Neutral Citation Number: [2022] EAT 97

Case No: EA-2020-000623-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 July 2022

Before :

THE HONOURABLE MR JUSTICE GRIFFITHS

- -

Between :

1)	**FDA**	
2)	**ANN CRIGHTON**	
3)	**STUART SAMPSON**	
4)	**PAULA O'TOOLE**	
5)	**PAUL WHITEMAN**	
6)	**SUE GETHIN**	**Appellants**

- and –

MS U BHARDWAJ **Respondent**

- -
- -

Mr M Sethi QC (instructed by Slater Gordon) for the **Appellant**
Mr H Southey QC (instructed on a direct access basis) for the **Respondent**

FULL HEARING
RULE 3(10) APPLICATION
RULE 6 (16) APPLICATION

Hearing date: 15 March 2022

- -

JUDGMENT

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SUMMARY

PRACTICE AND PROCEDURE

Appeals and a cross appeal against orders for costs both made and not made were dismissed.

The citation of authority in applications for costs must be strictly constrained to those which genuinely establish a point of principle not apparent from the words of the rules themselves. Costs awards do not operate by precedent. They are fact specific and to be determined as summarily as possible. The expectation must be that nothing more than the words of the relevant rule require addressing before the ET exercises its discretion on the particular facts of the case.

When the threshold requirements for an order for costs are met under rule 76(1)(a) and/or (b) of the 2013 ET rules, it by no means follows that, because it may make a costs order, it will proceed to do so. It has a discretion. The discretion is very broad and it would require a clear error of principle to justify an appeal, whether for or against an order for costs.

In a case involving multiple issues, it will often be unrealistic to hive off some issues from others when assessing whether costs should be awarded and, if so, in what amount. Most cases stand or fall as a whole, even though in many cases there will be some issues on which the losing party is successful or partly successful. Issue based costs orders are on the whole to be avoided.

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THE HONOURABLE MR JUSTICE GRIFFITHS:

1. For over 13 years, the claimant Ms Bhardwaj has been litigating against her former trade union (FDA) and five officers of the FDA. She issued two ET1s, the first on 8 December 2008 and the second on 12 June 2009. After 25 days of hearing, Employment Judge (EJ) Tayler rejected all her claims on 17 September 2010 ("the Tayler Decision"). She appealed to the EAT and lost. She appealed further to the Court of Appeal and lost. She petitioned for permission to appeal to the Supreme Court and was refused.

2. Until her appeals had been exhausted, an application by the respondents (FDA and the five named individual officers) for costs against her, which had been made on 19 October 2010, was held in suspense. After her appeals were exhausted, that application for costs was revived on 1 March 2018 and was transferred (on Ms Bhardwaj's application) to a different region. On 18 July 2020 it was decided by EJ Heap after two reading days, four hearing days, and one day in chambers ("the Heap Decision"). The present appeal is brought against the Heap Decision on costs.

3. In this way, costs incurred in 2009-10 are still being litigated in 2022.

4. The Heap Decision on costs is 51 pages long. The previous decision on the merits of the claims in the case (the Tayler Decision) is 89 pages long. Some people might have thought that, after such thorough decisions, and so many years, including multiple appeals, none of them so far successful, the case might be regarded as exhausted. Those people would be wrong. It is an unhappy observation from experience that, the greater the energy and resources that a case has consumed, the greater the energy and resources that tend to be devoted to it as it carries on. It is as if litigation is a chain reaction. As the stakes continue to increase, the parties double and re-double. In this appeal on costs, no point has been left alone, by either side.

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5. The Heap Decision was as follows:

   i) EJ Heap refused an application of the FDA and the five individual respondents ("the FDA respondents") for costs arising from the proceedings before EJ Tayler ("The Tayler Costs").

   ii) EJ Heap granted an application of the FDA respondents for costs thrown away in respect of hearings before EJ Heap on 4 and 5 February 2020 and by an adjournment on 5 February 2020 ("The Privilege Costs").

   iii) EJ Heap refused an application of the FDA respondents for the costs of dealing with Ms Bhardwaj's recusal application ("The Recusal Costs").

   iv) EJ Heap refused an application of the FDA respondents for costs arising from alleged breach of orders for disclosure ("The Disclosure Costs").

6. Thus, the results were mixed. Three of the applications by the FDA respondents for costs were refused, and one was granted.

7. Both sides have appealed. The FDA respondents appeal the refusal of their application for the Tayler Costs and the refusal of their application for the Recusal Costs. Ms Bhardwaj appeals the award of the Privilege Costs against her.

8. The FDA respondents also appeal a point dealt with and rejected in the body of the Heap Decision (at paras 163-165) as "Item 46". This was an application by the FDA respondents for the claimant to pay them their costs of Ms Bhardwaj's application to EJ Heap for an extension of time to advance an application of her own for costs ("the Extension of Time Costs"). EJ Heap had refused Ms Bhardwaj this extension of time after a hearing on 28 June 2019 (at which the FDA represented by leading counsel and Ms Bhardwaj was in person) in a reserved decision dated 19 July 2019. It was 10 pages long. It does not appear that the FDA

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respondents applied for those costs at the time. However, it seems that they added this as "Item 46" in a list of 46 items upon which EJ Heap was asked to rule in support of their application or applications for costs against Ms Bhardwaj.

9. In addition to those 46 points (which are clearly and systematically addressed in paras 66-166 on pp 25-41 of the Heap Decision), EJ Heap was asked by the FDA respondents to address a further four issues, which she did at paras 167-172 on pp 41-43 of the Heap Decision. This made a total of 50 points taken by the FDA respondents on costs.

10. The FDA respondents put forward ten grounds of appeal. Nine of these were allowed to proceed under rule 3(7) of the **EAT Rules** by Ellenbogen J and one was not. The FDA respondents renew their application on the single rejected ground, under rule 3(10).

11. Ms Bhardwaj's cross appeal against the award of the Privilege Costs was examined by Choudhury J, President of the EAT, under rule 3(7) and not allowed to proceed. Ms Bhardwaj renews her application under rule 3(10) notwithstanding this.

12. Therefore, every point raised on appeal, regardless of whether earlier judges have found them to be arguable, is pursued before me, by both sides.

The Tayler Decision

13. Ms Bhardwaj's claims of unlawful race discrimination, victimisation and of unjustifiable discipline by an independent trade union were considered by an ET sitting at London Central consisting of EJ Tayler and two members.

14. There were two reading days, 19 hearing days (including a day for consideration of written submissions) and four days of deliberation, making the total of 25 days. All parties were represented by counsel. Ms Bhardwaj gave evidence and called four witnesses (three who were Crown Prosecutors and also members of the FDA, and a Policy Adviser in the Equality

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and Diversity Unit of the CPS) in support of her case. The FDA respondents called 12 witnesses including themselves.

15. The Tayler Decision rejected all Ms Bhardwaj's claims.

The Heap Decision

16. When the appeals against the Tayler Decision had run their course, the question of costs eventually came before EJ Heap, sitting alone, for determination, which led to the Heap Decision.

The Privilege Costs

17. The costs hearing was listed for 4 days between 3-6 February 2020, the first of those days being a reading day.

18. On the morning of the reading day (3 February), Ms Bhardwaj raised a new issue, filed a new witness statement and provided new disclosure on that issue (which argued that Ms Bhardwaj had relied on specific legal advice). EJ Heap considered that this new material raised a question about whether privilege had been waived, and the parties were asked to deal with that on 4 February. Ms Bhardwaj (who is a barrister) on 4 February maintained that she had not waived privilege but was not ready to deal with that issue as her counsel was not due to attend until 5 February. The hearing on 4 February was adjourned to 5 February accordingly.

19. At the hearing on 5 February, Ms Bhardwaj's counsel conceded that privilege had been waived and orders for disclosure of legal advice were made against her.

20. As a result, the whole of 4-5 February 2020 was taken up with the privilege issues and orders; and the costs applications originally listed for 3-6 February could not be dealt with at all. They were re-listed on 22-24 April 2020. This is the background to the order that Ms Bhardwaj

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should pay the Privilege Costs (para 5.ii) above). The reasons for that order are in paras 193-204 (pp 47-49) of the Heap Decision. Ms Bhardwaj's cross appeal challenges that order.

The Recusal Costs

21. Shortly before the hearing was due to resume on 22 April 2020, Ms Bhardwaj applied for EJ Heap to recuse herself on the grounds of bias. The application was based on EJ Heap's conduct and rulings in February, or on arguments which were already available to Ms Bhardwaj in February, but she did not make it until the afternoon of 16 April 2020. EJ Heap rejected the application and included her full written reasons for doing so in paras 14-29 (pp 4-14) of the Heap Decision.

