EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondents**
Mr P Warr	AND Pivotal Professional Services Ltd (1)
	Pivotal Homes Group Ltd (2)
	Pivotal Development Services Ltd (3)
	Mr Denis Dixon (4)
	Mr Stephen Fowley (5)
	Mrs Fiona Dixon (6)
	Mrs Elizabeth Fowley (7)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton (by CVP) ON 24 January 2022

EMPLOYMENT JUDGE GRAY **MEMBERS: MS LLOYD-JENNINGS**
MR M RICHARDSON

Representation

For the Claimant: **Mr E Beever (Counsel)**
For the Respondents: **Miss D Masters (Counsel)**

RESERVED JUDGMENT ON RESPONDENTS APPLICATION FOR COSTS

The unanimous judgment of the tribunal is that the Respondents' application for costs is dismissed

REASONS

1. By reserved unanimous judgment of the tribunal delivered orally on the 28 October 2020 (following a final hearing from 19 October 2020 to 28 October 2020) and written reasons then having been requested at the hearing on

the 28 October 2020, which were written dated 2 November 2020 and then sent to the parties on 20 November 2020, it was found:

a. All claims against the Third, Fourth, Fifth, Sixth and Seventh Respondents are dismissed on withdrawal.

b. All the complaints of detriment on the grounds of making a protected disclosure are dismissed on withdrawal.

c. The complaint for payment of accrued but untaken holiday is dismissed on withdrawal.

d. The complaint of whether the Claimant should have been automatically enrolled on a pension scheme is dismissed on withdrawal.

e. The complaint of automatic unfair dismissal for the reason (or principal reason) of making a protected disclosure fails and is dismissed.

f. The complaint for breach of section 10 of the Employment Relations Act 1999, refusing to allow a requested companion, fails and is dismissed.

g. Therefore, for the complaint of failure to give written particulars of employment, albeit it is found that a section 1 Employment Rights Act 1996 compliant set of particulars was not provided, there can be no award of compensation for this.

2. The Respondents made an application for their costs, by letter dated 17 November 2020, against the Claimant … "on the basis that the Claimant's claims were unreasonably pursued since they were entirely misconceived, and that this was plain from the outset of these proceedings.".

3. Under rule 77 of the Employment Tribunals Rules of Procedure 2013 a party may apply for a costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. The Respondents' application was therefore received in time.

4. Further, 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.

5. The Respondent proposed case management directions including that the matter be addressed at a one-day hearing.

6. By letter dated 14 December 2020, following request from the Tribunal, the Claimant confirmed he resisted the application, but otherwise agreed to the directions proposed to determine the application.

7. This hearing was then listed to determine the application.

8. For reference at this hearing we were provided with:

    a. Agreed bundle (412 pages);

    b. Additional bundle (4 pages);

    c. Respondents' submissions with authorities bundle (referring to 11 cases);

    d. Claimant's submissions with authorities bundle (referring to 6 cases).

9. At the hearing we were presented with helpful oral submissions by both Counsel which concluded at just after 13:20. To allow for deliberation time it was determined to release the parties and reserve our decision.

The Application for Costs

10. The Respondents submit that their primary position is … "that they are entitled to recover all costs incurred from the point that the Claimant's claims were received by the Respondents". Further, that … "For the period from receipt of the claim form in February 2019 up to and including the end of the hearing on 28 October 2020, the total costs incurred by the Respondents are £305,500 plus VAT… The Respondents accordingly ask that any costs award is subject to detailed assessment under rule 78(1)(b).".

11. The Respondents highlight four overarching matters to demonstrate that the Claimant's decision to commence, and maintain proceedings in the Employment Tribunal, amounts to unreasonable conduct within the meaning of rule 76(1)(a) & (b) of the Employment Tribunals Rules of Procedure 2013 ("the Rules"). These are:

    a. That the majority of the claims were withdrawn

    b. The remaining claims were comprehensively rejected by the Tribunal

    c. The Respondents consistently highlighted weaknesses in the claims

    d. The Claimant is a sophisticated, well-resourced, well-advised individual.

