EMPLOYMENT TRIBUNALS

Claimant: Mr S Knox

Respondent: Chief Constable of Merseyside Police

Heard at: Liverpool **On:** 25 and 26 April 2022 and (in the absence of the parties) on 15 June 2022

Before: Employment Judge Horne

Members: Mr G Pennie
Ms D Kelly

REPRESENTATION:

Claimant: In person, assisted by Mrs Knox, claimant's wife
Respondent: Mr D Tinkler, counsel

RESERVED COSTS JUDGMENT

The unanimous judgment of the tribunal is that the claimant is ordered to pay the respondent the sum of £750.00 in respect of the respondent's costs.

REASONS

The costs application

1. In a written application dated 8 June 2021, the respondent applied for an order under rule 76 of the Employment Tribunal Rules of Procedure 2013 that the claimant pay her costs of defending his claim. It is this application which we now have to determine.

The costs hearing

2. This reserved judgment follows a two-day hearing on a remote video platform. Neither party objected to the format of the hearing.

3. At the start of the hearing, the claimant applied for the costs application to be struck out. We refused that application. The claimant also applied for the costs application to be adjourned. We refused that application too. Those decisions are recorded separately in writing.

Evidence and submissions

4. We read an agreed costs bundle running to 255 pages. The parties made oral submissions. The claimant gave oral evidence about his financial circumstances. No other witnesses gave oral evidence for either party.
5. When refusing to adjourn the costs application, we made case management orders to enable the parties to make further submissions in writing and to rely on further documents. In accordance with our orders, the claimant provided written submissions, with supporting e-mails, and the respondent provided submissions in reply. We took all of these documents into account.
6. Where necessary, we referred back to the witness statements and documents in the original bundle for that hearing.

Facts

7. The claimant presented his claim form to the tribunal on 6 February 2018. His "Particulars of Claim" were drafted by Mr Edward Legard of counsel. The claim raised complaints of harassment related to sex, harassment related to disability, victimisation, direct discrimination because of sex and disability, discrimination arising from disability, failure to make adjustments, unlawful deduction from wages and "discrimination by association".
8. The factual allegations spanned a period of just under twelve years. Most of the allegations related to the period from 2006 until 23 February 2017. During this time, the claimant was in work. For our purposes, complaints about things done during that period can be grouped together as the **"In-Work allegations".** The Particulars of Claim went on to make allegations of harassment and victimisation which were said to have happened whilst the claimant was on sick leave. We refer to these allegations collectively as **"the Sick Leave allegations".**
9. The factual narrative began with a description of the claimant's caring responsibilities for his disabled parents. It continued with a general assertion that the claimant had submitted flexible working (Per50) requests over about 12 years in order to meet those caring responsibilities.
10. The earliest of the In-Work allegations dated back to 2006. We can call this **"the CID allegation".** The claimant had been removed from the Criminal Investigation Department and placed "back into uniform" on the orders of Detective Chief Inspector Holland. It was alleged that this decision was connected to the claimant having requested a flexible shift pattern so he could care for a disabled relative.
11. Another of the In-Work allegations, which we call **"the MIT allegation"** was about the withdrawal of an offered place in the Major Investigations Team in 2007. According to the Particulars of Claim, the offer had been withdrawn once Superintendent Barr was notified of the claimant's wish to work a flexible shift pattern.
12. A further In-Work allegation related to the conduct of officers in the Area Operations Team, allocating additional shifts to the claimant. This conduct was

said to have taken place "in or around 2010", and to have continued after the claimant made a successful flexible working application in 2010. For convenience, we call this **"the AOT allegation".**

13. Nothing in particular was alleged to have happened between 2007 and 2010.

14. The Particulars of Claim alleged that the claimant had been allocated more shift changes than two female colleagues. One of these colleagues was Constable AJ. So far as it concerns her, we refer to the allegation as **"the AJ Shifts allegation".** This was later clarified to have taken place between 2010 and 2016. It was, accordingly, one of the In-Work allegations.

15. Unfortunately, the Particulars of Claim was not a particularly helpful document. Whilst the factual allegations were relatively clear, and so were the general headings of prohibited conduct under the Equality Act 2010, it was hard to tell which legal complaints related to which facts, and how the statutory definitions of prohibited conduct were said to have been satisfied in the case of each factual allegation.

16. At the time the claimant presented his claim, his mental health was very poor. He had been on sick leave for over a year with a depressive illness. Less than four weeks after presenting the claim, Dr Friedman made an emergency referral to the Mental Health Crisis Team.

17. The claimant was, at the time of presenting his claim, deeply suspicious that the respondent was withholding documents relevant to his claim. Some notebooks that he had requested in November 2017 had gone missing. When he was given access to his Pronto device, also in November 2017, the software insisted that he authorise an update, which caused his "S-notes" to be deleted. There had been delays in complying with his Data Subject Access Request for e-mails. When e-mails were made available to him in January 2018, he believed (correctly as it turned out) that there were e-mails on the respondent's archive system that had not been disclosed to him. The Employment Appeal Tribunal has held that the non-retrieval of those e-mails did not amount to victimisation. Nonetheless, it contributed to the claimant's genuine sense that documents were being deliberately withheld.

18. The claimant, at that time, was particularly dependent on professional advice because of his highly vulnerable state.

19. The claimant waived his legal professional privilege to tell us that Mr Legard advised him that his claim had merit. According to the claimant, he was advised that that his complaints had a greater than 50% chance of success. We have not seen Mr Legard's written advice, or any attendance note of any discussion with Mr Legard. In our view it is unlikely that Mr Legard would have advised the claimant that each and every complaint in the grounds of claim had a greater than 50% chance of success. We do accept, however, that the broad thrust of Mr Legard's advice was that the claim as a whole was more likely than not to succeed.

20. The respondent presented a response to the claim. The grounds for resisting the claim were prepared by their in-house solicitor. As well as engaging with the complaints on their merits, the respondent observed that the CID allegation, the AOT allegation and the AJ Shifts allegation were stale, isolated incidents, and should be struck out.