22. This gave rise to the FDA respondents' unsuccessful application for the Recusal Costs (para 5.iii) above). EJ Heap decided that, while the application was refused, she was not satisfied that it amounted to unreasonable conduct for Ms Bhardwaj to have made it. The lateness of the application had made no difference to the ability of the resumed hearing to proceed. The application itself was not unreasonable, for reasons stated in the Heap Decision (in paras 206-210) as follows:-

> **"206. …it is abundantly clear that the Claimant was, and continues to be even a decade later, very severely impacted by her perception that she did not receive a fair hearing before the Taylor Tribunal. Given the invidious position in which she found herself with disclosure of the appointments of the relevant Respondents coming only in the midst of the hearing, I have a not inconsiderable degree of sympathy for her position.**
>
> **207. Those events have infected the proceedings since and I have no doubt whatsoever that the Claimant genuinely believes that she can never receive a fair hearing within the Tribunal system. Whilst I must respectfully disagree with her perception, it is nevertheless one which I accept that she genuinely holds.**
>
> **208. Every decision made adverse to the wishes of the Claimant is seen by her as evidence of bias. The trigger for the Claimant's recusal application was the decision taken by me at the Preliminary hearing on 8th April 2020 that I would not accede to her position**

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> **that the costs hearing should only proceed by means of CVP if the strict parameters that she believed were necessary were put in place and which deviated considerably from the timetable which had already been agreed by Mr. Southey on her behalf at an earlier hearing.**
>
> **209. Whilst the Claimant's stance given the agreement to the timetable previously appeared to be somewhat irrational, I am alive to the fact that the Claimant sees any failure to agree with her and accede to how she believes that matters should proceed to be evidence of bias.**
>
> **210. With all that in mind, I do not consider it unreasonable conduct that the Claimant made the application given that I am satisfied that she was and is genuinely of the belief that she would not receive a fair hearing. The application of the Respondents for costs on that basis is accordingly refused."**

The Disclosure Costs

23. In a letter to the tribunal on 2 April 2020, the FDA respondents made a further application for costs on the basis that (they argued) Ms Bhardwaj had failed to disclose all legal advice received and was consequently in breach of EJ Heap's order for disclosure of that advice on 5 February 2020.

24. EJ Heap examined the evidence and arguments in support of the application and decided, on the evidence, that there had in fact been no breach of the order for disclosure (Heap Decision para 177, pp 43-44). Hence, the application for disclosure costs failed. This is the only decision on costs made by EJ Heap which is not being appealed and I need say no more about it.

The Tayler Costs

25. The FDA respondents argued before EJ Heap that Ms Bhardwaj's pursuit of each of the grounds of the case she fought and lost before EJ Tayler included unreasonable conduct (such that costs might be awarded under rule 76(1)(a) of the **ET Rules**) or had no reasonable prospect of success (such that costs might be awarded under rule 76(1)(b) of the **ET Rules**).

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26. EJ Heap went through 46 points set out in a table before her which the FDA respondents argued either amounted to unreasonable conduct or had no reasonable prospects of success, or both. She reached the following conclusions:

    i) She rejected the argument of unreasonable conduct and no reasonable prospects of success in relation to Items 1-10, 12-25, 29-33, 35 and 46 inclusive (a total of 31 of the Items).

    ii) Items 36-45 were not about claims (and were not, therefore, said to have no reasonable prospects of success) but were about conduct said to have been unreasonable. EJ Heap examined them and found no unreasonable conduct (a total of 10 Items).

    iii) She found that the claim in Item 11 was "misconceived" such that it had no reasonable prospects of success.

    iv) She dealt with Items 26-28 and 34 in a section headed "Core allegations made in bad faith". She found that each of these Items had no reasonable prospect of success since it was based upon Ms Bhardwaj complaining of a detriment which "came from her very own quite forceful suggestion", and "It cannot reasonably be said to be a detriment for the First Respondent to have done exactly as the Claimant proposed…" (Heap Decision para 58).

27. In addition, EJ Heap considered the further four arguments advanced to her for making costs orders against Ms Bhardwaj.

    i) It was argued that it was unreasonable of Ms Bhardwaj to pursue claims which had already been rejected by "a substantial investigation using external Counsel" (Heap Decision para 167). EJ Heap rejected that, holding that Ms Bhardwaj was nevertheless entitled to have her case considered by an ET.

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ii) Reliance was placed on a costs warning letter from FDA's solicitors dated 14 November 2008. EJ Heap rejected this submission, saying (at para 168 of the Heap Decision):

> **"I do consider that it would have been helpful for the Claimant's solicitors to have engaged in a more meaningful manner with the terms of that letter. However, as I shall come to below, I am satisfied that at all material times the advice that was being given to the Claimant was that she had good prospects of succeeding in her claims. I do not consider that the Claimant's actions in following that advice to have amounted to unreasonable conduct and I remind myself that the letter was not sent directly to the Claimant and there is no evidence that she directed her solicitors not to materially engage."**

iii) It was argued that costs were disproportionate to the value of the claim (which was limited to a claim for injury to feelings) and that the conduct of Ms Bhardwaj's claim was unreasonable for that reason (Heap Decision para 170). EJ Heap examined this argument and rejected it (paras 187-191).

iv) It was argued that there was very little focus against one of the FDA respondents (Paula O'Toole) and that allegations against another of them (Ann Crighton) were not particularised. EJ Heap, however, decided that the claims against these respondents were neither misconceived nor unreasonably pursued.

28. Therefore, of the 50 points taken against Ms Bhardwaj in support of the application for costs, EJ Heap rejected 45 of them as not meeting the requirements for a costs award under rule 76(1) of the **ET Rules**.

29. She found that 5 of them did meet those requirements (Item 11 and the Items grouped together as "Core allegations made in bad faith", namely Items 26-28 and 34).

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30. She also made the following observation about the strength of Ms Bhardwaj's case generally:

> **"I should perhaps observe here that it is clear when reading the Judgment and the conclusions reached it is clear that the claim was not a strong one. However, it was not so hopeless that it would be properly categorised as being without any reasonable prospect of success (with the exception of the core allegation of bad faith and item number eleven above). Nor could it be said to be unreasonably brought or pursued and, particularly, there were elements that troubled the Tribunal as I have already observed; there were conflicting facts that needed to be tested and a full hearing was the only basis upon which those matters could be determined."**

31. EJ Heap then considered whether to exercise her discretion in favour of ordering costs on those aspects which she had found to satisfy the requirements of rule 76(1) of the ET Rules.

32. She decided not to. She found as a fact that Ms Bhardwaj had disclosed the entirety of the advice that she received during the course of the proceedings (para 177 of the Heap Decision) and this confirmed Ms Bhardwaj's case, which EJ Heap accepted, that she had at all times been advised that her claim had good prospects of success and that she relied on this advice when pursuing her claims. Ms Bhardwaj had received advice from a specialist firm of solicitors and from specialist counsel. Their advice assessed Ms Bhardwaj's prospects of success at 65% or better throughout. This positive advice was confirmed after exchange of witness statements (on 19 January and 23 February 2010), again in the course of the hearing (on 26 March 2010) and to Ms Bhardwaj's insurers on 1 July 2010 (before the Tayler hearing resumed after the first 13 days of hearing). It was based, as extracts cited by EJ Heap show, on the relative strength of Ms Bhardwaj's evidence as compared with the evidence from or on behalf of the FDA respondents.

33. Consequently, EJ Heap declined to award costs in respect of any of the 50 points taken by the FDA respondents on costs, including the costs of Item 11 and the Items grouped together as "Core allegations made in bad faith" (Items 26-28 and 34) which she had found to be brought unreasonably and/or with no reasonable prospects of success.

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34. EJ Heap did note that, when Ms Bhardwaj's legal advice was that the prospects of success were 65-70%, this was advice about the claim as a whole, and "regrettably there did not appear to be engagement with the merits of the individual allegations" (Heap Decision para 180).

35. EJ Heap also observed that little thought had been given to the question of proportionality. She expressed regret that comments made by EJ Snelson at a preliminary hearing on 8 September 2009 were not taken more seriously. EJ Snelson had said, at the end of a case management order he made on that date:

> **"Finally, I mentioned proportionality, a concept which the parties to this dispute appear to be overlooking. Justice is not aided by over-elaboration, copious correspondence and constant applications to the Tribunal. The Claimant should consider confining her case to her best points: experience shows that (unless, as alas occasionally happens, the purpose is to put the opposing party to needless trouble and expense by fighting on numerous fronts at the same time) to do otherwise is counter-productive since the weak claims distract attention from the stronger ones. The Respondent should make a virtue of co-operating with the Claimant so far as they can in the preparation of the case for hearing. And all parties should give urgent thought to any means of resolving the case outside the Tribunal, reflecting on the horrific waste of money and energy which a 19-day hearing, the costs of which will massively exceed the sums at stake, will entail."**

Core allegations made in bad faith

36. The Heap Decision addressed the topic of "Core allegations made in bad faith" (which was relevant to her findings on Items 26-28 and 34 that Ms Bhardwaj's conduct had been unreasonable) in paras 55-58.

37. EJ Heap noted that the Tayler Decision made findings "that the core allegations made by the claimant were in bad faith" (para 55), citing particularly paras 500, 502-504, 510 and 512-517 of the Tayler Decision in this respect. She concluded (at para 58):

> **"I accept the position of the Respondent that it is clear that this element of the claim had no reasonable prospect of success given the detriment of which the Claimant complained and upon which**

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> **she underpinned claims to have done a protected act came from her very own quite forceful suggestion. It cannot reasonably be said to be a detriment for the First Respondent to have done exactly as the Claimant proposed. The first strand of the test for costs is therefore made out in respect of this particular matter but I go on below to consider whether to exercise my discretion to make a costs Order."**

38. The Tayler Decision did indeed conclude that certain allegations made by Ms Bhardwaj "were false and made in bad faith" (Tayler Decision para 517, quoted in Heap Decision para 57). It went on to explain:

> **"The Claimant had on two occasions specifically suggested that Branch Officers should be suspended. When the Section Committee acted in accordance with her suggestion she responded by suggesting that they had acted unlawfully and might face legal action. In doing so she made false allegations and was not acting in good faith. Furthermore, the real reason for the suspension of the Section Committee was the breakdown in trust and confidence that arose from the Claimant's change of position."**

39. The terminology of an allegation being "false and not made in good faith" was relevant because of the defence against claims of discrimination by way of victimisation in section 2(2) of the **Race Relations Act 1976** (now replaced by section 27(3) of the **Equality Act 2010**). This removes from the definition of discrimination by way of victimisation, "treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith". It was also relevant because of the defence in section 65(6) of the **Trade Union and Labour Relations (Consolidation) Act 1992**, which removes, from the statutory definition of unjustified trade union discipline, discipline which is imposed for making an assertion which is "false" and "made in the belief that it was false or otherwise in bad faith".