12. Further … "The Respondents' argue in the alternative that they are – at the very least – entitled to the costs associated with those claims and allegations which were withdrawn before the Tribunal retired to adjudicate. These types of costs orders are commonly referred to under the Civil Procedure Rules as "issue-based costs order". Bearing in mind that these allegations account for around 62% of the live issues, it is anticipated that this type of costs order would be around £189,410 plus VAT.".

13. These figures were updated in the written submissions of Respondent's Counsel to £321,700 (including the anticipated costs of the detailed assessment process itself) or the 62% figure being £199,454 (including the costs of the detailed assessment process itself).

14. The Tribunal is invited by the Respondents to find that the Claimant pursued claims with no reasonable prospects of success and / or acted unreasonably as per rule 76 (1) (a) and / or (b) for the four overreaching reasons set out by the Respondents.

15. The Tribunal is then being invited to exercise its discretion to award costs (rule 76 (1)) in favour of the Respondents and former Respondents. The Respondents submit that the Claimant brought and maintained entirely misconceived claims despite being warned repeatedly of the many weaknesses in his approach. His conduct is the more inexplicable since he is a sophisticated, well-resourced and well-advised individual.

16. The Claimant submits that the Respondent … "cannot establish that there were "no reasonable prospects of success" in the face of its remarkable conduct in both dismissing C in the manner it did and subsequently finding itself to be "positively disbelieved" by an experienced employment lawyer engaged by R to conduct an appeal. When the "reason for dismissal" is actively obscured to an employee, this circumstance provides unpromising terrain for R's contention that C knew/ought to have known that he had no prospects even at the outset of proceedings.".

17. In the exercise of its discretion, the Claimant invites the tribunal … "not to make any cost order at all. The manner in which dismissal was effected has legitimately and genuinely impacted on C. The manner in which C conducted the proceedings, including pragmatically and sensibly managing the case and focusing on the main issue, ought not to be the subject of criticism from the tribunal.".

<u>The Rules and Relevant Law</u>:

18. We refer to rules 74 to 84 of the Rules. Noting in particular:

19. Rule 76(1) of the ET Rules provides that a Tribunal may make a costs order, and shall consider whether to do so, where it considers that:

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

    b. (b) Any claim or response had no reasonable prospect of success.

20. That under rule 76, there is a two-stage test: the Tribunal must consider (a) whether 76(1)(a) or (b) applies and, if so (b) whether to exercise its discretion to award costs.

21. Under rule 78(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000.

22. We were also referred to several case authorities by the parties, in particular we note:

    a. ***Radia v Jefferies International Limited UKEAT/0007/18/JOJ***. This case authority was referred to in detail by both Counsel. With Respondent's Counsel directing us in particular to paragraphs 60 to 66, and Claimant's Counsel in addition to paragraphs 67 and 68. From that we note:

        i. Paragraph 61 … "It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of r 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with r 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.".

        ii. Paragraph 64 … "This means that, in practice, where costs are sought both through the r 76(1)(a) and the r 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at

the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?".

iii. Paragraph 65 … "I should say something further about how the Employment Tribunal should approach an application seeking the whole costs of the litigation, on the basis that the claim 'had no reasonable prospects of success' from the outset. It should first, at stage 1, consider whether that was, objectively, the position, when the claim was begun. If so, then at stage 2 the Tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering these questions, the Tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation."

iv. Paragraph 66 … "This point needs to be considered in a little more detail. It may be observed that the test of 'no reasonable prospect of success' appears in both r 76(1)(b), and in the strike-out Rule (r 37(1)(a)). But the task carried out by the Tribunal under each of these provisions is different. When considering a strike-out application, the Tribunal must decide whether the complaint or argument in question 'has' – at the very same time when it decides that application – no reasonable prospect, based on the information available to the Tribunal at that point. Such applications are often considered at an early stage in the litigation, without the benefit of sight of any evidence; and the Tribunal's task is to assess the prospects of the claim succeeding if or when it comes to trial in the future. Those prospects are usually considered, therefore, on the basis of the case asserted, taken at its highest, although the Tribunal can also take account, for example, of key documents that may be before it at that point.".