21. A preliminary hearing took place on 19 April 2018 before Employment Judge Vincent Ryan. At that hearing, EJ Ryan expressed the provisional view that many of the claimant's complaints were likely to be time-barred.

22. Following the preliminary hearing, Mr David Flood of counsel re-formulated the claim in a document dated 15 May 2018. The document was headed, "Details of Claim".

23. The factual allegations made in the Details of Claim were substantially the same as those originally advanced in the Particulars of Claim. What changed, and changed considerably, was the way in which the complaints based on those factual allegations were formulated in law. Out went the complaints of discrimination arising from disability, failure to make adjustments and unlawful deduction from wages. It was no longer suggested that the claimant himself was disabled prior to his going on sick leave. In came a new complaint of indirect sex discrimination and new complaints of indirect discrimination by association with a person's disability. The original complaints were specifically matched to particular factual allegations.

24. The complaints in the Details of Claim were:

    <u>In-Work allegations</u>

    24.1. 4 complaints of direct disability discrimination by association

    24.2. 4 complaints of indirect disability discrimination by association

    24.3. 3 complaints of direct sex discrimination

    24.4. One complaint of indirect sex discrimination

    24.5. 3 complaints of harassment related to sex and/or disability

    <u>Sick Leave allegations</u>

    24.6. 4 further complaints of harassment related to sex and/or disability and

    24.7. 3 complaints of victimisation.

25. The respondent has criticised the Details of Claim as causing a significant expansion of the claim. In our view it is more accurate to say that the Details of Claim laid bare how wide the claim had been in the first place. It was only when particular facts were matched to specific statutory provisions that it was possible to tell just how many complaints there actually were.

26. The CID allegation and the MIT allegation were each pursued as complaints of direct and indirect discrimination, both by association with a disabled person.

27. The AJ Shifts allegation was said to be direct and indirect sex discrimination. The only comparator named was Constable AJ. There was no mention of the other female officer.

28. The facts of the AOT allegation were pleaded in support of complaints of direct and indirect discrimination, in relation to both sex and an associated person's disability.

29. One of the complaints of direct sex discrimination we will refer to as **"the Fixed Shifts for Women allegation".** In the words of the Details of Claim, the respondent was said to have treated the claimant less favourably by "creating and/or maintaining and/or tolerating a culture in which fixed working hours was accepted and/or permitted and/or encouraged for females with caring

responsibilities but was not accepted and/or not permitted and/or discouraged for males with caring responsibilities.

30. The temporal scope of the Fixed Shifts for Women allegation was not entirely clear. It was capable of including the CID allegation and the MIT allegation. It also extended to further factual allegations about the claimant's request for fixed shifts following the restructure in the summer of 2016. The officer who dealt with that request was Chief Inspector Garvey-Jones.

31. Of the In-Work allegations, the most recent was an accusation that Sergeants Williams and Laycock had harassed the claimant on 22 February 2017. The harassment allegedly took the form of berating the claimant on the subject of shift changes.

32. The claimant has waived privilege in the advice that Mr Flood gave him. Again, there is no evidence about what that advice was, other than what the claimant told us in broad terms. We make the same finding as with Mr Legard: Mr Flood advised that there were better than even prospects for the claim as a whole, but we do not accept that he advised the claimant that each of his complaints was more likely than not to succeed. For example, the complaint of indirect discrimination by association was always going to be risky. It was a novel form of claim, untested in the English courts, inconsistent with the express words of the Equality Act 2010, and dependent on a decision of the Court of Justice of the European Union whose effect on English law was unclear. Even if the claimant had been certain to prove the facts he alleged, his prospects of success were limited by the experimental nature of the claim in law.

33. By the time the Details of Claim were submitted, the claimant's mental health was no longer in crisis, but he remained unwell and was still dependent on legal advice.

34. The respondent then engaged Weightmans solicitors to defend the claim on her behalf. Their work on the case was mainly carried out by Ms Leppert, a solicitor, with supervision from a partner, Ms Peacock. Both Ms Leppert's and Mr Peacock's time was charged to the respondent at £135.00 per hour.

35. Between them, Ms Leppert and Mr Peacock spent several hours dissecting the Details of Claim, preparing a timeline of events, and identifying those complaints which (in their view) had been presented after the time limit expired.

36. A further preliminary hearing took place on 29 June 2018, this time before Employment Judge Porter.

37. At the hearing, the respondent sought a further preliminary hearing in public. One of the desired purposes of that preliminary hearing was to determine time limit issues in relation to some of the complaints. These complaints, we are sure, must have included the CID allegation and the MIT allegation. EJ Porter refused the respondent's request. This was on the ground that, in her view, there was little time and cost to be saved by such a hearing. It appears that EJ Porter was swayed by the claimant's contention that historical allegations would in any event form part of the background on which the claimant would rely in support of his "timeous complaints". We are sure that EJ Porter also bore in mind the difficulty that tribunals face at preliminary hearings when asked to determine the question of whether or not an act of discrimination extended over a period.

38. EJ Porter did list the claim for a further preliminary hearing in public to determine other preliminary issues. One of those issues was whether or not the complaint of indirect discrimination by association should be struck out on the grounds that it had no reasonable prospect of success.

39. EJ Porter also caused the claim to be fixed for a 15-day hearing, due to start on 11 March 2019.

40. A written case management order followed the preliminary hearing. In that order, the respondent was ordered to disclose its relevant documents to the claimant by 23 November 2018.

41. On 8 October 2018, the claimant was provided with a further batch of e-mails in response to his original data subject access request. The claimant complained that the e-mails were still incomplete.

42. Weightmans then submitted the respondent's amended response to the claim. it ran to 193 paragraphs. Ms Leppert and Mr Peacock spent approximately 20 hours drafting and taking instructions on this document.

43. The amended response dealt with time limit issues generically in three paragraphs. A further two paragraphs were devoted to a repeating the request for a preliminary hearing at which time limit issues could be determined. In summary, the respondent's stance was that any continuing act of discrimination was broken, at the latest, by the start of the claimant's sick leave on 23 February 2017. On the respondent's case, the tribunal would have no jurisdiction to consider any of the In-Work allegations.