40. In finding that Ms Bhardwaj had made "false allegations and was not acting in good faith", the Tayler Decision was therefore upholding statutory defences to her claims of victimisation and unjustified trade union discipline.

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41. Ms Bhardwaj's unsuccessful attempts to appeal included an *ex parte* application for permission to appeal to the Court of Appeal refused by Underhill LJ in a reserved decision on 27 November 2017: **Bhardwaj v FDA and Others** [2017] EWCA Civ 2198. Underhill LJ referred to para 517 of the Tayler Decision, which said:

> **"The Claimant had on two occasions specifically suggested that Branch Officers should be suspended. When the Section Committee acted in accordance with her suggestion she responded by suggesting that they had acted unlawfully and might face legal action. In so doing she made false allegations and was not acting in good faith."**

From this, Underhill LJ noted that the Tayler Decision's finding of "bad faith" was "not some act of dishonesty on the applicant's part, but her conduct in, if I can put it this way, blowing hot and cold" (**Bhardwaj v FDA and Others** [2017] EWCA Civ 2198 at para 9).

42. In relation to the Tayler Costs, the FDA respondents do not pursue all 50 of their points before EJ Heap. They do, however, challenge the findings in relation to "Core allegations made in bad faith" which impacts on Items 26-28 and 34. They also challenge, under Ground 5 of their Notice of Appeal, the Heap Decision on Items 2, 3, 11, 17, 29 and 35.

The law

43. Rule 76(1) of the **ET Rules** provides:

> **"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; or**
>
> **(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.**

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44. A number of authorities were cited to me.

45. Authorities on statutory wording can be divided into those which clarify and explain points of principle, and those which reach outcomes on particular facts. The former are obviously helpful: they save time and promote consistency. The latter are fact-specific decisions which are not to be applied as barnacles to the smooth surface of ordinary words and phrases which should be allowed to speak for themselves.

46. Any appeal on costs is, in the words of the Court of Appeal in **SCT Finance Ltd v Bolton** [2002] EWCA Civ 56 at para 2, "…overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him… For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely."

47. Just as the use of authorities has long been discouraged in connection with broad statutory discretions to extend time (starting with the deprecation by Phillips J of "very simple, wide words becoming encrusted by the barnacles of authority" in **Hutchison v Westward Television Ltd** [1977] ICR 279 at 282C), so must the citation of authority in applications for costs be strictly constrained to those which genuinely establish a point of principle not readily apparent from the words of the rules themselves.

48. It is in the nature of costs applications that they should be relatively straightforward, otherwise what might be thought of as parasitic on the main litigation may get out of hand. This case is an example of that happening.

49. That is not to say that costs are not important. Hoffman J opened his judgment in **Kickers International S.A. v Paul Kettle Agencies Ltd** [1990] FSR 436 by saying:

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> **"This is a dispute over costs. At one time it might have been said that it was only about costs. But litigation has become so expensive that there is no "only" about costs any more. The ruling on costs can easily be the most important decision in the case."**

50. But if argument about costs becomes too lengthy and elaborate, the costs generate costs. A prospect opens up which recalls the observation of the mathematician Augustus de Morgan that "Great fleas have little fleas upon their backs to bite 'em, And little fleas have lesser fleas, and so *ad infinitum*." Costs are important, but the parasite must not be allowed to overwhelm the host litigation.

51. It is particularly undesirable that reported cases on costs should be cited (as happened in this case) on the basis that some similarity of fact should encourage in later cases a similar approach or outcome. Costs awards do not operate by precedent, in the way that personal injury awards used to. They are fact specific and to be determined as summarily as possible. The expectation must be that nothing more than the words of the relevant rule require addressing before the ET exercises its discretion on the facts of the particular case.

52. A particular fallacy is to suppose that, because an appellate court or tribunal has approved an approach adopted by an ET when awarding costs in a particular case, it follows that other ETs should adopt the same approach. This is how barnacles of authority begin to encrust the simplicity of the statutory words by imposing particular ways of thinking or standards of assessment which the statute does not impose.

53. The most striking cases on costs are those in which the decision below has been overturned. But even then this is likely to be because of particular facts. There can be so little confidence that a general principle is thereby established that the trouble of researching and citing such cases should be avoided.

54. Rule 76(1) speaks for itself. It imposes a two-stage test, approved by Underhill J in **Vaughan v London Borough of Lewisham** [2013] IRLR 713 at para 8. The first question is whether

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the requirements of rule 76(1) are met, whether under (a) or (b). If they are, a tribunal may make a costs order, but the opening words of rule 76 show that there is a discretion whether or not to do so. It by no means follows that because it *may* make a costs order, it will proceed to do so. It has a discretion and in many cases it does not do so and is entitled not to do so. The discretion is to be construed very broadly and it would require a clear error of principle to justify an appeal, whether for or against an order for costs.

The FDA respondents' Grounds of Appeal

55. The FDA respondents have, as I have mentioned, ten Grounds of Appeal, including Ground 8 which they pursue under rule 3(10) notwithstanding its rejection by the Ellenbogen J under rule 3(7) of the **EAT Rules**. The ten Grounds are as follows:

i) Misconceived nature of Core Allegations inextricably intertwined with Ms Bhardwaj's unreasonable conduct. What the FDA respondents refer to as the "Core Allegations" are the allegations the Tayler Decision found to have been "false and made in bad faith" (see paras 36 to 41 above).

ii) Bringing Core Allegations in bad faith was in and of itself unreasonable conduct.

iii) Reliance on general legal advice cannot and/or did not entirely mitigate against claimant's own unreasonable conduct in the bringing and pursuing of Core Allegations which are false and made in bad faith.

iv) Ms Bhardwaj's failure to engage with a costs warning in a letter from the FDA respondents' solicitors dated 14 November 2008.

v) Specific challenges to the FDA respondents' failure to obtain awards of costs in relation to Items 2, 3, 11, 17, 29 and 35, which Ground 5 claims the Heap Decision "perversely failed to properly analyse (or grapple with)".

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vi) Reliance on general legal advice cannot and/or did not entirely mitigate against Ms Bhardwaj's other unreasonable conduct or misconceived claims.

vii) The Heap Decision erred in law or was perverse in its decision on Item 46, which was the FDA respondents' application for the costs of Ms Bhardwaj's application to EJ Heap for an extension of time to advance an application of her own for costs (see para 8 above).

viii) Failure to consider each of the costs applications separately in relation to each one of the FDA respondents.

ix) Reliance on general legal advice cannot and/or did not entirely mitigate against bringing and pursuing disproportionate claims. Although this Ground on its face appears to focus on legal advice, and therefore to overlap with earlier Grounds, in oral argument it was made clear that the distinctive feature of Ground 9 was its reference to proportionality.

x) Ms Bhardwaj's recusal application, and the FDA respondents' failure to obtain an order for their Recusal Costs.

56. In argument, counsel for the FDA respondents sensibly combined some of his submissions on the ten Grounds of Appeal (which, even on the face of the Notice of Appeal, appeared to overlap to some extent) in order to make the following submissions:

i) Ms Bhardwaj's pursuit of the Core Allegations, found to have been made falsely and in bad faith, could not be excused by her legal advice.

ii) The Heap Decision erred, when finding some of the claims to satisfy the requirements of rule 76(1)(b) ("no reasonable prospect of success"), in not also considering and

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finding that Ms Bhardwaj had acted "unreasonably" in bringing and pursuing them, so that the requirements of rule 76(1)(a) were also satisfied.

iii) The Heap Decision erred in its approach to the costs warning in the FDA respondents' solicitors' letter of 14 November 2008.

iv) In relation to the various Items singled out under Ground 5, the Heap Decision erred in finding that these were not instances of unreasonable conduct or had no reasonable prospects of success.

v) The Heap Decision's treatment of Item 46 in paras 164-165 was perverse.

vi) The Heap Decision should have considered the costs applications separately in relation to each of the six FDA respondents.

vii) The Heap Decision should have awarded costs on the basis of a lack of proportionality between the value of the claims and the amount of costs incurred. It is argued, in particular, that there was no evidence to support a finding that Ms Bhardwaj was not advised about proportionality or to limit her claims.

viii) The Heap Decision was wrong not to find that the threshold requirement of unreasonable conduct in rule 76(1)(a) had been passed in respect of the FDA respondents' application for the Recusal Costs.

57. I will consider these in turn.

i) Ms Bhardwaj's pursuit of the Core Allegations, found to have been made falsely and in bad faith, could not be excused by legal advice

58. In support of this submission, counsel for the FDA respondents cited the unreported decision of Wilkie J in **Daleside Nursing Home Ltd v Mathew** (18 February 2009). In that case, Ms Mathew brought a claim of direct race discrimination based on the allegation that her manager

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had called her “a black bitch”. The ET found that these words were not used and the EAT understood its decision to mean that the allegation was “a deliberate and, to an extent, cynical lie”. The EAT concluded that the ET should have found that this satisfied the then-applicable rule governing costs for acting “unreasonably” (rule 40(3) of the 2004 **ET Rules**) and that it followed that some order for costs ought to have been made.

59. It is not surprising that the case has never been reported although it is the only case cited to me on behalf of the FDA respondents in which an ET decision on costs was not upheld by the EAT. It is a decision of fact, and the facts are quite different from the facts of Ms Bhardwaj’s case which I have summarised at paras 36 to 41 above.