v. Paragraph 67 … "Where the Tribunal is considering a costs application at the end of, or after, a trial, it has to decide whether the claims 'had' no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start, and considering how, at that

earlier point, the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may, and should, take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time.".

b. In short, the guidance in ***Radia v Jefferies International Limited UKEAT/0007/18/JOJ*** reminds us of the two-stage process when determining a costs application, as referred to by Claimant's Counsel … "First, to consider whether the threshold is made out: here, "no reasonable prospect of success" and "unreasonable" is argued by Rs in the sense that C knew he had no prospect from the outset", and then … "Secondly, even if so, it does not automatically follow that a costs order will be made. This is an exercise of the tribunal's discretion.". Also, we note the process described at paragraphs 65 to 69 reminds us that whether there were reasonable prospects should be assessed at the point at which the claim was begun.

c. Costs in the employment tribunal are still the exception rather than the rule, ***Yerrakalva v Barnsley MBC [2012] ICR 420***.

d. Respondent's Counsel also referred us to ***Salinas v Bear Stearns International Holdings Inc [2005] I.C.R. 1117***; and ***Power v Panasonic (UK) Ltd EAT 0439/04***… it is a statement of fact that the reason why costs orders are not made in the substantial majority of tribunal cases is that the Rules of Procedure contain a high hurdle to be surmounted before such an order can be considered.

e. Respondent's Counsel confirmed that, with reference to ***Boras Topic v Hollyland Pitta Bakery and Others UKEAT/0523/11/MAA***; … "The fact that the ET had concluded that the Claimant had not deliberately lied did not prevent the ET from considering that the claim had no reasonable prospect of success or that the claim had been reasonably brought and pursued.".

f. Claimant's Counsel drew our attention to ***McPherson v BNP Paribas [2004] ICR 1398*** which held that it is not unreasonable conduct in itself for a claimant to withdraw a claim or necessarily parts of claim. This is because a claimant must not be deterred from

withdrawing claims by the prospect of a costs order in circumstances where they might otherwise have fought on to the bitter end. We were also referred to the IDS text on McPherson … "It is not unreasonable conduct per se for a claimant to withdraw a claim before it proceeds to a final hearing — McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA. As the Court of Appeal in McPherson observed, it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full hearing and failed. It further commented that withdrawal could lead to a saving of costs and that tribunals should not adopt a practice on costs that would deter claimants from making 'sensible litigation decisions'. On the other hand, the Court was also clear that tribunals should not follow a practice on costs that might encourage speculative claims, allowing claimants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction. The critical question in this regard was whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable.".

g. Respondent's Counsel drew our attention to ***Brooks v Nottingham University Hospitals NHS Trust UKEAT/0246/18/JOJ***… in particular paragraph 36 "… A party that is represented may not be afforded the same degree of latitude by the Tribunal in the assessment of whether the claim had reasonable prospects of success as would be afforded to a litigant in person…In the absence of any evidence to the contrary, the Tribunal is entitled to proceed on the assumption that a represented party has been properly and appropriately advised as to the merits."."

The Decision

23. The Tribunal must first consider whether the Claimant pursued claims with no reasonable prospects of success and / or acted unreasonably as per rule 76 (1) (a) and / or (b).

24. If it does the Tribunal then has a discretion to award costs (rule 76 (1)).

25. Taking each of the four overarching matters in turn (although we note that they do overlap with each other in our considerations).

    a. ***That the majority of the claims were withdrawn***.

i. It is recorded in our judgment on liability the way certain complaints were withdrawn by the Claimant. This is not in dispute and as our judgment records, we were ultimately asked to determine whether the Claimant had been automatically unfairly dismissed because of the principal reason he had made a protected disclosure and whether or not he was given written particulars of employment.

ii. The Respondents assert that the lack of explanation for the withdrawals demonstrates an acknowledgement by the Claimant that the withdrawn complaints had no reasonable prospects of success.

iii. The Claimant asserts that the fact of his withdrawal is not evidence of a lack of genuine belief or of merit, nor that doing so is unreasonable conduct. It is submitted that the critical question is whether by the Claimant withdrawing a complaint that amounts to conducting the proceedings unreasonably, which the Tribunal is invited to reject. It is asserted that the Claimant made sensible litigation decisions.

