CD

EMPLOYMENT TRIBUNALS

Claimant: **Mr Nathaniel Levy**

Respondent: **Oaks Park School**

Heard at: **East London Hearing Centre**

On: **9 November 2021 (By Cloud Video Platform)**

Before: **Employment Judge Russell**
Members: **Ms J Forecast**
Ms P Alford

Representation
Claimant: **Mr G McKetty (Legal Consultant)**
Respondent: **Ms L Robinson (Counsel)**

JUDGMENT

The Judgment of the Tribunal is as follows:

1. The Claimant acted disruptively or otherwise unreasonably in respect of the Preliminary Hearing on 11 April 2019. The Claimant shall pay the Respondent the sum of £703.20 in respect of costs incurred from 26 March 2019 to 11 April 2019 inclusive.

2. The Claimant acted unreasonably and/or brought some claims with no reasonable prospect of success to the final hearing. The Claimant shall pay the Respondent's costs from 17 July 2019 to 24 September 2019, reduced by 50% to reflect the part of the claim which did have reasonable prospects of success. The amount due is £7,426.

3. **By 6 May 2022, the Claimant must pay to the Respondent the total sum of £8,129.20 in respect of costs.**

REASONS

1. By a claim form presented to the Tribunal on 23 July 2018, the Claimant brought claims of constructive unfair dismissal, direct discrimination because of race, racial harassment and victimisation. In summary, the Claimant alleged 22 discrete detriments as acts of direct discrimination because of race or, in the alternative, as acts of

harassment related to race, as well as three acts of victimisation. In addition, there was a complaint of constructive unfair dismissal relying upon a course of conduct with the final straw said to be a letter sent in April 2018.

2. The matter came before this Tribunal for a final hearing on 17, 18, 20, 23 and 24 September 2019 and the Tribunal deliberated in Chambers on 26 September 2019. By a Judgment sent to the parties on 17 March 2020, all claims failed and were dismissed. In our Judgment and Reasons, the Tribunal made extensive findings of fact both with regard to the merits of the claims but also a number of procedural issues which arose during the course of the hearing.

3. The Tribunal had careful regard to the contents of that Judgment in deciding today whether or not there was unreasonable conduct by the Claimant and/or whether he had brought claims which had no reasonable prospects of success. The Tribunal also had regard to the procedural history to this claim, to the contents of the application for costs made by the Respondent on 1 June 2020 and the Claimant's written response opposing the costs application provided to the Tribunal on 8 November 2021. The Tribunal were greatly assisted by the oral submissions of both Ms Robinson and Mr McKetty today.

Preliminary Issues

4. The application for costs was made on 1 June 2020, after expiry of the time limit prescribed by the Rules and so a preliminary issue arose as to whether or not the Tribunal had jurisdiction to hear the application at all. Upon the invitation of Employment Judge Russell, the parties sent in written representations on the time point. By a letter to the parties sent in October 2020, the Tribunal directed that time would be extended to 1 June 2020 for the presentation of the cost application. Employment Judge Russell accepted the Respondent's explanation, supported by documentary evidence, that the delay was caused by the effects of the Covid-19 pandemic because of which HR work on Employment Tribunals had stopped from 24 March 2020 and so authority to proceed could not be given to the Respondent. There was no application for reconsideration of that decision nor any appeal against it. In the circumstances, the Respondent's cost application is properly before the Tribunal today.

5. By way of a second preliminary issue, Mr McKetty referred to an outstanding appeal presented by the Claimant to the Employment Appeal Tribunal. The appeal was submitted in April 2020, was acknowledged by the Employment Appeal Tribunal in October 2020 but as yet there has been no decision as to whether or not the appeal would proceed to a full hearing. Prior to today's hearing, Employment Judge Gardiner and subsequently Employment Judge Russell refused applications to stay the hearing of the application for costs pending the outcome of the appeal.

6. At the outset of the hearing, Mr McKetty addressed the Tribunal on whether or not this costs application was in itself an abuse of process. The reason for the late application for costs was given as the effect of the pandemic upon the ability of the school to get authority from the relevant local authority to proceed with the application. Mr McKetty submits that the reason for the late application for costs (the effect of the pandemic upon the Respondent's ability to get local authority authorisation to apply) is quite patently untrue. He relies upon the letter sent in April 2018 in which the Claimant was required not to put matters into the public domain under threat of costs as evidence that the local

authority did not require specific authority to proceed. As such, he submitted, the Respondent had misrepresented the issues to the Tribunal when obtaining an extension of time. As his submissions progressed, it appeared to the Tribunal that Mr McKetty was in fact seeking to revisit the Judgment and Reasons of the Tribunal as to the merits of the claim itself. The Tribunal declines to do so and nor were we persuaded that the costs application was an abuse of process.