44. The amended response specifically addressed the CID allegation and the MIT allegation. Between them, these allegations took up 15 paragraphs of the response. The respondent's solicitors repeated their stance that these two allegations were out of time.

45. Doing the best we can, our finding is that the CID allegation and the MIT allegation accounted for at least 2 hours of the 20 hours' work done on the amended response.

46. The preliminary hearing was due to take place in November 2018. The respondent decided not to have any preliminary issues determined at that hearing. This meant that the question of striking out the complaint of associative indirect discrimination would be left to the final hearing.

47. The claimant's solicitors e-mailed the respondent on 23 November 2018 and 4 December 2018. In these e-mails, the claimants sought specific disclosure of various documents. Amongst the requested documents were:

    47.1. Records of shift pattern changes for the claimant, Constable AJ and two other female police officers and

    47.2. All the claimant's PER50 applications.

48. The claimant argued before us that there should have been no need for these documents to be specifically requested. We agree up to a point. The shift pattern changes for the claimant and AJ were clearly relevant to the AJ shifts allegation. The records of the other two officers were less obviously relevant, since they had not been named as comparators in the Details of Claim. The claimant's PER50 applications were obviously relevant to the Fixed Shifts for

Women allegation. All the documents would have become known to the respondent following a reasonable search.

49. On 4 January 2019, Weightmans spent 4 hours discussing the case with CI Garvey-Jones and preparing for that discussion. They prepared a lengthy statement for her. The statement dealt with both In-Work allegations (in particular the Fixed Shifts for Women allegation) and several Sick Leave allegations. It is not possible to break down the precise drafting time, because it was recorded along with other work. The parts of the statement dealing with the In-Work allegations must have taken at least two hours.

50. On 14 January 2019, Weightmans wrote to the claimant about his request for specific disclosure. Weightmans confirmed to the claimant that he had already received copies of all his PER50 applications.

51. On 18 January 2019, Weightmans sent three spreadsheets to the claimant. The spreadsheets indicated all the occasions when shifts were varied for:

    51.1. The claimant; and

    51.2. The two other officers (who were not Constable AJ).

52. On 18 January 2019, Weightmans also sent a costs warning letter to the claimant's solicitors. The letter set out the respondent's detailed arguments as to why the claimant should withdraw his entire claim. One of the key arguments was that the "vast majority" of the claimant's complaints were out of time. Specific mention was made of the fact that some of the allegations dated back 12 years. The main thrust of the time limit argument, however, was that there was no reasonable prospect of the claim being in time for any of the In-Work allegations.

53. The costs warning letter was one of the items discussed in a case conference lasting two hours. The letter itself took about 4 hours to draft. We estimate that about 10% of that time was likely to have been devoted to the CID allegation and the MIT allegation.

54. On 22 January 2019, Weightmans prepared a witness statement for Superintendent Barr, dealing with the MIT allegation. The witness statement was one page long and took 1.8 hours to draft.

55. In advance of the liability hearing, the respondent also prepared a witness statement from DCI Holland. This statement ran to two pages. We were unable to find a specific entry in Weightmans' costs spreadsheet in which the time spent drafting this particular statement was recorded. Nonetheless, we are sure that the respondent did incur a legal cost in having that statement prepared, and that the time it took to prepare it could not have been less than 1.2 hours. The absence of a specific entry in the spreadsheet is probably explained by the fact that some entries refer to witness statements in general, without naming the individual witness.

56. On 6 February 2019, the respondent sent to the claimant's solicitors a breakdown of Constable AJ's shift changes.

57. The claimant's solicitors replied to the respondent's costs warning letter on 8 February 2019. They argued, in general terms, that there was a continuing state of affairs encompassing the whole claim, including all the In-Work allegations and all the Sick Leave allegations. In their letter, they set out the test in *Hendricks v.*

Commissioner of Police for the Metropolis. Their summary of the law was correct, but they made no attempt to explain how the CID allegation or the MIT allegation could have formed part of an act extending over a period encompassing the later allegations. The claimant's solicitors reminded the respondent of the claimant's mental health disability and his difficulties in obtaining documents in support of the claimant's argument that it would be just and equitable to extend the time limit. They repeated their assertion that they had made at the preliminary hearing before EJ Porter. To paraphrase: all the events of which the claimant complained would form part of the background evidence in any event, so they might as well be included in the claim.

58. The claimant prepared a witness statement dated 20 February 2019.

59. A number of features of the witness statement are notable for the purposes of the costs application.

60. Our first observation relates in particular to the CID allegation and the MIT allegation. As in the Particulars of Claim, there was no suggestion that anything in particular had happened between 2007 and 2010;

61. A number of passages were relevant to the AJ Shifts allegation:

    61.1. paragraph 31 of the witness statement asserted that his shifts had been changed 135 times between 2012 and 2016;

    61.2. paragraph 34 set out the claimant's personal observation of never seeing Constable AJ on operations or area initiatives (the sorts of activities that would generally cause the AOT to impose a shift change), despite the claimant being "in a carrier vehicle full of officers" and despite the claimant's caring requirements being similar to those of Constable AJ;

    61.3. paragraphs 35 and 41 explained the claimant's difficulties in tracing Constable AJ and having to find her collar number for himself; and

    61.4. paragraph 37 asserted that the respondent had still failed to supply the full shift pattern for Constable AJ; and

    61.5. according to paragraph 41, the deficiency in disclosure was that the respondent had only produced the "adapted" shift pattern and had not supplied "screen prints".

62. Pausing there, we are unable to tell what, precisely, the screen prints would have shown that were of particular relevance to the AJ Shifts allegation. Nor can we tell why the "adapted" shift pattern was insufficient to enable effective comparison between the claimant's shift changes and Constable AJ's shift changes. What we do find, however, is that the claimant genuinely believed that this material was necessary for a fair determination of his claim. He had a reasonable basis for thinking that relevant documents were being withheld. By this stage, he had legitimate concerns about the respondent's attitude to disclosure of information generally.

63. On 1 March 2019, the claimant's solicitors withdrew the complaints of indirect sex discrimination and indirect disability discrimination by association. This meant that the CID allegation, the MIT allegation, the AOT allegation and the AJ Shifts allegation all survived, but now they were pursued solely as complaints of direct discrimination.