iv. We have not been presented evidence from the Claimant or any other party on these assertions.

v. Claimant's Counsel submits that the "majority" of the claims is not a fair reference, as the majority of the claim in fact related to the complaint of automatic unfair dismissal. We accept his submission on this point, the complaint of automatic unfair dismissal and the connected issues was the "majority" of the claim.

b. ***The remaining claims were comprehensively rejected by the Tribunal***.

i. It is recorded in our judgment that the complaint of automatic unfair dismissal for the reason (or principal reason) of making a protected disclosure fails and is dismissed and the complaint of failure to give written particulars of employment, albeit it is found that a section 1 Employment Rights Act 1996 compliant set of particulars was not provided, there can be no award of compensation for this. That finding on the dismissal meant that the issue of a companion (which was ultimately asserted as a potential remedy issue) was no longer relevant.

ii. The Claimant submits that this overarching matter is the Respondents simply maintaining the point that the Claimant

has lost (albeit we would note that a section 1 Employment Rights Act 1996 compliant set of particulars were not provided).

iii. Claimant's Counsel, both in his written and oral submissions analyses why the Claimant "lost", and submits that, with what was known at the time the Claimant commenced proceedings, as to his dismissal (see paragraph 14 and 21 to 25 of his written submissions) and the appeal outcome (see paragraphs 15 to 20 of his written submissions) it does not show that the Claimant knew or ought to have known that his complaint of dismissal had no reasonable prospects at the outset. As highlighted by Claimant's Counsel, the reason for dismissal is in the mind of the dismissing officer. We observe that in this case it ultimately was found to be a joint decision of Mr Dixon and Mr Fowely, which, based on their evidence fluctuated, see paragraph 180 of our judgment at page 206 of the bundle.

iv. Also, we note the analysis of Claimant's Counsel (both in his written and oral submissions) of our findings on the disclosures themselves, as the findings we made do focus on the public interest element and not that the Claimant made no disclosure of information.

v. We are persuaded by what Claimant's Counsel submits about these matters.

vi. As to the detriment complaints, albeit withdrawn before determination, again we accept what Claimant's Counsel submits about these, that the test of evidence came with the exchanging of witness statements and at the hearing (see also for example paragraphs 27c of his written submissions).

vii. In our view the Respondents have not shown that the Claimant knew or ought reasonably to have known that these matters did not have reasonable prospects of success at the outset.

viii. We also note here that the employment relationship was not straight forward in this case and working/business relationships appeared to have existed around it. It was therefore necessary to explore the relationship of the Claimant with the First and Second Respondent and how and when it changed.

c. ***The Respondents consistently highlighted weaknesses in the claims***.

i. It is not in dispute that the highlighting by the Respondents does not go so far as to issuing a costs warning letter, nor making an application for Strike Out and/or Deposit Order.

ii. It is clear though that the Respondents do argue against the complaints, and as Respondents' Counsel asserts … "Despite all of these clear pointers, it seems that the Claimant gave no thought, or no serious thought, to pruning his claims until the bitter end and even he persisted in maintaining two claims that were misconceived since, for example, he did not even have the relevant subjective belief to found legitimate PDs.". This is an assertion that overlaps with what we have already considered above, and we accept what Claimant's Counsel submits. We would also observe, that as is highlighted to us by Claimant's Counsel, this assertion could be argued both ways, in that despite all these clear pointers, the Respondents did not issue a costs warning letter, nor make an application for Strike Out and/or Deposit Order in relation to any of the complaints.

iii. We also note the Claimant's Counsel's submissions about the detriment complaints as already referred to above.

iv. As to the holiday and pensions complaints it was highlighted to us that the Claimant did make reference to holiday pay in his witness statement (see page 247 of the bundle, paragraph 107, where the Claimant raises his perception of unfairness and lack of clarity in holiday entitlement) and that the pensions issues were articulated by the Claimant side in February 2020 (see page 114) and argued further in an email dated 5 March 2020 (see page 32). However, we note that the reasons for withdrawal of the pensions complaint at the final hearing appear to be on the basis of the Claimant accepting the Respondents position at that point.