60. In relation to the Core Allegations, Ms Bhardwaj was not found to have told a deliberate lie, or any lie at all. The reference to allegations being made “falsely” and in “bad faith” was driven by the relevance of those words to the statutory defences in section 2(2) of the **Race Relations Act 1976** and section 65(6) of the **Trade Union and Labour Relations (Consolidation) Act 1992**. I agree with Underhill LJ’s observation that the Tayler Decision established no act of dishonesty on Ms Bhardwaj’s part. There was nothing equivalent to the deliberate and cynical lie upon which Ms Mathew based her case in **Daleside**. It might be said to be intellectually dishonest to blow hot and cold, and an allegation that is made but not established may be said to be false. “False” and “bad faith” claims will sometimes, no doubt both justify and result in an order for costs, but whether they do or do not in any particular case is still a matter in the discretion of the ET. Many cases decide (on the balance of probabilities) that one witness rather than another is telling the truth. It may follow that a claimant’s allegations are found (on the balance of probabilities) to be untrue. If this necessarily not only permitted but required the ET to make an order for costs against the claimant, many more orders for costs would be made than are consistent with the long-standing principle, both that costs orders are the exception rather than the rule in any ET case,

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and that claimants should not feel the chilling effect of adverse costs orders to an extent that deters them from making claims which are well-founded. It is no answer to say that only ill-founded claims risk orders for costs, because it is axiomatic that the outcome of any litigation is uncertain.

61. In this case, the basis for saying that Ms Bhardwaj's Core Allegations were false and not made in good faith was not that she had given one version of events to her lawyers and the ET, when a different version was found by the ET to be the truth. It was that what the record showed she had said all along was inconsistent and self-contradictory. She began by saying that Branch Officers *should* all be suspended, and, when they *were* all suspended, she based Core Allegations of direct race discrimination, victimisation and unjustified trade union discipline on the suspension. She had not lied to the ET or to her lawyers. She had told the whole story and the Tayler Tribunal took one view of it and her lawyers had taken another, as she herself did. The Tayler Tribunal rejected the Core Allegations because on Ms Bhardwaj's own case her position was "false" and "in bad faith". She lost, not because she told lies, but because of undisputed truths about the way in which she blew hot and cold.

62. The Heap Decision accepted in para 58 (quoted in para 37 above) that the logic of the Tayler Decision was that the Core Allegations had no reasonable prospect of success. However, on the separate question on whether she would exercise her discretion to award costs, EJ Heap placed weight on the fact that Ms Bhardwaj was at all times advised by her solicitors that her claim had good prospects of success and she relied on that (Heap Decision paras 175 and 185).

63. EJ Heap had the benefit, as a result of the acceptance that privilege had been waived, of what EJ Heap found to be the entirety of the legal advice given to Ms Bhardwaj. All of it was favourable. The Heap Decision noted (at para 178) that Ms Bhardwaj was advised and represented by a specialist firm of employment lawyers and by a specialist employment barrister, who was already sitting part-time as an Employment Judge (and has since been

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appointed Queen's Counsel). She was in receipt of legal expenses insurance and the insurers required updates about the changing prospects of success in the case as it progressed. The legal advice given both to Ms Bhardwaj and the insurers was that the prospects of success were never less than 65%.

64. Legal advice is only as strong as the instructions upon which it is based, but in this case Ms Bhardwaj's instructions about the Core Allegations were no different from the findings of the Tayler Tribunal. She did not claim one version of events, only to find her case decided on a version of events contrary to her evidence. She accepted what she had originally said in support of suspension, and that she had later seen it as part of the unlawful acts against her. Her legal advice was not based on a version of events from Ms Bhardwaj which proved to be wrong. It was based on the same version of events that the Tayler Decision found to be fatal to her case.

65. Nevertheless, the legal advice had never fallen below a 65% prospect of success (Heap Decision para 178). As I have already mentioned, this positive advice was confirmed after exchange of witness statements (on 19 January and 23 February 2010), again in the course of the hearing (on 26 March 2010) and to Ms Bhardwaj's insurers on 1 July 2010 (before the Tayler hearing resumed after the first 13 days of hearing).

66. EJ Heap found that Ms Bhardwaj was being advised that she had a good case and that it was clear from the documentation that this advice was intended to apply "to the claim as a whole" (para 178). Although EJ Heap thought it regrettable that "there did not appear to be engagement with the merits of the individual allegations" (para 180), the fact remained that "She was not advised to abandon any aspect of the claim" (para 185).

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67. EJ Heap took this into account when deciding, in the exercise of her discretion, not to award costs against Ms Bhardwaj even on claims that had been pursued unreasonably or with no reasonable prospect of success. She said (at paras 185-186):

> **"185. As I have already observed, I am satisfied that the Claimant was advised that she had a good claim and it was that which formed the basis of her pursuit of the matter. She was not advised to abandon any aspect of the claim (and I say more about proportionality below) and I do not find that it is appropriate in circumstances where the Claimant was relying on specialist legal advice from solicitors and Counsel to exercise discretion to Order costs in respect of those elements of the claim that I have found to be misconceived.**
>
> **186. I should say that had I found any of the other grounds of the Respondents application for costs to have reached the threshold test of amounting to unreasonable conduct or that the claim had no reasonable prospects of success, I would have similarly declined to make an Order for costs arising from the same basis that the Claimant was relying on specialist legal advice."**

68. The FDA respondents argue that the legal advice should not have protected Ms Bhardwaj because her claims were made falsely and in bad faith. There is a superficial attraction to the submission because of the ordinary circumstances in which positive advice is given about a claim which is later found to be made falsely or in bad faith: the lawyers have been misled and the client knows the truth which they do not know. But Ms Bhardwaj's claims were not false or in bad faith in the ordinary meaning of those words, but only in the technical sense which I have discussed. The lawyers knew what Ms Bhardwaj knew, and what the Tayler Decision relied upon in support of its findings against her. The element of falseness and bad faith did not vitiate the legal advice and did not, therefore, make it illogical or impermissible to consider the legal advice as a relevant factor in Ms Bhardwaj's favour.

69. The FDA respondents also argue that legal advice should not protect Ms Bhardwaj on particular claims (such as the Core Allegations, but not limited to them) which (it is said) on analysis, and in accordance with the Tayler Decision, were misconceived and therefore unreasonably pursued and/or had no reasonable prospects of success. However, this is not a

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compelling criticism of the reasoning of EJ Heap, who recognised the weaknesses of individual claims or elements of the claims and nevertheless exercised her discretion not to award costs. The fact that the lawyers advised that there were good prospects on the claim as a whole rather than by individual analysis of different claims and elements of claims did not deprive the advice of its force, or Ms Bhardwaj of her right to point to her reliance on it in order to resist an order for costs.

70. In a case involving multiple issues, it will often be unrealistic to hive off some issues from others when assessing whether costs should be awarded and, if so, in what amount. Most cases stand or fall as a whole, even though in many cases there will be some issues on which the losing party is successful or partly successful. Issue based costs orders are on the whole to be avoided.

71. I reject the submission that it was an error of law for the Heap Decision to point to the legal advice as a reason for not exercising the discretion to award costs even though the requirements of rule 76(1)(a) or (b), or both, may have been satisfied. EJ Heap was entitled to identify the legal advice as a relevant factor in the exercise of her discretion.

72. The Heap Decision avoided the wisdom of hindsight when judging Ms Bhardwaj's decision both to bring and to pursue claims which ultimately failed, for reasons which (it might be said) could have been identified at the outset. Hindsight often emphasises things that were known earlier, but not thought to be as important or decisive at that time as they later turn out to be. There is no dispute that in this case Ms Bhardwaj's lawyers were expert and I have seen no basis in the Heap Decision or the Tayler Decision for saying that they were in any critical respect misinformed by Ms Bhardwaj. Their evaluation of the prospects of success was not less than 65%, at one point 65%-70%, and said to have increased rather than decreased when insurers were given advice in the middle of the hearing, after cross examination of the FDA respondents. The legal advisors thought that the FDA witnesses were making a poor

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impression, and they were right about that. The Tayler Decision criticised (in paras 451-456) the evidence of Ms Crighton, Ms O'Toole and Mr Sampson (who were FDA respondents) and witnesses on behalf of FDA named Mr Baume and Ms Tweed (who were not). The poor impression being made by FDA witnesses was one of the points said in the legal advice to insurers to "increase rather than decrease the prospects of success… already advised".

73. The legal advice of 65%-70% "prospects of success" (Heap Decision para 179) was not a prediction. It was an evaluation of the strength of the case. Even on this evaluation, if the case was run 100 times, it would be lost 30 or 35 times out of the 100. In the event, Ms Bhardwaj found that she was one of the 35 losers, and not one of the 65 winners. In that sense, the lawyers were not proved wrong by the outcome: they did not say that the case was 100% likely to succeed. This does not mean that it was not misconceived, or that it was necessarily reasonable to bring it: EJ Heap herself decided on multiple items that either or both of these conditions for an award of costs was satisfied. But it does mean that the legal advice cannot be discounted as a relevant factor. The argument of the FDA respondents is that EJ Heap was wrong to consider it relevant to the exercise of her discretion that reputable and expert specialist employment lawyers had consistently advised Ms Bhardwaj that her claims had reasonable prospects of success and had never advised her that it was unreasonable to pursue them in the ET. I disagree. It was up to EJ Heap to consider whether it was relevant or even decisive, and in the exercise of her discretion she thought it was relevant and either decisive or at least weighed heavily in Ms Bhardwaj's favour. She was entitled to take this view.

74. That does not mean that the Heap Decision's finding that the favourable legal advice was both relevant and decisive to the exercise of the discretion was the right approach. It means it was not a wrong approach. The approach to be adopted was a matter for EJ Heap. I will not impose a straitjacket which is not written into the rule. It is enough that she approached her task in a way that was properly open to her, as she did.