64. It is hard to discern the claimant's reasons for choosing to abandon his complaints of indirect discrimination at that time. No reasons were provided in the letter of 1 March 2019. The timeline might suggest that the claimant had taken heed of the costs warning letter, but it would be too simplistic to find that that explained the claimant's decision-making. The claimant sought to distinguish between types of legal complaint, whereas the costs warning letter was much more heavily focused on the age of the underlying factual allegations. The most likely explanation of the claimant's withdrawal at that stage, we find, is that the claimant must have received some advice that the indirect discrimination complaints were inherently risky because of the difficulties in establishing group disadvantage and (in the case of indirect associative discrimination) the uncharted legal territory into which they would have to enter.

65. Weightmans wrote again to the claimant's solicitors on 6 March 2019. By this time, the final hearing was less than a week away. The letter took the form of another costs warning. In fact, Weightmans' letter did not raise any new arguments as to why the surviving parts of the claim were likely to fail. Rather, the letter criticised the claimant for having persisted with the indirect discrimination complaints for as long as he did, set out the costs that had been thrown away in defending those complaints, and offered not to apply for a costs order if the claimant were to withdraw his claim in its entirety. In other words, it incentivised the claimant to throw in the towel in order to avoid the financial consequences of his past conduct of the litigation.

66. The same day, the claimant met with his solicitors and his counsel, Mr Bheemar. The meeting lasted all day. The claimant has waived privilege in his solicitors' attendance note of that meeting.

67. The claimant and his legal team discussed the AJ Shifts allegation. It was agreed that they should seek specific disclosure of information about Constable AJ's shifts. This indicates to us that the claimant and Mr Bheemar both thought that the AJ Shifts allegation had merit, but that further disclosure was needed before the facts could be proved. In our view, it is likely that the assessment of prospects of the AJ Shift allegation was broadly based on the evidence in the claimant's recent witness statement.

68. The conference moved on to the other parts of the claim. It appears from the attendance note that Mr Bheemar put the onus on the claimant to persuade him that particular allegations had sufficient strength to go forward to the final hearing. During the course of that discussion, the claimant decided to withdraw a significant further batch of allegations, which were recorded in the attendance note. We infer that remaining complaints were believed by the claimant and Mr Bheemar to have reasonable prospects of success.

69. The withdrawal decision was communicated to the tribunal on 7 March 2019. The withdrawn complaints were:

    69.1. All the complaints of direct discrimination because of association with a disabled person;

    69.2. One complaint of direct sex discrimination;

    69.3. Three complaints of harassment (one of which was later restored with the respondent's consent); and

    69.4. One complaint of victimisation.

70. The effect of this letter was that the CID allegation, the MIT allegation and the Fixed Shifts for Women allegation were completely withdrawn. The AJ Shifts allegation remained live. So, it appears, did the AOT allegation, at least in part. The apparently-surviving part of the AJ Shifts allegation was the complaint that the disparity amounted to direct sex discrimination.

71. The parties continued to prepare for the final hearing. As part of his preparation, Mr Bheemar prepared a comparison table in support of the AJ Shifts allegation. The table purported to show that the claimant's shifts had been changed considerably more often than Constable AJ's shifts. The claimant was given a copy of this table in advance of the hearing, but did not fully understand it.

72. The final hearing began on 11 March 2019. At an early stage in the hearing, the comparison table was placed before us and we gave it the label "C2".

73. For various reasons it was not until the third day of the hearing that the claimant gave oral evidence. That morning the claimant faced questions about the C2 table. Our subsequent written reasons record what we made of his answers:

> "33.1…Another example of the unreliability of the claimant's recollection was vividly brought home to us on the first morning of his evidence. His comparison table at Cpurported to show a stark difference in the number of shift changes that the claimant had been given, compared to certain female officers. A couple of hours of patient questioning by Mr Tinkler quietly demonstrated that the claimant's figures in this table were wholly misconceived. When computing his own shift changes he included those that had been given to him at his own request and others that had been made to accommodate days of leave. This mistake had not been made for the female comparators."

74. The day after the claimant had given this evidence, Mr Bheemar informed us that the AJ Shifts allegation was withdrawn.

75. By the time the parties had completed their closing submissions, there were eight complaints left for us to determine. Three of these were In-Work allegations, with the remainder being Sick Leave allegations.

76. During his closing submissions, Mr Bheemar conceded that the remaining In-Work allegations were not part of the same state of affairs as the Sick Leave allegations.

77. It will be remembered that the final hearing had been given a time allocation of 15 days. As it turned out, the evidence and submissions were concluded in 9 days. We have already paid tribute to both counsel's contribution to that saving of time, in particular by focusing their attention on the issues in dispute. One of the ways in which the issues were narrowed was by the withdrawal of so much of the claim.

78. In a reserved judgment sent to the parties on 10 June 2019, the tribunal found that the respondent had harassed the claimant on 26 October 2017.

79. The remaining Sick Leave allegations were dismissed on their merits.

80. The three surviving In-Work allegations were dismissed on the ground that they had been presented after the expiry of the statutory time limit. As our reasons recorded, we took into account the fact that the claimant had good reasons for large periods of the delay in presenting his claim. In particular, the claimant

faced the uncertainty of a major restructure. His attempts at obtaining information from the respondent were frustrated for several months through no fault of his own. For over a year, the claimant was in a state of poor mental health, though we also found that this did not sufficiently explain why the claimant had not presented his claim earlier in 2017. The reason why we ultimately refused to extend the time limit was because, having heard all the evidence, and having attempted to find the facts, we found that particular factual disputes were too difficult to determine because of the passage of time.

81. All these findings were unanimous.

82. By a majority, the tribunal found that the respondent had victimised the claimant. That decision was subsequently reversed on appeal. Giving the judgment of the Employment Appeal Tribunal (EAT), His Honour Judge Auerbach concluded that, on the basis of the tribunal's unanimous findings as a whole, the majority could not properly have found that the claimant had been victimised.