The Application for Costs

7. The Respondent's application for costs is made under Rule 76 of the Employment Tribunal on the basis either that the Claimant or his representative had acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings or the way in which proceedings had been conducted or that any claim had no reasonable prospects of success. Ms Robinson initially relied on rule 76(1)(c) in respect of the Preliminary Hearing on 11 April 2019. However, rule 76(1)(c) applies where a hearing is being adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins and the Preliminary Hearing was not in fact adjourned, rather it proceeded in the Claimant's absence. Ms Robinson accepted in the course of her submissions that she relied instead on rule 76(1)(a), unreasonable conduct of the proceedings, as the absence of the Claimant meant that the Preliminary Hearing achieved nothing.

8. It is helpful to set out a brief background to the case. The claim was issued on 23 July 2018 and standard Case Management Orders were made on 3 October 2018. A Preliminary Hearing should have taken place on 10 October 2018 but was cancelled by the Tribunal due to a lack of judicial resource. There was then a significant delay in relisting the Preliminary Hearing which cannot be attributed to the conduct of either party.

9. On 5 November 2018 the Respondent chased the Tribunal for a re-listed Preliminary Hearing, requested further information of the claims and noted that the Claimant had failed to comply with an Order requiring him to provide a Schedule of Loss.

10. On 13 February 2019, the Respondent invited the Tribunal to strike out the claim on the grounds that it was not being actively pursued as the Claimant had failed to comply with Orders. Indeed, it appears that the Claimant was not responding to any communication from the Respondent's solicitors at all at that point. On 20 February 2019, however, he confirmed his intention to proceed with the claim.

11. On 21 February 2019 the Respondent wrote to the Claimant setting out in some detail the areas of non-compliance about which it was concerned. In particular, failures to co-operate with agreement of a draft list of issues, failure to provide further particulars of claim and failure to provide a schedule of loss. The Respondent wrote to the Tribunal requesting a Preliminary Hearing. On 15 March 2019, the Tribunal sent a Notice of Hearing to the parties for a Preliminary Hearing to take place on 11 April 2019.

12. On 26 March 2019, the Respondent made an application for an Unless Order in respect of the further and better particulars of claim which it had previously requested.

13. On 4 April 2019 the Claimant made an application to postpone the forthcoming

Preliminary Hearing as he would be out of the country until 23 April 2019. The application was not supported by evidence to show that this was a pre-booked holiday and Employment Judge Gilbert caused a letter to be sent to the Claimant on 8 April 2019 requiring him to provide reasons why he had not provided dates to avoid when asked to do so earlier and to provide proof of the pre-booked holiday by midday on 9 April 2019.

14. The Claimant responded on 8 April 2019 stating that he would provide proof of his pre-planned journey but did not in fact do so at that point. The Claimant pointed out that the litigation was extremely stressful and he was acting as a litigant in person. In the absence of evidence of pre-booked absence from the UK, the hearing proceeded on 11 April 2019. The Claimant did not attend and, as a result, little could be achieved beyond a pragmatic acknowledgement that the final hearing listed for June 2019 could not proceed as the case was not ready. Regional Employment Judge Taylor set out at paragraphs 6 to 9 of her Summary the history of procedural difficulties.

15. When the case came before Employment Judge Moor on 18 June 2019, the final hearing had already been listed for dates in September 2019. The time estimate was increased from 4 to 6 days, in part because the Claimant was permitted to give further information and/or leave to amend his claim to include more detriments. He was not permitted to include a claim of sex discrimination.

16. On 24 July 2019, the Respondent's solicitors sent a cost warning letter to the Claimant in which it asserted that the claims being made were unjust and, in many instances, based on falsehood. It set out in a table the reasons why it asserted each specific claim lacked merit. For example, where Ms Baker and/or Ms Fraser were relied upon as comparators, the Respondent asserted that neither was visibly white and neither identified as being white. The Respondent also identified detriments where documentary evidence would clearly undermine the Claimant's case. Whilst we accept Ms Robinson's submission that it is a particularly detailed cost warning letter, the Tribunal takes into account that many of the reasons where the claims are said to be doomed to failure are merely an assertion of the Respondent's case.

