with the essential evidential requirements necessary to establish her case on protected qualifying disclosure also apply.

48. The Claimant is an experienced HR practitioner and has had intermittent legal advice throughout these proceedings. Yet she came to the final hearing 2 ¼ years after presenting her claim (2 ¾ years since the termination of the IDL contract) and, having prepared a very lengthy witness statement with her complaints still in a state of flux after last minute amendments and withdrawals. She also came to trial apparently still without any clear understanding or articulation of what her own case was on the core factual allegations of what was said on a relevant occasion, even though there were in the end only five such matters relied upon.

49. As well as the withdrawal of two victimisation complaints, the Claimant in respect of one of those same allegations also withdrew it as an allegation of protected qualifying disclosure. That specific allegation also had never had any reasonable prospect of success.

50. Of the remaining five alternative allegations of having made a protected qualifying disclosure, one as we have already said, we found not to have happened. Another, as severely limited in scope on the actual evidence, also did not amount to the, making of a relevant disclosure of information, because:

> *"265. The passing comment to L Bowen about CL, asking her to "explore" if everything appropriate was being done did not disclose information about what had actually been done as the Claimant admittedly did not know the situation."*

51. One of the remaining allegations was so far at odds with the evidence that we concluded:

> "*255. The Claimant's case in respect to Disclosure 2 is a well-nigh total distortion of what actually happened.*
>
> *256. The email from SG was dealt with promptly and appropriately in all the circumstances, except that the Claimant failed to record her discussion with SG or to relay that information back to the Third Respondent so that further action might be taken as appropriate, and indeed positively misled her as to what actions she had taken.*
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> *257. The Claimant did not ever state in "unequivocal terms" that she did not have the authority to conduct a formal investigation, as this would be wholly inconsistent with the manner in which she actually expressed any reservations when contacting SG on 29th October 2018.*
>
> *258. What the Claimant in fact said about the inappropriateness of her investigating any grievance against L Bowen (or any other member of the lead team) is not the disclosure of any information. There was no formal grievance raised. All the Claimant was being asked to do was to speak to SG in the first instance to clarify the issues raised, which she was clearly perfectly willing to do, and not at any stage to carry out any form of investigatory hearing with L Bowen."*

52. Of the further two allegations, the first in relation to the "Safecall" report, was as we have said in the context of it being claimed to have been a protected act the expression of a provisional view on the process to be adopted. As the Claimant was ignorant of the precise circumstances, and on her own admission did not have recent or relevant experience as an investigator in disciplinary matters, this opinion did not carry, and could not have carried, the weight necessary to make it an allegation which could qualify for protection.

53. In the context of this complaint it is to be noted that from the issue of her ET1, until the hearing where she sought to put a different gloss upon it the Claimant had made an unequivocal assertion as to what the Third Respondent had said about when she had first received the complaint and what she had then done about it and which we found to be "*demonstrably false"*

54. Also, although the Claimant was given leave, very late in the course of proceedings, to amend the alleged detriment arising from this purported disclosure in order to claim as against the Third Respondent "attempting to pressure the Claimant into being part of an ill-conceived covert investigation and caused or contributed to acute anxiety and distress", this was in fact entirely at odds with her own evidence as to the sequence of events. We concluded:

> "*251 We find, on balance, and in accordance with the Claimant's own case that the expression of opinion came after she was invited to use her expertise to "flush out if there were any issues regarding VC." The subjecting of her to this alleged detriment cannot therefore have been because she had made any disclosure."*

55. The final complaint is of having made a protected qualifying disclosure related to the submission of the Draft Report. Despite repeated opportunities to do so, including at the final hearing the Claimant has never properly identified any specific part of the content, or contents, of that report which is relied upon as actually communicating any genuine belief upon her part that a legal obligation was being breached, or that the health and safety of individuals was being endangered, or that any matter as being concealed. Accordingly, we concluded:

> "*243. The Draft Report does in fact not contain protected qualifying disclosures. The Claimant is an experienced, human resources professional. If she had genuinely and reasonably believed that the quotations from interviewees actually disclosed any breach of a legal obligation or an endangerment to health or an attempt to conceal this information she would have said so.*
>
> *244. If she had genuinely and reasonably believed this to have been the case, she would have made specific recommendations as to how these matters ought to be addressed and would not have presented the position to Third Respondent simply as one where the low morale in the team could easily be addressed."*