83. Our reserved judgment was accompanied by written reasons. These reasons recorded numerous findings of fact about the involvement of CI Garvey-Jones. The findings largely relate to her interaction with the claimant during his sick leave. This was in order to determine the Sick Leave allegations.

84. In the meantime, Mr Tinkler's chambers submitted a fee note on his behalf. The total fee for the final hearing was £17,500.00.

85. On 10 May 2021, the tribunal assessed the claimant's remedy for the single upheld allegation of harassment. The claimant was awarded £10,000.00 together with interest of £2,080.00. We do not know whether or not the claimant has yet been paid that sum.

Relevant law

86. Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides, relevantly:

> **"76.**—(1) A Tribunal may make a costs order…, and shall consider whether to do so, where it considers that—
>
> (a) a party… has acted … unreasonably in either the bringing of the proceedings (or part) or in the way that the proceedings (or part) have been conducted; [or]
>
> (b) any claim… had no reasonable prospect of success.
>
> …"

87. Rule 84 provides, so far as is relevant:

> **"84.** In deciding whether to make a costs… order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay."

88. A tribunal faced with an application for costs must decide, first, whether the power to award costs under rule 76 has been triggered and, second, whether in its discretion it should make a costs order and, if so, in what amount.

89. In deciding whether unreasonable conduct should result in an award of costs, the tribunal should have regard to the "nature", "gravity" and "effect" of the conduct. There is no need for rigid analysis under the separate heading of each of those

three words. 'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had': *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, [2012] IRLR 78.

Grounds on which a costs order is sought

90. The costs application is brought on a number of different grounds. They are summarised in paragraph 25 of the costs application. That paragraph reads:

> "25. The Respondent contends that Claimant has acted unreasonably in the bringing of the proceedings and/ or in the way that the proceedings have been conducted. The Respondent further contends that the withdrawn/ unsuccessful Claimant's claims had no reasonable prospects of success. In short, the Respondent avers that the Claimant unreasonably advanced claims which he knew or ought to have known were out of time and/ or misconceived in fact or law and/ or had no reasonable prospects of success. The Claimant acted unreasonably by significantly enlarging his claim in the Amended Claim only to abandon the majority of the claims shortly prior to, and during, the final hearing."

91. Having read the detail of the costs application and heard Mr Tinkler's helpful submissions, we are able to break that paragraph down into a number of discrete and more refined grounds:

91.1. None of the In-Work allegations had any reasonable prospect of success, because they were presented long after the expiry of the statutory time limit. Moreover, it was unreasonable conduct to pursue them.

91.2. The older the allegation in the Details of Claim, the stronger that argument.

91.3. The Details of Claim expanded the claim from the original Particulars of Claim. This was unreasonable conduct of the proceedings.

91.4. It was unreasonable conduct to pursue the AJ Shifts allegation on the basis of data that obviously did not support the claimant's case.

91.5. The victimisation complaints (including those on which the tribunal adjudicated) had no reasonable prospect of success.

91.6. It was unreasonable of the claimant to persist with a large number of complaints, only to withdraw them at a late stage without explanation.

91.7. It was unreasonable conduct of the claimant to proceed with the parts of the claim which had been the subject of a clear costs warning.

Conclusions – does the tribunal have power to award costs?

92. We address each of the respondent's grounds in turn.

<u>The In-Work allegations as a whole – time limit</u>

93. The respondent's starting point is that all the In-Work allegations were doomed to fail because of the claimant's delay in presenting the claim. The hopeless complaints, according to the respondent, included the three In-Work allegations which we ultimately determined at the final hearing.

94. In order for the respondent's argument to succeed, the respondent must establish:

94.1. That there was no reasonable prospect of any of the In-Work allegations being found to have been part of an act extending over a period which encompassed the Sick Leave allegations; and

94.2. That there was no reasonable prospect of the claimant persuading us that it would be just and equitable to extend the time limit.

In-Work allegations not part of the same period as Sick Leave allegations

95. In our view, Mr Bheemar was right to concede that the In-Work allegations were not part of a continuing state of affairs that lasted beyond the start of the claimant's sick leave. Had he chosen to argue the point, there would have been no reasonable prospect of it succeeding.

Just and equitable extension

96. That finding does not of itself open the door to a costs order. The claimant still had an important argument in reserve. It was an argument that the claimant's solicitors had made plain that they would rely on in their response to the respondent's costs warning letter. If there was a reasonable chance of the claimant obtaining an extension of time for the In-Work allegations, the time limit would not, by itself, have been obviously fatal to their chances of success.

97. In our view, the claimant had reasonable prospects of successfully persuading the tribunal to extend the time limit for at least some of the In-Work allegations. We ultimately found that it was not just and equitable to extend the time limit for any of them. But, as our written reasons recorded, there were respectable arguments on both sides. The claimant had a good reason for much of the delay. It was not until we heard all the evidence that we identified particular, and quite narrow, disputes where the passage of time had detrimentally affected our ability to find the facts.

<u>Particular In-Work allegations – time limit</u>

98. The respondent's next ground bites onto the oldest of the In-Work allegations.

CID allegation and MIT allegation

99. We start with the CID allegation and the MIT allegation.

100. On any view, these complaints were very old and stale. The events complained of happened over 10 years before the claim was presented.

101. The claimant was never realistically going to establish that the CID allegation and the MIT allegation were part of the same state of affairs as the later In-Work allegations. It might be said that the underlying discrimination was capable of coming within the Fixed Shifts for Women allegation. But, even allowing for that possibility, the CID allegation and the MIT allegation involved quite separate departments and separate decision-makers from all the other complaints about fixed working hours. Importantly, in our view, there was a gap of three years from 2007 to 2010 during which nothing in particular was alleged to have happened.

102. We now have to assess the prospects of the claimant successfully arguing that the time limit should be extended. Our assessment of prospects is based on the information that the claimant knew or ought to have known from the time of presentation of the claim until the date that these allegations were withdrawn. In

our view there was no reasonable prospect of such an argument succeeding. It would only be in an extreme case that a tribunal would ever think of extending a time limit by ten years. The effect of such a long delay on witnesses' memories would be obvious. So would the chilling effect on individual managers' careers of having to face historic claims.