17. The cost warning letter made clear to the Claimant, who was still then acting in person, that costs are not ordinarily made in the Employment Tribunal. It set out the provisions of Rule 76, the circumstances in which cost orders may be made and asserted that the claims had no reasonable prospect of success and that the Claimant had acted unreasonably in bringing and pursuing them. The letter repeated the earlier advice of the Tribunal to obtain independent legal advice and said that the Respondent would not claim costs if the Claimant withdrew the claim by 9 August 2019. The Claimant did not withdraw his claim and the matter came before the Tribunal at a final hearing.

18. At the outset of the final hearing the holiday pay claim was withdrawn. The issues were revisited but no further claims or specific allegations were withdrawn. For reasons given in a reserved Judgment, all claims failed and were dismissed.

Law

19. Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides that:

> **"A Tribunal may make a costs Order or a preparation time Order, and shall consider whether to do so, where it considers that-**
>
> **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
>
> **(b) any claim or response had no reasonable prospect of success."**

20. Rule 84 provides that:

> **"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."**

21. As made clear by Choudhury P in **Mihailescu v Better Lives (UK) Limited** UKEAT/0184/19/BA at paragraph 17, the rules dictate a three-stage approach. The Tribunal must first consider the threshold question of whether any of the circumstances identified in rule 76(1) applies. If so, it must then consider separately, as a matter of discretion, whether to make an award of costs. If it is decided that an award of costs should be made, the final stage is to decide what amount of costs to award.

22. In **Yerrakalva v Barnsley Metropolitan Borough Council** [2011] EWCA CIV 1255, Mummery LJ held that the Tribunal should consider the whole picture of what had happened in the case and ask whether there had been unreasonable conduct by the Claimant in bringing and conducting the case. If so, it should identify the conduct, what was unreasonable about it and the effect it had. The Tribunal should also take into account any criticisms of the employer's conduct and its effect on the costs incurred.

23. In **Kapoor v The Governing Body of Barn Hill Community High School** UKEAT0352/13RN, the Tribunal fell into error when it directed itself that it was sufficient without more that failure to tell the truth is to conduct a case unreasonably. Whether or not a party has told an untruth is a relevant factor, but it is not determinative, and the Tribunal must look at the full picture as made clear in **Yerrakalva**. In **Kapoor**, the EAT considered the case's lengthy procedural history and unsuccessful attempts by the Respondent to strike out the claims as relevant considerations in determining the costs application which had not been taken into account by the Tribunal. The Tribunal's findings that the Claimant's evidence was not worthy of belief and that the Claimant had falsified certain documents were powerful factors which might have been taken into account if the Tribunal had approached the exercise properly.

24. The correct approach to costs in the Employment Tribunal was considered again by the Court of Appeal in **Sud v London Borough of Ealing** [2013] EWCA Civ 140. From paragraph 67 it emphasised the importance of the **Yerrakalva** approach. A Tribunal has a broad discretion; it should avoid adopting an overly analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct into separate headings such as nature, gravity and effect. The words of the Rule should be followed, and the Tribunal needs to look at the whole picture of what had happened in the case, then to ask whether there has been unreasonable conduct by the Claimant.

25. As was made clear in **Yerrakalva**, although causation is undoubtedly a relevant factor, it is not necessary for the Tribunal to determine whether or not there was a precise

causal link between the unreasonable conduct in question and a specific cost being claimed. The circumstances do not need to be separated into sections, each of which in turn forms the subject of individual analysis, as this risks losing sight of the totality of the relevant circumstances.

Conclusions

26. The Tribunal considered first whether or not there had been unreasonable conduct or disruptive behaviour in the conduct of the proceedings by the Claimant.

27. Ms Robinson's submission is that there has been unreasonable conduct throughout. From as early as November 2018, the Respondent was complaining about the Claimant's failure to comply with Tribunal Orders. Replying on behalf of the Claimant, Mr McKetty submits that failure to comply with Orders is not a particularly unusual feature of Tribunal proceedings, particularly at a time when the Claimant was a litigant in person suffering from depression as a consequence of losing his job and, as a result of financial difficulties caused by his dismissal, could not afford to obtain legal representation. He submits that the Claimant's failures to comply with Orders falls far below the threshold for a cost order.