v. We also note paragraph 43c of the Claimant's written submissions … "at the conclusion of the evidence, Counsel for C entirely properly made concessions where the evidence required. The point should be made, if it is not already apparent, that the tribunal ought not to be distracted by peripheral matters such as "pension claim" or "holiday pay claim" as such matters are common fare in broader litigation and realistically do not serve to materially add a burden of time

or cost to the extent that costs become relevant in a costs application".

vi. The complaints against the Sixth and Seventh Respondent were confirmed between the parties to be withdrawn on the 16 October 2020.

vii. As highlighted by the Respondents' Counsel in her submissions the inclusion of the Sixth and Seventh Respondent is challenged in the grounds of resistance … "The inclusion of Fiona Dixon and Elizabeth Fowley was misconceived since they had no role in the detriments (para 10);" see page 83 of the bundle.

viii. We note in the draft list of issues dated 23 January 2020 (see page 31 of the bundle) that under the liability head (see page 23 of the bundle) there is an issue which asks to what extent were the Sixth and Seventh Respondent responsible for all or any of the alleged detriments.

ix. Reference to the Sixth and Seventh Respondent is then struck through as a tracked change in the draft list of issues (see page 54 of the bundle) dated 15 October 2020 (see page 64).

x. In the written submissions of the Claimant's Counsel at paragraph 27a about the Sixth and Seventh Respondent he submits … "… the claims against R6 and R7 were withdrawn. This was sensible litigation decision making. Nor can C be accused of not engaging on the issue: see [357] where, "the timing of their directorships of R2 (29 August 20218 (sic)) was highly suggestive" of an involvement especially given that C was not advised of it notwithstanding that he was also a legal director. R6 and R7 had issues and animus with C (c.f."uncontrollable megalomaniac"). C solicitor said in January 2020 "we will keep it under review". All that R6/R7 materially stated in their witness statements (September 2020) was that, "I confirm that I was not a party to the decision to dismiss Philip Warr". It was hardly a compelling explanation. Regardless of that, there was nothing unreasonable about C's approach.". Further, at paragraph 43a… "as part of trial preparation, C took a view on R6/R7 (as above) … No-one can sensibly say (and it is submitted there is no finding to that effect) that C did not hold a genuine belief. The fact of his withdrawal is not evidence of a lack of genuine

belief or of merit. Again, C perhaps should be commended for assisting the tribunal to focus on the main issues.".

xi. The complaints against the Third Respondent were withdrawn in the final hearing itself (see page 168 of the bundle, paragraph 17).

xii. In the grounds of resistance at paragraph 9 (see page 83 of the bundle) it is noted that the inclusion of Second and Third Respondent in the litigation is misconceived since the First Respondent was the Claimant's employer at all material times. As we have already noted, this was not a straightforward employment relationship. However, the way that Third Respondent is dealt with at the final hearing could suggest the Claimant may not have thought this about the Third Respondent at the outset.

xiii. We have not been presented written submissions by Claimant's Counsel as to why such claims against the Third Respondent had so far as the Claimant was concerned reasonable prospects of success from the outset.

xiv. In oral submissions Claimant's Counsel addressed the position with the Third Respondent submitting it was a de minimis issue, so even if we were to find that the Claimant did or ought to have known a complaint against the Third Respondent did not have reasonable prospects at the outset, when we exercise our discretion there should be no order for costs.

d. ***The Claimant is a sophisticated, well-resourced, well-advised individual***.

i. As noted, this is an argument that can be deployed both ways as Claimant's Counsel submits and is of relevance to our discretion.

26. In this application costs are sought through both rule 76(1)(a) and rule 76(1)(b), where the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success. Therefore, the key issues for overall consideration are:

a. Did the complaints, in fact, have no reasonable prospect of success?

b. If so, did the complainant in fact know or appreciate that?

c. If not, ought they, reasonably, to have known or appreciated that?

27. This is also an application seeking the whole costs of the litigation, on the basis that the claim 'had no reasonable prospects of success' from the outset, so:

    a. At stage 1, it is necessary to consider whether that was, objectively, the position, when the claim was begun.

    b. If so, then at stage 2 the Tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it.