103. We also think that it was unreasonable of the claimant to pursue the CID allegation and MIT allegation. We take into account here that the claimant was in poor mental health and was heavily dependent on advice from his legal representatives. He had reasonable grounds for thinking that disclosure was being withheld in relation to parts of his claim. We consider these factors further when it comes to our discretion to award costs. But even allowing for those factors, the claimant and his representatives should both have realised that there was at best a negligible chance of the tribunal having jurisdiction to consider these two complaints. He did not need further disclosure from the respondent to tell him that. There was no suggestion in the correspondence that further disclosure would help to establish whether or not the CID allegation or the MIT allegation were part of a continuing act. If it was not already clear by the time of the preliminary hearing before EJ Ryan, it should have been crystal clear by the time that hearing finished.

104. We have also taken into account that it would have been reasonable for the claimant to have included the CID allegation and the MIT allegation as part of the background evidence in any event. This is the argument that found favour with EJ Porter. But that does not mean that it was reasonable to formulate these two allegations as complaints requiring adjudication. If an employer is faced with background evidence that is over 10 years old, what they usually do is ignore it, or deal with it in a proportionately cursory way. The inclusion of the CID allegation and the MIT allegation in the claim meant that the respondent had to devote much more time and cost to dealing with them.

AOT allegation and AJ Shifts allegation

105. The next oldest complaints are the AOT allegation and the AJ Shifts allegation. They were similar to each other and were alleged to have spanned the period 2010 to 2016.

106. We first consider whether or not the claimant should have realised he needed an extension of time. Realistically, the best that the claimant could have reasonably hoped for was to argue that the AOT allegation and the AJ Shifts allegation were part of an act extending over a period which ended in the summer of 2016. We have considered whether or not there was a reasonable prospect of the claimant establishing a continuing state of affairs which lasted until 22 February 2017. Our consideration was informed by the fact that the alleged harassment on 22 February 2017 was related to shift changes. Nevertheless, we have concluded that there was no reasonable chance of the tribunal finding a continuing act that lasted that long. During the summer of 2016, the Force was restructured, so that shift changes were no longer the responsibility of the AOT and were instead directed by the Force Resourcing Unit. Sergeants Laycock and Williams were new to the claimant's management and had no responsibility for his shifts prior to 2017. They were based at Huyton Police station, where the claimant had not previously worked. Their actions were quite discrete and could not reasonably have been regarded as part of the same state of affairs as the actions of the AOT.

107. This meant that the claimant was always going to need an extension of time. Although it is close to the borderline, our finding is that the claimant had a reasonable prospect of getting one. Put another way, there was a reasonable prospect of the tribunal finding that period between summer 2016 and early 2018 was a just and equitable period for presenting the claim. This is essentially for the same reasons as we have given in relation to the In-Work allegations generally. It is legitimate to distinguish between the AOT allegation (on the one hand) and the CID allegation and the MIT allegation (on the other). A delay of 18 months or so is a different order of magnitude from 10 years.

Fixed Shifts for Women allegation and remaining In-Work allegations

108. We can deal with the remaining In-Work allegations relatively briefly. The Fixed Shifts for Women allegation encompassed factual complaints about the claimant's PER50 requests. Arguably, the claimant's PER50 history during 2015 and 2016 was all part of the same discriminatory state of affairs. The latest that state of affairs could reasonably have been thought to extend was November 2016 when the claimant's own PER50 request for fixed shifts was granted. Of course, that still left the claimant needing a substantial extension of the time limit. For the reasons we have given, there was a reasonable prospect of that extension being granted on the ground that it was just and equitable.

Expansion of the claim

109. It is always undesirable to make multiple allegations in a discrimination claim when fewer allegations will do. As Underhill LJ observed in *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439, overcomplication is a real problem in the discrimination field and Occam's Razor should be applied wherever possible.

110. What we have to decide, against that background, is whether the claimant or Mr Flood conducted the proceedings unreasonably by expanding the claim beyond what had previously been alleged in the Particulars of Claim.

111. We find that, for the most part, they did not act unreasonably. At paragraph 25 we have already found that the Details of Claim did not represent as challenging an expansion of the claim as the respondent suggests. The underlying allegations of fact were broadly the same. There was some duplicity of legal complaints based on the same facts, but in general, the Details of Claim confined themselves to one or two forms of prohibited conduct for each factual allegation. What the Details of Claim mainly did was to make clear which legal complaints related to which factual allegations. The result was an unwieldy piece of litigation, but that was not Mr Flood's fault. The claim had been complex all along. The relative brevity of the Particulars of Claim, compared to the Details of Claim, had been originally been achieved at the expense of leaving the respondent guessing about how the claimant put his case.

112. We have not forgotten that the Details of Claim did introduce complaints of indirect discrimination by association where none had previously existed. This was essentially a re-labelling exercise. The factual allegations were the same as in the original Particulars of Claim. Underlying the complaints was the assertion that the claimant needed particular shift patterns in order to accommodate his caring responsibilities for his disabled parents. That assertion had been made all along. We have considered whether the recasting of the claim in this way was unreasonable. We do not go that far. It is telling, in our view, that the respondent had the opportunity to argue at a preliminary hearing that four of the

indirect discrimination complaints to be struck out on a pure point of law. The respondent did not take advantage of that opportunity.

113. Of course, the exercise of matching specific complaints to existing factual allegations may still have been unreasonable if those specific complaints had no reasonable prospect of success, for example, because they were obviously time-barred. We have already considered that argument under the heading of individual complaints.

AJ Shifts allegation – reliance on the comparison table

114. The claimant's evidence in support of the AJ Shifts allegation essentially took two forms. First was his day-to-day observations of Constable AJ's lack of involvement in operations. Second was his comparison of his shift data with Constable AJ's shift data. Part of the data analysis was set out in the claimant's witness statement. Mr Bheemar added what appeared to be a corresponding analysis for Constable AJ.