28. The Tribunal carefully considered the respective submissions. Whilst there is no more lenient rule for a litigant in person than for a represented party, the Tribunal did consider it relevant that the Claimant was acting in person whilst depressed in the context of considering the reasonableness or otherwise of the Claimant's conduct.

29. Whilst the Respondent was initially chasing for compliance with Orders from 5 November 2018, the real pressure upon the Claimant to comply was made clear from correspondence on 13 February and 21 February 2019. The Tribunal considers that by the end of February 2019, even as a litigant in person and even allowing for his mental health difficulties, the Claimant could have been under no doubt firstly that he was in breach of Tribunal Orders and secondly that these were important matters that may well affect the ability of a final hearing to proceed in June 2019. We find that the Respondent's letter dated 26 March 2019 was necessitated by reason of the Claimant's unreasonable failure to engage at all with the Respondent's efforts to prepare the case for a final hearing. This is not a Claimant who wrote to the Respondent to say "I am sorry, I do not understand what is required", it is not a Claimant who sought to respond by saying "I am too unwell to provide that detail", rather the Claimant unreasonably ignored the Respondent altogether thereby causing it to incur cost.

30. The Preliminary Hearing on 11 April 2019 would have afforded the perfect occasion for the list of issues to be finalised through discussion between the Judge and the parties. Whilst the Employment Tribunal accepts that the Claimant had a pre-booked holiday and therefore had good reason not to attend that hearing, the way in which the Claimant made his application to postpone was unreasonable conduct. The holiday had been booked as early as November 2018, the Claimant was aware that the Tribunal would be re-listing the Preliminary Hearing and made no attempt to inform the Tribunal that of dates to avoid by reason of pre-booked holiday. Had he done so, the hearing would have been listed for a date on which he could attend. Further, when making his application to postpone, the Claimant failed to provide the evidence in support of the application, thereby necessitating repeat correspondence between the Respondent, the Tribunal and the Claimant. The Claimant's absence on 11 April 2019 meant that very little progress could be made, for example in finalising the list of issues. Had the Claimant complied with the requirement to

provide evidence of his pre-booked holiday, the Preliminary Hearing would likely have been adjourned and the Respondent's cost of attending would have been saved. Even accepting that the Claimant was a litigant in person acting without legal representation, it was entirely unreasonable on his part to have failed to have taken the very easy step of providing evidence of his pre-booked holiday as requested by Employment Judge Gilbert. The Tribunal conclude that the Claimant did conduct his claim unreasonably, surpassing the rule 76 threshold, in respect of the Preliminary Hearing.

31. The second part of the cost application relates to the pursuit to final hearing of claims which ultimately failed and which, the Respondent submits, had no reasonable prospect of success.

32. In his submissions resisting the application on behalf of the Claimant, Mr McKetty sought to revisit some of the factual issues before the Tribunal so as to explain why the Claimant had brought the claim and why he had considered that it had reasonable prospects of success.

- The Respondent had not sought nor had the Tribunal ordered a strike out of any of the claims on the merits at any stage prior to the final hearing. Insofar as the Claimant relied on historic matters and/or comparators who were not white, this was the fault of the legally represented Respondent for failure to defend the case with sufficient robustness. The Claimant was entitled to bring his claim before the Tribunal given the very important issues that the case raised.

- With regard to the ultimate findings and conclusions of the Tribunal, the Claimant had very good reason to prosecute his claims of constructive dismissal and race discrimination because of the content of the Respondent's letter in April 2018. When looking at the prospects of the case, the Tribunal should not have taken the technical approach for example to matters of time and was misled by the erroneous evidence of the Respondent at the final hearing. In particular, Mr McKetty submits that the subsequent information provided by the Respondent to support the request for an extension of time to make the costs application, shows that the evidence of Ms Hamill as to the 12 April 2018 letter was unreliable and/or misleading.

- As for the length of the final hearing itself, a large amount of the time was used up by the Respondent cross-examining the Claimant at length on historical events which were not necessary for the fair determination of the issues. He makes the valid point that the Tribunal did not sit on one of the days as the Claimant needed to a funeral. In summary, there were only about two days of the hearing where issues of real substance were brought before the Employment Tribunal.