28. When considering these questions, we must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, we may have regard to any evidence or information that is available to us when we consider these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation.

29. So, to consider whether the costs threshold is crossed, in the sense that at least one of rule 76(1)(a) or (b) is made out.

30. Addressing the relevant questions on whether in fact the complaints have no reasonable prospects of success and considering whether that was objectively the position when the claim was begun, we find as follows:

31. We do not find in respect of the complaints/matters we went on to determine (the automatic unfair dismissal, the failure to give written particulars, the companion issue from a remedy perspective and the correct employer), that they in fact had no reasonable prospect of success when the claim was begun. We do not find that pursuing them was unreasonable. These findings are based on the reasons set out above and in accepting the submissions of Claimant's Counsel on these issues.

32. For the withdrawn complaints/matters, we accept the submissions of Claimant's Counsel as to the detriment complaints, holiday pay complaint and the position in respect of the Sixth and Seventh Respondent, and we do not find that they in fact had no reasonable prospect of success when the claim was begun based objectively on what we understand was known at that time.

33. On balance we find that the complaint against the Third Respondent and the pension complaint did in fact have no reasonable prospects of success from the outset based objectively on what we understand was known at that time.

34. We cannot say as fact though that the Claimant knew this about the reasonable prospects of success from the outset as we have no direct evidence on this point.

35. The important factor for us therefore is whether the Claimant ought reasonably to have known or appreciated that at the outset. This has not been clearly established in our view. Based on the challenge the Claimant raises as to who the employer was and the continuation of the pensions arguments in the list of issues and the interparty correspondence combined with the lack of a costs warning letter, or application for Strike Out or Deposit Order by the Respondents, we cannot say the Claimant ought reasonably to have known or appreciated that at the outset.

36. Considering then whether pursuing the withdrawn complaints was unreasonable. For the same reasons we do not find this. The Claimant has presented reasons for the complaints he makes, which included issues as to who the employer was and a continuation of the pensions arguments in the list of issues and the interparty correspondence. We do not find that the Respondents have proven that the Claimant acted unreasonably in that respect. The litigation process was conducted based on the parties' views of their respective positions and we are not persuaded that by the Claimant withdrawing the complaints he did that he has conducted the proceedings unreasonably.

37. We do not find that rule 76(1)(a) or (b) applies and therefore the Respondents' application for costs is dismissed.

38. Even if we are wrong in that we do not find, for the same reasons, that it would be reasonable to exercise our discretion to award costs in this matter.

39. This is an application for all costs, or in the alternative all the costs associated with those claims and allegations which were withdrawn before the Tribunal retired to adjudicate (being the Respondents assert 62% of all costs).

40. When exercising our discretion, we would need to consider whether, when the claim was begun, the complainant knew it did not have reasonable prospects, or at least reasonably ought to have known it. We cannot say this, and we note that the Respondent did not seek to challenge this with a costs warning letter, or with an application for Strike Out or a Deposit Order.

41. This is not a costs application by the Respondents for specific costs incurred in respect of a specific complaint, or complaint against a specific party (for example the Third Respondent) on the basis that such a specific complaint had no reasonable prospects of success either from the outset or did so

from a particular point but was continued unreasonably. This is understandable as no such issue was specifically identified by the Respondents by a costs warning letter, or an application for Strike Out or Deposit Order against a specific complaint or allegation.

42. Even with the specific complaints that we have more concern with, namely the Claimant's complaints against the Third Respondent and for pension. The Respondents have not demonstrated that they held the same view by warning the Claimant at a particular time in advance of incurring costs specific to those complaints or seeking to have those specific complaints struck out or subject to a deposit order. Accordingly, we are not presented with an application for such specific costs. Even if we were, we accept Claimant's Counsel submissions that such complaints are potentially de minimis when considered against the others.

43. For all those reasons we would not exercise our discretion to award the costs sought by the Respondents in their primary or alternative position (being 62% of all costs).

44. The Respondents' application is therefore dismissed.

Employment Judge Gray
Date: 31 January 2022

Judgment sent to parties: 7 April 2022

FOR THE TRIBUNAL OFFICE