115. We found that the comparison was misconceived. Before we had a chance to assess its impact on the AJ Shifts allegation as a whole, that allegation had been withdrawn. We are not surprised at the claimant's decision to abandon it. He could, of course, still have fallen back on his observation evidence of when Constable AJ had and had not been present. But once it was obvious that the data analysis had been dismantled, the claimant would doubtless have appreciated that the reliability of his observation evidence would be seriously questioned.

116. There is a reason why we have deconstructed the withdrawal of the AJ Shifts allegation in this way. It is to explain that the thing that was fundamentally flawed was the data comparison, but not necessarily the AJ Shifts allegation itself. Constable AJ may, in fact, have been absent from all the usual activities for which there would be an imposed shift change. That might have been enough to sustain the complaint. It was just that the unsustainable data analysis effectively scuppered the claimant's chances of having that observation evidence believed.

117. It was regrettable that such a flawed data analysis was put before us. Between them, the claimant and his representative acted unreasonably in putting it forward. That is not the end of the matter, however. Now that the claimant has waived privilege, we have been able to make findings about how the comparison table came to be before us. Those findings appear to us to be relevant when it comes to the exercise of our discretion.

Victimisation - prospects

118. The respondent has not satisfied us that the victimisation complaint had no reasonable prospect of success.

119. The respondent's argument appears to be based on the conclusion of the EAT that there was only one possible outcome. But that conclusion was based on the tribunal's findings of fact. The majority's findings were held to be impermissible, but that was, in part, because they could not stand up against the findings of fact on which the tribunal had been unanimous. The parties could not know what the tribunal's unanimous findings were going to be until all the evidence had been given at the final hearing.

Late withdrawal

120. It is not generally unreasonable to withdraw part of a claim. Better that, from the respondent's point of view, than for a claimant to pursue it to a hearing.

121. A claimant who withdraws a claim is not generally expected to explain why they are withdrawing it. More often than not, the employer will not much care what the explanation is: the most important thing from the employer's point of view is that they are no longer exposed to the claim.

122. The respondent's real criticism here is not that the claimant withdrew the 14 or so complaints, but that he kept going with them for as long as he did. The significance of the withdrawal is in the conclusions that the tribunal might draw from the claimant's ultimate decision not to pursue them. One possible conclusion might be that the withdrawn part of the claim was always weak. This conclusion is more easily reached where the claimant has not given any explanation for the withdrawal. But even then, the conclusion is by no means inescapable. Often it will be obvious what has prompted a claimant to withdraw and the claimant does not need to spell it out. That reason may, clearly, be something completely unconnected to the merits of the complaints. Examples include a settlement, or a party being admitted to hospital.

123. In this case, there were three occasions when parts of the claim were withdrawn:

123.1. On 1 March 2019;

123.2. On 7 March 2019; and

123.3. On Day 4 of the hearing.

Withdrawal on 1 March 2019

124. We have already recorded at paragraph 64 our finding as to why the claimant withdrew the complaints of indirect discrimination on 1 March 2019. It is an indicator that the prospects of success of those complaints were always doubtful. We have considered whether or not to go further and find that they never had a reasonable prospect of success. Our conclusion is that the only complaints of indirect discrimination that were as hopeless as that were those which were based on obviously-stale facts. In other words, it is another route to the conclusion that the CID allegation and the MIT allegation had no reasonable prospect of success.

125. It is possible that this finding might be held to be too generous to the claimant. As Mr Tinkler reminds us, when assessing prospects of success of a particular complaint, we must consider all the litigation risks in relation to that complaint. These would include the risk of a complaint being found to be out of time, but also the risk of it being found to be unsound in law. We have borne this submission especially in mind when considering the AJ Shifts allegation and the AOT allegation, so far as they were pursued as complaints of indirect discrimination. If the claimant had just about reasonable prospects of both overcoming the statutory time limit and proving the facts on which those complaints were based, the complaints might still lack a reasonable prospect of success overall when one factors in the complicated legal arguments. In other words, the law might tip the balance. To anticipate a possible ruling that we should have found that the AJ Shifts allegation and AOT allegation lacked

reasonable prospects as complaints of indirect discrimination, we have gone on to address our discretion to award costs in this regard.

Withdrawal on 7 March 2019

126. It is plain why the claimant withdrew so many complaints on 7 March 2019. He had been advised to do so by Mr Bheemar in conference. This was the first time that the claimant had consulted Mr Bheemar since the respondent had disclosed its documents in late 2018 and early 2019. Where his complaints were not obviously hopeless, it was reasonable of the claimant to wait until his conference with counsel before deciding whether or not to withdraw.

127. We do not think that the fact that the claimant withdrew so many complaints on 7 March 2019 means that all of those complaints lacked a reasonable prospect of success, or that the claimant had acted unreasonably in pursuing them up to that point.

128. The exceptions are the CID allegation and the MIT allegation which, by 7 March 2019, were still being pursued as complaints of direct discrimination. These allegations were so obviously out of time that the claimant should have withdrawn them long before his conference with Mr Bheemar. Basic advice from his solicitors should have been sufficient to enable him to make that decision.

Withdrawal on Day 4

129. We have already found the reason why the claimant withdrew the AJ Shifts allegation during the final hearing. The comparison table had been demonstrated to be unfit for purpose. The fact that the claimant promptly withdrew this part of the claim at that stage does not in our view add to our analysis of whether or not it was reasonable to pursue the AJ Shifts allegation up to that point.

Failure to heed the costs warning letter

130. The claimant's initial reaction to the costs warning letter of 18 January 2019 was to attempt to argue against it, rather than to withdraw any part of the claim. When the complaints of indirect discrimination were withdrawn on 1 March 2019, it was not for the reasons that the costs warning letter had pointed out.

131. We have to consider whether the claimant acted unreasonably or not by taking that stance.

132. In our view, the costs warning letter should have served as an additional red flag to the claimant that particular complaints were likely to be dismissed due to the statutory time limit. These were the CID allegation and the MIT allegation.

133. We do not find that the claimant acted unreasonably in persisting with the remaining In-Work allegations. The costs warning letter sought to persuade the claimant that all of the In-Work allegations would be defeated by the statutory time limit, but the claimant's solicitors engaged with that argument. They made the point, which was reasonable for some of the In-Work allegations, that the claimant had good arguments for obtaining an extension of time.