33. For her part, Ms Robinson relied at length upon the Tribunal's findings and conclusions in our Judgment, in particular findings where the Tribunal rejected the Claimant's case and/or reached conclusions that were unhelpful to him. She submitted that the Tribunal had found that the Claimant did not tell the truth - untruthfulness is the very definition of unreasonable conduct and a claim can have no reasonable prospect of success if it is based upon lies. Ms Robinson relies upon the effect of the warning in the letter sent by the Respondent in July 2019 which explained why the claims had no reasonable prospects and that proceeding after this explanation was clearly unreasonable.

34. The Tribunal do not consider that the absence of a strike out application suggests that there were reasonable prospects of success. As has been made clear in a number of appellate Judgments, strike out applications have a high hurdle as the Tribunal must be satisfied that there are **no** reasonable prospect of success when taking the Claimant's case at its highest. Strike out is particularly inappropriate in discrimination claims where there is a dispute of core facts as there is a public interest in the evidence being tested in open court. The failure of the Respondent to apply for a strike out is a factor of little, if any, weight.

35. The Tribunal had very careful regard to our Judgment and detailed reasons for rejecting the claims. We conclude that some of the issues for determination could properly be said to have had no reasonable prospects of success for the reasons given by the Respondent in its cost warning letter. These are issues 3.1, 3.2, 3.3, 3.7, 3.8 and 3.15 as each relies upon Ms Baker or Ms Fraser as a white comparator when they are not, and do not identify as, white.

36. On other issues, the Tribunal rejected the Claimant's case and had preferred that of the Respondent. For example, on issues 3.5, 3.6, 3.9 and to some extent the issues surrounding the Claimant's eventual suspension and the allegations of gross misconduct. The Tribunal did not accept that the comments alleged had been made by Mr Manning in June 2016. However, there is no express finding that the Claimant had given untruthful evidence. At its highest, the Tribunal reached the following conclusions:

> **163 It was a feature of the Claimant's evidence, both in his witness statement and orally, to make repeated generalised allegations of a discriminatory or stereotypical culture and environment at the Respondent. He referred repeatedly to, as he put it, a "drip, drip" effect of race discrimination within the school. The Claimant failed to provide much detail of specific incidents of discrimination, despite his assertion that he had maintained a contemporaneous journal. Indeed, in cross-examination when asked for detail, he repeatedly digressed into a general discussion about the feeling of being discriminated against. The Tribunal recognises that people with protected characteristics may appear to tolerate inappropriate conduct for fear of speaking out and that the failure to make a timely grievance does not necessarily mean that the conduct complained about did not occur. However, even taking that into account, it is significant that in June 2016, whilst under the headship of Mr Wilkes whom he held in high regard and against whom he makes no allegation of race discrimination, there were concerns about the Claimant's failure to adhere to school procedures both in relation to students' mentoring sessions and his own attendance.**
>
> **164 Allegations of discrimination are extremely serious. The Claimant's apparent willingness to make allegations of this sort, without any evidential foundation and even where the evidence directly undermined his case (for example in the handling of his absences in issues 3.9, 3.11 and 3.13) and with the aim of stopping a genuine disciplinary process, undermined the Tribunal's confidence in the veracity of his evidence as to his belief that he had been subjected to unlawful discrimination or harassment. Overall, the Tribunal did not consider the Claimant's case to be credible or coherent.**
>
> **165 The Respondent's case, by contrast, was clear, plausible and consistent with contemporaneous documents. There were concerns about the Claimant's adherence to proper procedure over a number of years, both under Mr Wilkes and Ms Hamill. There were repeated instructions about the need to see students in a structured setting. The Claimant did not do so on 3 November 2017 and allowed a situation in which student A missed her lesson in period 4 and was late for her lesson in period 6, conduct**

which was rendered more serious by the inaccurate record card apparently signed by the Claimant. This led to a disciplinary investigation which revealed significant discrepancies in the Claimant's account of events. Once suspended, the Claimant declined to attend any Occupational Health assessment or internal meetings and took steps designed to frustrate the disciplinary process.

…

169 Both of the Claimant's grievances were made with the express purpose of stopping the disciplinary proceedings. To this extent they were made in bad faith. With the exception of the email sent by Mr Todd in September 2017, the Claimant has found that the complaints made were not well founded in fact. To this extent, they were false.