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ii) The Heap Decision erred, when finding some of the claims to satisfy the requirements of rule 76(1)(b) ("no reasonable prospect of success"), in not also considering and finding that Ms Bhardwaj had acted "unreasonably" in bringing and pursuing them, so that the requirements of rule 76(1)(a) were also satisfied

75. Once EJ Heap had found, in respect of the Core Allegations, and on Items 11, 26-28, and 34, that the claims were misconceived and had no reasonable prospects of success (as she did), the requirements of rule 76(1)(b) had been satisfied and she was not wrong to proceed to the question of discretion. It was open to her to find that Ms Bhardwaj also acted unreasonably in bringing and pursuing those claims (so as to fall within rule 76(1)(a) as well) but she was not bound to do so. No court or tribunal has to decide every point argued before it, but only those necessary for its decision. A decision may take different routes in different hands and be correct in all of them. The Heap Decision does quite enough to be both sound and sufficient.

76. In this case, the burden placed on EJ Heap was far in excess of anything that could really be justified. It is ironic that EJ Snelson's warnings about proportionality (para 35 above) are quoted by the FDA respondents against Ms Bhardwaj, in which he said, as long ago as 2009,

> **"The Claimant should consider confining her case to her best points: experience shows that (unless, as alas occasionally happens, the purpose is to put the opposing party to needless trouble and expense by fighting on numerous fronts at the same time) to do otherwise is counter-productive since the weak claims distract attention from the stronger ones."**

77. The FDA respondents should have taken this as good advice to them too. The Heap Decision went through all 50 of the FDA respondents' arguments, and it is impossible to criticise EJ Heap, when she had done enough on each one to establish that she had the power to award costs, for not investigating alternative bases for doing so. This is particularly when, on the facts of this case, the arguments based upon claims or aspects of the claims having "no reasonable prospect of success" under rule 76(1)(b) were for practical purposes indistinguishable from the arguments that Ms Bhardwaj "acted… unreasonably" in pursuing them, under rule 76(1)(a).

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78. The argument seems to be that, whereas the test under (a) is subjective or partly subjective (because it is conduct-based), the test under (b) is objective (because it is merits-based) and a finding against Ms Bhardwaj under (a) as well as (b) might have been more damaging to her and consequently have created greater momentum towards the exercise of the discretion against her. I have some doubts about this analysis. The test under (b) is undoubtedly objective, but the test under (a) is whether a party or party's representative has acted "vexatiously, abusively, disruptively or otherwise unreasonably". A person who knew or ought to have known that their conduct was vexatious, abusive, disruptive, or otherwise unreasonable, will be in a worse position than a party who did not, but even a party or representative who is deluded or misguided or lacking self-awareness (and who sincerely considers their actions to be justified) may be acting "vexatiously, abusively, disruptively or otherwise unreasonably". Once again, I stress that it is the words of the rule itself which must be applied, and not some philosophical analysis of what is or may be subjective or objective. Furthermore, even when the requirements of (a) are met, a lack of insight may (I do not say it must or even should) make a difference to the exercise of the discretion.

79. But, in any case, the argument must in my judgment fail on the facts of this case. Not only was EJ Heap not required to decide points which might duplicate a jurisdiction to award costs which she had on other grounds found she had, it is clear from the Heap Decision that her decision would have been the same even if she had made extra findings of unreasonableness. This is explicit in para 186 of the Heap Decision, which I have quoted (in para 67 above). This is because of the weight she placed on the legal advice, which I have found to be justified.

iii) The Heap Decision erred in its approach to the costs warning in the FDA respondents' solicitors' letter of 14 November 2008

80. Ms Bhardwaj's solicitors wrote a letter before claim on 6 November 2008.

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81. FDA's solicitors responded on 14 November 2008. It was a detailed response which addressed the claim under the following headings:

i) "Your assertion that your client has been suspended." It was denied that Ms Bhardwaj had been suspended. Rather, it was said that the CPS National Section Committee had taken over control of the branch.

ii) "Your statement that there has been no breakdown." This statement was disputed.

iii) "Your client's suggestion that the action of the CPS Committee breaches the Race Relations Act." It was argued that Ms Bhardwaj could not allege victimisation by reason of something she had suggested should happen. This section concluded: "Any complaint taken by your client to the Employment Tribunal will be vigorously defended and costs will be sought against your client in these circumstances". This is the costs warning relied upon.

iv) "Your allegations of unjustifiable discipline." This was denied for the same reasons as before, and an application for costs was again threatened if ET proceedings were brought.

v) "Your client's demands." There was disagreement about what Ms Bhardwaj's demands were.

vi) "Yesterday." A version of events on the previous day was set out, and "a fundamental breakdown in trust and confidence between the other members of the Committee and your client" was alleged.

82. Ms Bhardwaj's solicitors replied on 1 December 2008 taking issue with various aspects of this account. It was a detailed response of 6 pages. There was disagreement about whether Ms Bhardwaj had been suspended. A narrative from Ms Bhardwaj's point of view was set out. As

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part of this, it was accepted that "in her distress and frustration at the Union's failure to assist in her exclusion our client did say that she wanted action taken, if necessary, by suspension of all Officers." It was denied that her comments "justify excuse and explain the decision to suspend". Reference was made to section 11 of the **Race Relations Act** and section 64 of the **Trade Union and Labour Relations (Consolidation) Act**. The letter said "You suggest that these claims are misconceived but do not explain the basis of this suggestion". It complained of selective quotation and offered context. A previous request for reinstatement of all London Officers and for all London Officers to be instructed to communicate fully and to consult with one another about London Branch issues was repeated. Surprise and concern was expressed about a decision not to allow Ms Bhardwaj to participate in a meeting on 13 November. The letter said that to suggest that the making of a complaint and raising a concern had led to committee members suffering a fundamental breakdown in trust and confidence with Ms Bhardwaj was "a clear act of further detriment". The Committee was urged "to consider our client's concerns carefully". The letter concluded: "We trust the above gives you any further explanation you seek but please do not hesitate to contact us with any further queries".

83. No correspondence after this was relied upon before me. Ms Bhardwaj's first ET1 was presented on 8 December 2008 and her second was presented on 12 June 2009.

84. A case management order as made by EJ Snelson on 8 September 2009. The two ET claims were consolidated, and directions for disclosure and witness statements were given, and a hearing of all issues of liability and remedy was fixed. There was no application for a deposit order or anything of that sort. Nor did the ET make such an order on its own initiative.

85. Reliance on the costs warning in the letter of 14 November 2008 was the 48th point addressed by EJ Heap out of the 50 points advanced before her. Her handling of it in para 168 of the Heap Decision is said before me to be perverse or an error of law. That paragraph said:

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> **"168. Mr. Sethi also points to the fact that the Claimant was clearly warned about pursuing a claim and the prospects of success of the claim in a costs warning letter from Messrs Russell, Jones & Walker dated 14th November 2008. That letter was despatched to the Claimant's then solicitors for presentation of the first claim in these proceedings on 8th December 2008. The Respondents rely particularly on the extracts which I have already set out above. I do consider that it would have been helpful for the Claimant's solicitors to have engaged in a more meaningful manner with the terms of that letter. However, as I shall come to below, I am satisfied that at all material times the advice that was being given to the Claimant was that she had good prospects of succeeding in her claims. I do not consider that the Claimant's actions in following that advice to have amounted to unreasonable conduct and I remind myself that the letter was not sent directly to the Claimant and there is no evidence that she directed her solicitors not to materially engage."**

86. The FDA respondents take particular issue with the observation that the letter of 14 November was not sent directly to Ms Bhardwaj and that there was no evidence that she directed her solicitors not to materially engage.

87. For my part, I do not see the costs warning as particularly stark. It is a passing reference in a letter which is primarily a detailed response to a number of points which had been laid out in the letter before claim. The response to that letter on 1 December 2008 was, as I read it, a meaningful engagement with the terms of that letter, but I note and respect the statement by EJ Heap, after a much longer hearing, and with no doubt a more detailed grasp of the matter, that it should have done more.

88. It is said by the FDA respondents that it was perverse and an error of law to say that it was relevant that the letter was not addressed to Ms Bhardwaj personally, or that there was no evidence that she had instructed her solicitors not materially to engage.

89. Taking a step back, the key point being made in para 168 of the Heap Decision is that Ms Bhardwaj was receiving favourable legal advice and that to follow that advice, by pursuing the claims, was not unreasonable conduct. I have already decided that EJ Heap was entitled to take that view when deciding not to exercise her discretion to award costs even when the

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requirements of rule 76(1) were in her judgment met. This was a complete answer to reliance on the costs warning, which really added very little to the arguments about the facts (which were disputed) and the merits (which are now said to have been undermined by the undisputed facts, as indeed the Tayler Decision decided that they were) upon which the legal advice was based.

90. Counsel for the FDA respondents made it clear that he was not suggesting that in any case where a costs warning had been given, costs should follow.

91. So far as the particular criticism of para 168 of the Heap Decision is concerned, it seems to me that it misunderstands the point that EJ Heap was making. The fact that the letter including the costs warning was addressed to Ms Bhardwaj's solicitors, and that it was her solicitors and not herself who responded to it, supported the observation that the reason the letter including the costs warning did not stop her claims in their tracks was that her solicitors considered her claims to be arguable notwithstanding the points in that letter. It was therefore an aspect of the substantive point that it was not unreasonable of her to follow her legal advice; this was not a decision she took without her solicitors' involvement. This observation was not perverse and it was not unlawful. It was not incorrect. It was a fair point to make.