Conclusions – discretion to award costs

134. Before considering how to exercise our discretion, we thought it helpful to recap our findings about how our power to award costs arose:

134.1. The MIT allegation and CID allegation had no reasonable prospect of success and the claimant acted unreasonably in pursuing them from the time of the preliminary hearing before EJ Ryan; and

134.2. It was unreasonable of the claimant and Mr Bheemar between them to rely on the comparison table for the AJ Shifts allegation.

135. We also indicated our intention to discuss how we would exercise our discretion in the event that it is held that we had power to award costs in respect of the pursuit of the AOT allegation and the AJ Shifts allegation.

Should we award costs in respect of the AJ Shifts allegation?

136. We start with the AJ Shifts allegation. We have considered the case in the round and decided not to award costs in relation to this complaint.

137. Our first reason is that there was evidence in support of the AJ Shifts allegation that was independent of the unreasonably-introduced comparison table. The claimant's witness statement was clear as to his first-hand experience.

138. Our second reason is rooted in our findings about what happened during the claimant's conference with Mr Bheemar. Both the claimant and Mr Bheemar formed the view that this part of the claim had merit. This was obviously not an opinion that Mr Bheemar reached lightly. The record of the conference, and the withdrawal of so many complaints, shows that Mr Bheemar maintained a healthy scepticism throughout. He tested the prospects of success of each and every part of the claim.

139. Linked to this point was the conclusion that the claimant and Mr Bheemar jointly reached about the necessity for further disclosure from the respondent. The claimant already believed, on reasonable grounds, that the respondent was withholding relevant information from him (see our findings at paragraph 62). We are satisfied that Mr Bheemar also reached the considered opinion that further information was necessary.

140. We also find it relevant that there appears to have been a genuine misunderstanding between the claimant and Mr Bheemar in relation to the comparison table. The claimant did not prepare the comparison table himself and did not fully understand it. Mr Bheemar prepared the table. We have no basis for thinking that Mr Bheemar had any intention to mislead the tribunal. It is regrettable that it was not properly explained to the claimant, but we find that the claimant had no intention to deceive us.

141. It is certain that the unreasonable introduction of the comparison table must have caused Mr Tinkler to have to spend additional time preparing his cross-examination and asking questions. But, taking the case in the round, we do not think it likely that the respondent was put to any extra cost. Mr Tinkler was briefed for a 15-day final hearing. Mr Tinkler's extra preparation time would, we are sure, have been absorbed into his overall fee for that hearing, which came to £17,500.00. Partly as a result of the claimant withdrawing so much of his claim, the evidence and submissions were concluded in 9 days. Had the comparison table not been introduced, the final hearing might have been shorter still, but not by much. Mr Tinkler would still have had to ask the claimant about the AJ Shifts allegation, albeit he would have been aiming at a different target. We do not think that the respondent would have paid him any less than was actually paid.

Indirect discrimination – AJ Shifts allegation and AOT allegation – should we award costs?

142. Another aspect of the AJ Shifts allegation which has come in for criticism is its formulation as a complaint of indirect discrimination by association with a disabled person. Linked to this point is the indirect discrimination complaint underpinned by the AOT allegation. The respondent's contention was that these complaints lacked prospects and should have been withdrawn long before 1 March 2019 (or never introduced in the first place).

143. Although we disagreed with the respondent on this point, we record here how we would have exercised our discretion (see our paragraphs 125 and 135).

144. Our decision would have been not to make a costs order in respect of these two allegations. In forming that view, we imagined how the course of the litigation might have changed had the AOT allegation and AJ Shifts allegation only ever been pursued as complaints of direct discrimination. In this hypothetical scenario, we considered that the respondent's costs would probably have been very similar, if not identical, to the amount they actually incurred. There would still have had to have been evidence and analysis of the claimant's shift changes and how they came about. The witness statements would probably not have changed significantly. Nor would the length of the cross-examination time or the amount of Mr Tinkler's brief fee.

Should we award costs in respect of the CID allegation and MIT allegation?

145. Finally we address the CID allegation and the MIT allegation. Having looked at the whole picture, our decision is that we should make a costs order in respect of those two allegations.

146. We have looked again at the claimant's arguments as to why costs should not be awarded. We have already rejected the notion that he needed further disclosure to deal with the time limit difficulty. His health and his dependence on legal advice all provide relevant context. They do not, however, mean that we should avoid making a costs order altogether. The claimant's mental health had recovered from crisis. He was able to take many steps in the litigation and to progress his SARs. We were not prepared to accept that he was advised that each and every allegation had a greater than 50% chance of success.

147. The way in which we have factored in the claimant's health and his dependence on legal advice is in our approach to assessing the amount of costs.

148. Our approach, which would otherwise have been more generous to the respondent, was to confine the costs order to those costs that we were sure had been specifically incurred in defending the CID allegation and the MIT allegation. We gave the benefit of the doubt to the claimant.

The amount of costs

149. Here is how we calculated the amount of costs, taking that approach:

Work done	**Para**	**Hours**	**Rate (£)**	**Cost (£)**
Drafting amended response	45	2	135.00	270.00

Case conference on costs warning letter	53	0.2	135.00	27.00
Drafting costs warning letter	53	0.4	135.00	54.00
Barr witness statement	54	1.8	135.00	243.00
Holland witness statement	55	1.2	135.00	162.00
Total				**756.00**

150. We have rounded the total down from £756.00 to £750.00.

Ability to pay

151. If he has not yet been paid his compensation for discrimination, it will effectively provide a ring-fenced fund from which the claimant could afford to pay a costs order.

152. If he has already been paid this amount and spent it, we would still regard the sum as being relevant to his ability to pay, because the claimant has known since early 2019 that the respondent would apply for a substantial costs order against him. He should have put some of the money aside.

Outcome

153. We therefore make a costs order in the sum of £750.00.

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Employment Judge Horne

Date: 30 June 2022

SENT TO THE PARTIES ON

Date: 4 July 2022

FOR THE TRIBUNAL OFFICE