37. At paragraph 177, the Tribunal concluded that the allegations raised against the Claimant were not wholly unreasonable or designed unfairly to discredit him as he submitted but arose from his own lack of judgment and failure to adhere to required procedures. It was of concern to the Tribunal that the Claimant continued not to realise that his conduct was the proper subject of a disciplinary process. Finally, at paragraph 179 we concluded that the Claimant resigned solely because he was not prepared to attend the disciplinary hearing.

38. In considering the issue of costs, we consider it relevant to bear in mind that whilst the Tribunal expressed doubt about the Claimant's credibility and the veracity of his evidence, we did not go so far as to make any finding that he had been untruthful or had lied to the Tribunal during the course of the evidence. However, based upon our findings of fact and conclusions, the Tribunal concludes that of the 22 detriments alleged as direct race discrimination and/or harassment, those set out at paragraphs 3.1, 3.2, 3.3, 3.5, 3.6, 3.7, 3.8, 3.9 and 3.15 had no reasonable prospects of success. Nor did the victimisation claim given our finding that the "protected acts" were in fact false and made in bad faith.

39. Costs do not follow the event in the Employment Tribunal. It is not sufficient that the Claimant lost and the Claimant was properly putting before the Tribunal some of the issues, albeit on balance the Tribunal ultimately preferred the evidence of the Respondent. Taking the broad brush approach encouraged by the higher courts, the Tribunal concludes that about half of the case brought before the Tribunal had no reasonable prospects of success and that it was unreasonable conduct of the Claimant to have pursued them.

40. The lack of prospects should objectively have been appreciated by the Claimant in July 2019 when he received the Respondent's cost warning letter. By this date disclosure had taken place and he was in possession of the relevant contemporaneous documents which undermine his claims. It was at that point that the Claimant should properly have considered the merits of his claim. Had he done so, and withdrawn those parts of the claim which had no reasonable prospect of success, the final hearing would have been significantly shorter than the five days that it eventually took. From this date, the rule 76 threshold was surpassed in respect of approximately half of the claim.

41. Having decided that the Claimant's surpassed the threshold required by rule 76, the Tribunal considered whether we should exercise our discretion in favour of making a cost order. In doing so, we took into account Mr McKetty's submissions that the Respondent had given misleading evidence in respect of the 12 April 2018 letter such that it would not be in the interest of justice to order costs against the Claimant. Mr McKetty submitted that

at the final hearing the Respondent had sought to distance itself from the content of the 12 April 2018 letter by arguing that it was a letter sent by solicitors rather than on the instructions of the school. He contrasted this was the position of the Respondent on the late costs application which he submitted made clear that nothing could be done by the solicitors without the instruction of the Respondent as lay client. Ms Robinson submitted that this was a mischaracterisation of the position and that there was a difference between the ability of solicitors instructed to act on the claim generally with the need for specific instructions to incur the additional cost of making a separate costs application.

42. At paragraph 99 of our Reasons, the Tribunal found as a fact that the 12 April 2018 letter was sent by solicitors acting for the Respondent, we referred to the Respondent's position being set out within that letter and we quoted from the relevant parts of the letter. In our conclusions, the Tribunal held that:

> **160 Issue 3.22: letter of 12 April 2018. The Tribunal considered the letter to be drafted in strong terms and objectively to give the impression that the Respondent did not accept that the grievance was made in good faith and that it may not investigate its contents. In the ordinary course of events, this would be an entirely inappropriate response to a grievance raised by an employee, particularly one raising serious matters such as discrimination. However, based upon our findings of fact, the response could not objectively be considered to give rise to the proscribed effects in circumstances where the March 2018 grievance was submitted for the purpose of stopping the disciplinary process. The complaints made in the grievance were about events which had occurred long before the three-month time period specified in the grievance procedure. There was no good reason for the late presentation of the grievance, not least where the Claimant's case is that he had a journal detailing the conduct about which he complained and where he was sufficiently aware of the grievance procedure to have raised a complaint in January 2018.**
>
> **161 The threat of defamation proceedings if the complaints were found to be made in bad faith or were repeated in public was made because of the Respondent's genuinely held belief that this was a grievance made in bad faith for the purpose of stopping the disciplinary process. The Claimant has not proved the primary facts from which the Tribunal could conclude that this strongly worded letter was related to or because of race.**

43. It may be seen on a proper reading of the above paragraphs, that the Tribunal's conclusions were based upon the content of the solicitor's letter being a statement of the Respondent's position. The Tribunal did not distinguish between the solicitors acting on their own initiative or acting with the apparent or actual authority of the school. To that extent, there was no misrepresentation as asserted on behalf of the Claimant.