92. I also reject the criticism of the final phrase, that "there is no evidence that she directed her solicitors not to materially engage." It is argued that Ms Bhardwaj must have been aware of the letter, and the response to it must have been based upon her instructions. But this again misses the point. EJ Heap did criticise (without saying it would justify, let alone require, an order for costs) what she regretted as the solicitors not engaging "in a more meaningful manner" with the letter containing the costs warning. The point she was then making was that the fault for this presumably lay with the solicitors, and not with Ms Bhardwaj personally. She was correct to say there was no evidence to the contrary. This was a conclusion EJ Heap

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was well-equipped to draw in a case in which there had been disclosure of Ms Bhardwaj's legal advice, and in which she had given evidence about it, and been cross examined about it.

iv) In relation to the various Items singled out under Ground 5, the Heap Decision erred in finding that these were not instances of unreasonable conduct or had no reasonable prospects of success

93. This is not a point of law. There is therefore no need to engage with it. However, I will do so, in case it should be thought that there is anything of substance in it, which in my judgment there is not.

94. An overarching criticism is made that EJ Heap did not achieve more variety of expression when dismissing different points on essentially the same basis. However, when her reasons were the same, she had no need to disguise that by rephrasing points that applied to other items as well. The course adopted by EJ Heap in this respect allowed her to keep a decision which dealt systematically with the excessive number of arguments addressed to her within the bounds of the Heap Decision's 51 pages, which was already an extraordinary length for a decision on costs. It was more than half as long as the Tayler Decision on all aspects of liability, which was 89 pages. EJ Heap would have been entitled, under the overriding objective in rule 2 of the ET rules, to curtail the length of the hearing and of the submissions, and if that forced the applications for costs to be more selective, and briefer, and to require briefer reasons for the decision, that would not have been a bad thing.

Item 2

95. Item 2 was that reliance on what was identified as protected act number 2 was unreasonable or misconceived. Protected act number 2 was comments made by Ms Bhardwaj at the CPS Section Committee meeting on 7 February 2008. In that meeting she suggested that BME members in London did not feel properly represented although she stated in terms that she was not accusing anyone of being racist. Para 463 of the Tayler Decision said: "We do not

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accept that what was said in that meeting involved any specific allegations of race discrimination or of treatment that would involve a breach of the [**Race Relations Act**] and do not consider that the comments made by the Claimant constituted a protected act." It went on to find, also, that these comments had no effect on her later treatment in any event. The Heap Decision at para 65 decided "this is simply a case that this aspect of the claim failed following the facts found by the Tribunal. That is not unusual…" Before me, it is argued that it could never have been a protected act, because "she was not accusing anyone of being racist" and that the Heap Decision was perverse, therefore, in not finding that it was misconceived or unreasonably pursued. This is descending very much into the fine detail of the facts, and it is not legitimate to take a single phrase out of context and insist to me that EJ Heap misunderstood or misapplied it, or should have drawn a stronger conclusion from it. It is possible for an allegation to be a protected act, because it involves a breach of the **Race Relations Act** (now the **Equality Act**), even if no-one involved is "being racist". EJ Heap was quite correct that this was not a finding which compelled her to draw the conclusion that the claim was unreasonably pursued or misconceived from the outset, although it ultimately failed.

Item 3

96. Item 3 was based on the Tayler Decision's finding about what was described as detriment 1. The allegation was that, after a confrontation between Ms Bhardwaj and Ms Tweed, Ms Crighton and Ms O'Toole rushed to comfort and support Ms Tweed and ignored the distress which Ms Bhardwaj was suffering as a result of the altercation. The Tayler Decision decided (at para 464) "We do not accept that this allegation is factually made out", and proceeded to make findings about what, in their view, on the evidence, and applying the balance of probabilities no doubt, did happen on this occasion as a matter of fact. Again, the submission to me is that, because this detriment was "not factually made out", it was misconceived from

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the outset, and it was unreasonable to pursue it. That does not follow at all. The Heap Decision was quite correct, at para 66, to decide that it was simply a dispute of fact which Ms Bhardwaj lost.

Item 11

97. Item 11 is about what was called detriment 5. Ms Bhardwaj's case was that the London respondents failed to progress an application for facility time for the Race Equality Officer, Mr Omo, whereas they were pushing for facility time for Mr Sampson. The Tayler Decision found as a fact that this was not the case (para 476 of the Tayler Decision). Having made that finding of fact, it also observed that, in any event, this matter concerned Mr Omo "and we do not accept that the Claimant was subject to a detriment". The Heap Decision accepted that this aspect of Ms Bharwaj's claim was misconceived "on the basis that it is not possible to see how the actions of the Respondents towards another individual could amount to a detriment to the Claimant" (para 76). The complaint to me is that EJ Heap should also have decided, since the claim was misconceived and had no reasonable prospect of success, that it was unreasonable to pursue it. This is the argument I have rejected at paras 75 to 79 above.

Item 17

98. Item 17 related to what was called detriment 7(iii). This was that, at a meeting with the London Respondents on 11 June 2008, Mr Whiteman told them that they should not communicate with Ms Bhardwaj. The Tayler Decision decided that "Mr Whiteman did suggest that there should be a cessation of the intemperate email correspondence that had occurred between the Claimant and Ms Crighton, but not that there should be a cessation of correspondence generally" (para 486). It therefore found that the detriment was not factually made out. Before EJ Heap, the FDA respondents argued that this allegation was not included in the claim and no application to amend was made; that the detriment claimed did not occur; and Ms Bhardwaj

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was not present at the meeting so she could not know what was said (Heap Decision para 92). The Heap Decision on this point was that, whatever the position with regard to whether the allegation was pleaded or not, the Tayler Decision clearly determined it. EJ Heap went on to find "this is simply a case that this aspect of the claim failed following the facts found by the [Tayler] Tribunal" (Heap Decision para 93). That conclusion was not only open to her, it seems to be undeniably correct. Before me, it is argued that the allegation was "pure speculation" about what was said at a meeting which Ms Bhardwaj did not attend, and "Unsurprisingly, it had no foundation in basic fact" (skeleton argument para 24(1)). Ms Bhardwaj may not have been present, but she obviously got wind of what had been said, and, although her understanding proved when evidence was given by the FDA respondents not to be correct, it had more than a grain of truth in it, given the relatively fine distinction drawn by the Tayler Decision in the passage from para 486 which I have quoted above. It is impossible to argue from this that the claim had no reasonable prospect of success, or that it was unreasonable to make it. This aspect of the claim failed; that is all that can be said. Costs do not follow the event in the ET. There has to be more.

Item 29

99. Item 29 was about what was called detriment 23. The point made by the FDA respondents here is that detriment 23 was alleged to have been suffered because of what was called protected act 11. Protected act 11 was the one in respect of which the Tayler Decision made its finding that the allegation said to constitute protected act 11 had been made falsely and in bad faith. The argument of the FDA respondents is that the bad faith "infected" the detriment in question "which was dependent on Protected Act 11 for it to even get off the ground" (para 24.1(5) of the FDA respondents' skeleton argument).

100. However, the Heap Decision concluded that detriment 23 was not in fact supported by the bad faith finding. It explained (at para 122 of the Heap Decision):

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> **"The [Tayler] Tribunal found that the Claimant was turned away from the meeting because of the suspension of the Section Committee and that was therefore the "reason why" she was treated in the manner of which she complained but there was no finding of bad faith in respect of detriment 23. Again, this is a matter which the Claimant was in my view entitled to pursue in order for there to be a factual finding on the "reason why" question".**

101. This was a meticulous analysis and there is no error of law or principle in it. I was not presented with any argument for saying that it was wrong at all.

Item 35

102. Item 35 was about the detriment alleged in the second set of ET proceedings, brought against Ms Gethin as sole respondent, which was heard with the first ET claim after consolidation. The argument is that the detriment in question was said to have been suffered because of Ms Bhardwaj's protected act 11, which the Tayler Decision found to be based on an allegation made falsely and in bad faith. The argument of the FDA respondents is, again, that the bad faith "infected" the detriment in question "which was dependent on Protected Act 11 for it to even get off the ground" (para 24.1(6) of the FDA respondents' skeleton argument).

103. The relationship between protected act 11 and the second set of ET proceedings is not quite as close as this argument would require. The suspension was part of the background, but no more. This can be seen from para 511 of the Tayler Decision. In the second set of ET proceedings, the detriment alleged was not the suspension itself, but the publication and circulation of a disclosure letter. The Tayler Decision decided (in para 511) that, in this newsletter, Ms Gethin "did no more than seek to explain to the membership the events that had occurred in the London branch that had led to the suspension of its officers… She set out her genuine understanding of the position to explain to the membership what was happening rather than as a response to the fact that the claimant had submitted tribunal proceedings or

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done any previous protected acts." The Tayler Tribunal found that "the real reason that the matter was dealt with in the newsletter was to explain the situation to London Members".

104. No criticism can be made of the Heap Decision that this claim was "was dismissed on a factual basis" and that Ms Bhardwaj was entitled to a finding from the Tayler Tribunal as to "the reason why" (Heap Decision para 136).

General points

105. I have found that the criticisms of the Heap Decision in respect of these items are not well founded. But there are more general difficulties with them too. The arguments in relation to Items 29 and 35 depend on the effect of the Tayler Decision's conclusion that Ms Bhardwaj's complaint about suspension was made falsely and in bad faith, but I have in paras 58 to 74 above examined the FDA respondents' reliance on that in relation to the Core Allegations and shown that what was meant is likely to be misunderstood if those words are taken out of the context in which the Tayler Decision applied them. Moreover, even if the Heap Decision was wrong not to make a finding that the requirements of rule 76(1)(a) and (b) were satisfied on any or all of these items (which I have decided not to be the case), the Heap Decision clearly concluded that no costs order should be made as a matter of discretion, and the criticism of that conclusion, based on the effect of the favourable legal advice, is also one that I have rejected. These points can never, therefore, get over the finish line so far as the FDA respondents are concerned.

v) The Heap Decision's treatment of Item 46 in paras 164-165 was perverse.