56. The Claimant did not properly or adequately plead the elemental facts relied upon as the first stage of establishing potential liability. At no stage prior to her witness statement had the Claimant ever attempted to identify what she in fact did or said. When she came to the preparation of that statement, we did, of course, conclude:

> "*241. Establishing from the Claimant the facts of what was actually said in respect of any alleged oral disclosure has proved elusive. The Claimant has not provided any clear verbatim account of what was said close to the time. It is now, of course, nearly 3 years after the events in question and lapses in memory might be excused. Unfortunately, however, the more detailed accounts now given by the Claimant, particularly in her witness statement, bear all the hallmarks of being what she would like to think that she said in support of her claim as it has now been constructed, rather than what actually happened at the time."*

57. Nor did we find that the Claimant had established any facts from which a "prima facie" causal link could be established between any of the putative disclosures and an alleged detriment.

58. When the Claimant came to give her evidence, it was apparent that the pleaded claim, as amended, and the evidence in her statement did not correspond to her case as it was now being put before the tribunal.

59. In her response to the Costs Application the Claimant has sought to challenge the way in which she was cross-examined by Mr Panesar Q.C. much as she did at the reconsideration hearing. Like Employment Judge Batten on that earlier occasion we find nothing to criticise in the conduct of these proceedings.

60. The Claimant can have no proper cause for complaint just because the fundamental weaknesses in her case were methodically and incisively exposed by experienced and able counsel.

61. This is not a case such as *ET Mahler v Robinson [1974] ICR* 72, where the deficiencies in the claim were only apparent "once the dust of battle had subsided". Objectively this claim as presented simply had no reasonable prospect of success.

62. The Claimant has clearly committed to a narrative in which she sees herself as a "whistleblower". As she told us in the course of her evidence, her own preferred descriptions of herself are as "a canary singing in the mine" or as somebody "sitting on a tinderbox". That does not, however, mean that it is reasonable for her to have brought or continued specific legal proceedings under these statutory provisions, which on the actual facts that were known to her are, and were, misconceived. Whether or not her legal advisers share some responsibility in failing to concentrate the Claimant's mind upon the real issues in a claim of this nature, or whether the Claimant chose not to heed advice is not something we have to concern ourselves with or consider in relation to costs.

63. The unreasonable conduct for which the Claimant must take responsibility lies in her failure to provide an accurate statement of the case in its essential elements and which actually accorded with the facts as known to her. This would have indeed put an entirely different complexion on the claim and would have made it clear why, objectively, it had no reasonable prospect. In this context we take into account the fact that the Claimant has made a number of misleading statements which she has never corrected in a timely manner.

64. The preconditions under both rules 76 (1) (a) and (b) are therefore made out. We must, therefore, consider the making of a costs order. In all the circumstances of this case, especially given the extent to which the Respondent, a public body, has been exposed to the expense of defending an unmeritorious claim we do exercise our discretion to make an award.

65. The exercise of that discretion is a matter for the tribunal and does not require direct apportionment of costs incurred to the unreasonable conduct: *McPherson v BMP Parabas [2004] ICR 1398*. In any event the application is limited to £20,000 under the summary assessment in rule 78 (1) (a), although the total costs incurred are said to be £285,654.18 excluding VAT. The costs of defending the strike out application are put at £12,312.12, and of further resisting the reconsideration application £8,430.88.

66. Though we may take into account the Claimant's ability to pay we are not necessarily required to do so under rule 84.

67. Whilst the Claimant has asserted that she has health issues and has not worked since the termination of the contract between the First Respondent and IDL, she has provided no actual information as to her means or assets. We bear in mind that she has evidently had a long career, latterly attracting a significant salary, and that £20,000 represents only some 7 percent of the costs actually incurred, though admittedly those are necessarily as yet untaxed, and will not be so. In the circumstances it is not appropriate to take any further account of any unquantified alleged inability to pay the sum claimed.

EMPLOYMENT JUDGE LANCASTER
DATE 24th February 2022

JUDGMENT SENT TO THE PARTIES ON
25 February 2022
AND ENTERED IN THE REGISTER
25 February 2022

Olivia Vaughan
FOR SECRETARY OF THE TRIBUNALS