44. The Tribunal took into account the fact that the Respondent is a publicly funded body, considerable time and expense has been expended upon this case and the Respondent has a duty to the public purse to use its resources carefully and wisely. The Claimant was put on notice that a cost application would be made, it was a balanced cost warning letter and the Claimant was given an appropriate period of time to reflect, seek independent legal advice and withdraw with no cost consequences. He chose not to do so. There is nothing in the Respondent's conduct which renders it inappropriate to make a cost order and, for all of the reasons set out above, the Tribunal concludes that it is appropriate to exercise our discretion and make a cost order.

45. The final stage is to decide the amount of the cost order. This costs hearing has been listed for some time yet the Claimant has not disclosed documents or provided a witness statement as to his financial means. In representations made on his behalf today, but not given on oath, the Claimant asserts that he is not earning money currently and is reliant on government payments, although he anticipates that he will earn money from 2022. The Tribunal took this into account but gave it little weight in the circumstances. If the Claimant has relevant evidence of impecuniosity he could and should have disclosed it to the Tribunal and to the Respondent. In giving our oral Judgment and Reasons, the Tribunal invited the Claimant to submit any such relevant evidence of impecuniosity with an application to reconsider if his financial circumstances were such that the costs ordered were not in the interests of justice. No such evidence or reconsideration application has been presented.

46. The Tribunal had regard to the Respondent's schedule of costs. We do not accept that the Respondent is entitled to all of its costs from the outset of the proceedings. Claimants are properly entitled to bring a claim to the Tribunal and there about half of the case properly raised matters which required evidence to be tested on oath at a final hearing.

47. The Tribunal has concluded that there was unreasonable conduct of proceedings by the Claimant in the period 26 March 2019 up to and including 11 April 2019 in respective of the ineffective Preliminary Hearing. The costs incurred by Ms Matherson-Harley as solicitor for the Respondent, charging a rate of £80 per hour, was the total sum of £703.20.

48. The Tribunal has also concluded that the Claimant should be ordered to pay 50% of the costs from 17 July 2019 as the date of the cost warning letter and by which time the Claimant had the relevant documents properly to assess the merits of his claims. Had he done so and narrowed the claim to the matters which had reasonable prospects of success, the amount of time spent in preparation and at the final hearing would have been significantly reduced. For example, almost all of the first half-day of cross-examination was taken up with issues about room allocation and the arrival of Ms Hamill on which the Claimant could never have succeeded as they were fundamentally flawed as a matter of fact and relied upon inappropriate comparators.

49. Doing the best we can and adopting a broad brush approach, we have allowed the solicitor's cost from 17 July 2019 until 4 September 2019 when the witness statements were finalised and exchanged. The full cost claimed for this period is £2,900 which is then reduced by 50%. The Tribunal has not awarded the Respondent the cost of the solicitor's attendance at the final hearing as the Tribunal does not consider that those costs were reasonably incurred: the Respondent was represented by Counsel and the solicitor could have been contacted by telephone and appropriate representatives from the lay client were present to give advice and instructions throughout.

50. The Tribunal is satisfied that Counsel's fees for preparation and attending the hearing were incurred in the sums set out with VAT. These are reduced by 50% for the reasons given above. We did not award Counsel's fees for this costs hearing (originally listed for 20 May 2021 be postponed until today) as the Tribunal accepts that there were valid arguments that needed to be considered as to whether there should be a costs order and, if so, in what amount. Further, the May 2021 hearing was postponed for good reason. Whilst the Claimant did not initially volunteer the pregnancy of his wife as an

explanation for the postponement the Tribunal does not consider that unreasonable given its personal nature and conclude that it was not unreasonable for the Claimant to seek an adjournment on the basis of an outstanding appeal to the EAT instead. For that reason, the amount of Counsel's fees is awarded in the sum of £4,980 with VAT of £996 in addition.

51. The total amount of costs to be paid by the Claimant to the Respondent is therefore £8,129.20. The date for payment in full is 6 May 2022, to allow time for the Claimant to prosecute with dispatch any outstanding appeal to the EAT and also to give him time to receive some of the money which he anticipates earning in 2022.

Employment Judge Russell

Date: 11 April 2022