106. Item 46 was a claim by the FDA respondents for the costs of Ms Bhardwaj's application to extend time to bring her own costs application. I have set out the circumstances of this in para 8 above.

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107. Ms Bhardwaj's application to extend time to bring her own costs application was made to EJ Heap herself, and had been refused by EJ Heap in her earlier decision of July 2019. At the hearing, Ms Bhardwaj appeared in person, and the FDA respondents were represented by leading counsel. The hearing took place on 28 June 2019 and, when it concluded, well after usual sitting hours, at 5.45 pm, EJ Heap reserved her decision. The only question considered at the hearing was Ms Bhardwaj's application for an extension of time to make her own application for costs, which EJ Heap refused.

108. There were some unusual features about the hearing. Although the FDA respondents instructed leading counsel, their solicitors did not provide him with a copy of Ms Bhardwaj's bundle. This was resolved by the ET itself providing him with copies of those documents he did not already have (Extension of time decision para 9).

109. More importantly, until the day of the hearing the FDA respondents included two arguments against the proposed extension of time which were abandoned at the hearing itself. These were arguments about privilege and collateral use. Ms Bhardwaj said that she had spent a significant amount of time and costs dealing with the abandoned arguments and EJ Heap agreed with her that it was "most unfortunate to say the least" that the solicitors for the FDA respondents had not notified Ms Bhardwaj in advance of the hearing that they were no longer taking those points (Extension of time decision para 11).

110. On the substantive question of whether Ms Bhardwaj should be granted an extension of time for making her own application for costs, Ms Bhardwaj gave evidence. The ET did not question her case that she did not become aware of the facts upon which she based her application for costs until receipt of a letter of 4 January 2017 (Extension of time decision para 23). She also argued that the general stay of proceedings pending the resolution of appeals meant she could not make her application until the stay came to an end on 27 February 2018. EJ Heap did not accept that argument, finding that an application might have been made, even

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if it could not immediately be heard (Extension of time decision para 26). EJ Heap noted, however, that Ms Bhardwaj had written to the ET on 2 March 2018 signifying her intention to apply for costs, and setting out the grounds, which were identical to those relied upon when she did issue an application on 20 March 2019 (Extension of time decision para 27). EJ Heap accepted that Ms Bhardwaj was understandably occupied with what proved to be a fatal head injury sustained by her mother on 7 June 2018 until her mother sadly died on 4 October 2018.

111. The ET rejected two arguments advanced by the FDA respondents against the extension of time as "without merit" (Extension of time decision paras 33-34).

112. Nevertheless, the ET concluded that, taking the whole period from January 2017 to the issue of the application on 20 March 2019, it included some delay which Ms Bhardwaj could not justify and this weighed against granting her what was by the time of issue a very considerable extension of time. It was also noted that Ms Bhardwaj could raise the same issues in the context of her resistance of the FDA respondents' pending application for costs against her (Extension of time decision para 32).

113. The FDA respondents do not appear to have made any application for costs at the hearing on 28 June 2019. However, after the reserved decision was sent out on 20 July 2019, they added an application for costs to their existing applications for costs against Ms Bhardwaj. It formed Item 46, and was rejected by EJ Heap at paras 163-166 of the Heap Decision.

114. As that passage makes clear, the argument advanced was that Ms Bhardwaj's application for an extension of time had been "manifestly futile". This was rejected in para 164 of the Heap Decision for the following reasons:

> **"It is fair to say that the Claimant's application was brought substantially out of time. However, whilst I dismissed the application I did not make any determination – and I do not do so now – that it was "manifestly futile". It was not an application that was misconceived. In view of the background circumstances I also**

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> **do not consider that it was an application that was made or pursued unreasonably. I say that on the basis that the Claimant had already set out her intention to apply for costs some years previously and she has a clear and strong sense of feeling as to the basis of the same."**

115. This is the operative part of EJ Heap's decision on this point. It finds that the application for an extension of time was neither misconceived (so as to engage rule 76(1)(b)) nor made or pursued unreasonably (so as to engage rule 76(1)(a)). EJ Heap, having conducted the hearing, and written the reserved decision, was well placed to make those judgments.

116. These conclusions were supported by the fact that, while not making a formal application, Ms Bhardwaj had notified her intention to make it, with all the grounds for it, on 2 March 2018, very shortly after the costs proceedings generally were revived on 27 February 2018, basing it on information that had not come to her until receipt of a letter of 4 January 2017 at a time when the proceedings were effectively stayed. That aspect is the first point in the final sentence of the passage of the Heap Decision I have just quoted: "the Claimant had already set out her intention to apply for costs some years previously".

117. The FDA respondents' appeal on this point has to be considered alongside their own points about privilege and collateral use which they abandoned on the day of the hearing and the other two points which they pursued at the hearing and which EJ Heap ruled were "without merit".

118. The main basis of the appeal before me is the Heap Decision's reference, at the end of the passage in para 164 which I have quoted, to Ms Bhardwaj's "clear and strong sense of feeling" about her application for costs, and the following passage which immediately follows, in para 165:

> **"I accept – as I have already remarked upon in the context of item number 45 above – that the Claimant strongly believes that she has not had a fair hearing; that there has been injustice and that her complaints and concerns about the legitimacy of the proceedings**

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> **before the Taylor Tribunal have not been dealt with. The Claimant has a determination given her strength of feeling about the issue to take every course to bring that that she sees as having been unjust to the fore. The Claimant's costs application was a way of ventilating those issues and even had I found that an out of time application to do so was unreasonable conduct (and I have not) I would not have considered it appropriate to exercise my discretion to Order costs given the circumstances that I have described above."**

119. This is criticised, on the basis that "Many an objectively unreasonable litigant will subjectively have a clear and strong belief in their case" (FDA respondents' skeleton argument para 26.3). However, that is not the operative part of the Heap Decision reasoning, which was that, although the application for an extension of time failed, it was not misconceived. Since the only basis for arguing that it was unreasonable to make it is that it was misconceived, this assessment by EJ Heap was fatal to the FDA respondents' own application for costs. There was a good basis for the assessment that Ms Bhardwaj's application for an extension of time could not be said to have no reasonable prospects of success, given the chronology which I have outlined.

120. The further observations in para 165 were reasons for not exercising discretion against Ms Bhardwaj, but since the basic requirements of rule 76(1)(a) and (b) were not met, on the Heap Decision's finding in para 164, that is not a basis for challenge on appeal.

vi) The Heap Decision should have considered the costs applications separately in relation to each of the six FDA respondents.

121. The six FDA respondents were represented before EJ Heap by one firm of solicitors and the same leading counsel (who also appeared before me). Some of the 50 points taken related to only some of the FDA respondents, and not others. Each of the 50 points was addressed individually in the Heap Decision. The vast majority – 45 of the 50 – were found not to cross the threshold requirements of rule 76(1) (see para 28 above). The Heap Decision decided not to exercise the broad discretion about whether or not to award costs in respect of the 5 which did cross the threshold, for reasons which I have found to be sound.

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122. Advocacy is the art of selection. Selection was lacking in this case. Instead of picking a few of the strongest points, and arguing those, on the basis that, if they failed, weaker points would not be likely to change the outcome (which requires a degree of courage, and confidence in the selection), the FDA respondents ran all 50 points, including the 45 which did not even cross the threshold. They may have hoped that the weight of so many points would have its own effect, so as to justify the number. This proved not to be the case. In those circumstances, however, it is not a fair criticism that those items which did cross the threshold were not examined at greater length or in greater isolation. The argument cannot be run at all, of course, in relation to those items which did not cross the threshold.

123. So far as the specific Grounds of Appeal are concerned, this point is only taken in Ground 8, which still does not analyse which of the individual respondents might have benefitted from a more isolated analysis. In oral argument, particular emphasis was placed on the position of Ms Gethin and Item 35, which related only to her. However, Item 35 was found not to cross the threshold on its individual merits (paras 135-136 of the Heap Decision) and I have rejected the appeal on that (paras 102 to 104 above).

vii) The Heap Decision should have awarded costs on the basis of a lack of proportionality between the value of the claims and the amount of costs incurred.

124. The Heap Decision addressed the question of proportionality. Ms Bhardwaj's claim was always limited to injury to feelings. There was never any claim for loss of earnings or other special damages. The initial advice – said in para 187 of the Heap Decision to be "somewhat optimistic" – was that Ms Bhardwaj would recover the then maximum amount under the *Vento* guidelines of £25,000, but her own legal costs on the basis of a 10 day hearing (well short of what turned out to be 18 days of hearing) were at the same time estimated at twice what could possibly be recovered by the claimant if she was successful (para 187 of the Heap Decision). The Heap Decision was therefore critical of the fact that "little thought was given to the question of proportionality" (in para 187), referring, particularly, to the prescient warning of

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EJ Snelson (quoted in para 35 above) and saying that it was "regrettable" that it was not taken more seriously.

125. This is not a case in which the Heap Decision failed to take account of something it ought to have taken into account.

126. The basis of the appeal on this point is that the Heap Decision erred in law or was perverse when deciding that Ms Bhardwaj's legal advice provided significant mitigation and weighed heavily against the making of a costs order.

127. The FDA respondents do not accept the finding in para 188 of the Heap Decision that Ms Bhardwaj was not advised about proportionality, and did not receive specific advice on the individual claims (with the exception of those which potentially faced a time bar), and was also not advised about whether to limit her claims to certain allegations or to withdraw claims against any individual respondent.

128. However, these are findings of fact. I do not see any legal basis for challenging these findings, which were made after (as the Heap Decision finds in para 177) Ms Bhardwaj had disclosed the entirety of the advice which she had received during the course of the proceedings, and had given evidence about that advice.

129. It follows that the Heap Decision was entitled to make those findings and, having made them, to take them into account, both on the question of whether it was reasonable to pursue the proceedings (as the lawyers considered it was, and as the insurers apparently agreed, since they funded the proceedings on the basis of the advice received), and on the question of whether any discretion should be exercised against her if it arose (paras 189 and 191 of the Heap Decision).

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130. That is a complete answer to the appeal on this point but it is right to point out that the Heap Decision also accepted that race discrimination is an extremely serious societal issue (para 190). Whilst this does not mean that costs will not be awarded in such cases, it does reduce the force of an argument based solely on the potential money return. From the early days of the ET jurisdiction it has been recognised that cases may be justified even if no money at all is at stake: see **Telephone Information Services Ltd v Wilkinson** [1991] IRLR 148 per Tuckey J at para 21, discussing a non-discrimination claim for simple unfair dismissal, which was cited with approval by Laws LJ in **Rose Gibb v Maidstone & Tunbridge Wells NHS Trust** [2010] EWCA Civ 678 at para 19.

viii) The Heap Decision was wrong not to find that the threshold requirement of unreasonable conduct in rule 76(1)(a) had been passed in respect of the FDA respondents' application for the Recusal Costs.

131. I have explained the circumstances behind the FDA respondents' application for the Recusal Costs in paras 21 to 22 above. That application was refused.

132. On appeal, it is argued that the Heap Decision was perverse or erred in law by not awarding the FDA respondents these costs. Particular exception is taken to the weight attached by the Heap Decision to Ms Bhardwaj's strongly held belief that she did not receive a fair hearing before the Tayler Tribunal (para 206) and her subsequent irrational belief "that she can never receiver a fair hearing within the Tribunal system" (para 207). That it was irrational is clear from the Heap Decision's observation that "Every decision made adverse to the wishes of the Claimant is seen by her as evidence of bias" (para 208) and Ms Bhardwaj's stance is explicitly stated to be "irrational" in para 208 of the Heap Decision.

133. The FDA respondents also point to the rejection of a bias appeal by the Court of Appeal in **Bhardwaj v FDA and others** [2016] IRLR 789 in the judgment of Sir Colin Rimer, with whom Arden LJ and Jackson LJ agreed. However, the Court of Appeal decided that the appointment of one of the FDA respondents as a lay ET member in the same region as the

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Tayler Tribunal did give rise to a real possibility of bias (although not, of course, actual bias, which was not alleged) and found against Ms Bhardwaj in the appeal only because she had waived her right to object.

134. This may explain the "not inconsiderable degree of sympathy" expressed in para 206 of the Heap Decision, given "the invidious position in which she found herself with disclosure of the appointments of the relevant Respondents coming only in the midst of the hearing."

135. I think there is some force in the submission that paras 206-210 of the Heap Decision, read in isolation, express a surprising level of sympathy for Ms Bhardwaj's irrational beliefs, and do not, in themselves, justify the conclusion in para 210 that "I do not consider it unreasonable conduct that the Claimant made the application given that I am satisfied that she was and is genuinely of the belief that she would not receive a fair hearing." An irrational belief, however strongly and sincerely held, does not prevent conduct from being unreasonable for the purposes of the test in rule 76(1)(a).

136. However, I do not read paras 206-210 in isolation. The finding at the very beginning of para 206 was that "Whilst the recusal application was ultimately refused, I am not satisfied that it amounted to unreasonable conduct to have made it." This has to be read in conjunction with the detailed examination of the recusal application in paras 18-27 of the Heap Decision. The points argued in favour of recusal were by no means limited to the fact of EJ Heap being part of the ET system of which Ms Bhardwaj is now distrustful (as to which see, particularly, para 18 of the Heap Decision). They included also a series of specific arguments based on actions taken and judgments made in the course of the proceedings by EJ Heap herself (see para 20 and its nine sub paragraphs). These were carefully examined in paras 27-28 on pp 10-14 of the Heap Decision. Although they were rejected, they were treated seriously, and they were by no means all as fanciful as the points based on generic distrust. In those circumstances I reject the submission that the Heap Decision was perverse or erred in law by failing to find

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that the recusal application had no reasonable prospect of success or that Ms Bhardwaj acted unreasonably in making it. EJ Heap demonstrated that she was able and willing to make such findings against Ms Bhardwaj when she thought they were warranted, and to make costs orders against her too, as she did in respect of the Privilege Costs.

137. If EJ Heap had thought that all the recusal arguments were as irrational as Ms Bhardwaj's belief that she can never receive a fair hearing within the Tribunal system, she would have said so. She did not make that finding, and there is nothing in her treatment of the more promising, although unsuccessful, arguments considered at para 27 of the Heap Decision to suggest that she was bound to do so.

138. Therefore, the FDA respondents are not able to get over the absence of a finding in their favour that the threshold requirements of rule 76(1) were met in relation to the Recusal Costs.

139. It is also, I think, very clear, given the "not inconsiderable degree of sympathy" expressed in para 206 of the Heap Decision, and the acceptance that even the least rational of Ms Bhardwaj's suspicions of bias were genuinely held, that EJ Heap would not have exercised her discretion to award Recusal Costs against Ms Bhardwaj even if she had found that she had jurisdiction to do so. The FDA respondents accept that she would have been entitled to find in Ms Bhardwaj's favour at the discretion stage. Their submission, therefore, is not that I should myself award Recusal Costs, but that the question of those costs should be remitted back to EJ Heap for reconsideration. That would be pointless when her view on discretion is already clear, and most undesirable in a case which has already gone on for too long, and consumed too many resources. But the question of discretion does not arise, given that the requirements of rule 76(1)(a) and (b) were not satisfied.

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The cross appeal

140. Ms Bhardwaj appeals the order for costs which was made against her, which was in respect of the Privilege Costs (paras 17 to 20 above).

141. In support of the appeal, Mr Southey QC takes the following points:

i) Ms Bhardwaj has a genuine commitment to equality.

ii) There was good reason for her to be concerned about racial discrimination within the CPS.

iii) There was good reason for her to be concerned about conscious or unconscious racial bias on the part of the FDA and its officers.

iv) There were criticisms of the FDA respondents' conduct in the Tayler Decision and Ms Bhardwaj also has other criticisms of them.

v) The FDA respondents were unsuccessful on a number of factual issues which caused unnecessary expense, failed in a time limit application to strike out the claims, and then dropped an application to strike out on another ground.

vi) The FDA respondents made no interim application based on Ms Bhardwaj having suggested the suspension before she changed her mind about it and based claims on it.

142. It is said that these matters should have led to no order being made for costs.

143. I disagree. The application for the Privilege Costs was not an application for an issues based costs order, unlike many of the items argued in respect of the Tayler Decision. The Privilege Costs were quite distinct, being in respect of a separate argument about privilege which had been raised, quite unnecessarily, at the last minute, and which (unlike the other last minute

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application mentioned in para 206 of the Heap Decision) had disrupted, delayed and prolonged the determination of the substantive costs hearing (paras 8-10 of the Heap Decision). The position taken by Ms Bhardwaj was wrong, and it was ultimately abandoned, but the damage in terms of specific costs incurred and specific ET days wasted had by then already been done. Ms Bhardwaj was an experienced barrister and did not plead ignorance of the law as an excuse. In those circumstances, there is no real challenge to the finding that the threshold requirements of rule 76(1) were met, but those circumstances also justified the making of a costs order as a matter of discretion. It is impossible to argue that the Heap Decision was perverse or made any error of law or principle in doing so. This was very much a matter for EJ Heap, and, since she was making a decision about an application made in the course of the proceedings before her, she was better placed than anyone else to make it; much better placed than the EAT is now. She was not bound to look at the whole litigation and decide, effectively, that there should be a plague on both houses and no order for costs. She might have done that, but she was not bound to do it, or even to consider it, especially when no submission to that effect had been made to her. She had only to apply the words of rule 76 itself, and she did so.

144. It is also argued on Ms Bhardwaj's behalf that the award of the Privilege Costs was disproportionate, and the following points are made:

i) The delay in resolving the costs issues, which had been pending for many years since 19 October 2010 when applications were first made after the Tayler Decision.

Those delays were, however, caused by Ms Bhardwaj's own unsuccessful appeals.

ii) Ms Bhardwaj's success in resisting the Tayler Decision costs applications.

However, this did not entitle her to act unreasonably in raising and then abandoning the claim of privilege which led to the Privilege Costs.

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iii) An imbalance in resources between the FDA respondents and Ms Bhardwaj, who could not afford legal fees as well as they could. The requirement of the overriding objective in rule 2(a) of the ET rules is invoked, which is to ensure that the parties are, so far as practicable, on an equal footing.

However, Ms Bhardwaj was taking a legal point when claiming privilege, and her experience and qualifications as a barrister meant that she could not avoid responsibility for it.

iv) A risk that costs applications will deter discrimination applications.

However, no claims or applications are exempt from the risk of costs under rule 76(1) if parties or their representatives act unreasonably or if they have no reasonable prospect of success. The privilege claim was not a discrimination claim anyway. A cause of action for discrimination cannot act as general cover against liability for costs under rule 76 when the conditions of that rule are satisfied and the ET is minded to exercise its discretion to order them.

v) After the claim to privilege was abandoned, the legal advice proved helpful to Ms Bhardwaj in resisting the application against her for payment of the Tayler costs.

That is correct, as I have demonstrated when considering the FDA respondents' appeal against her success in relation to those costs. But this is not relevant, let alone persuasive. A claim to privilege does not depend on whether the advice in question is helpful or unhelpful. If it did, every claim to privilege would suggest that there is something to hide, and such claims would lose some of their value. It made no difference that Ms Bhardwaj was not trying to obtain a tactical advantage by objecting to disclosure of her legal advice. The problem was that she filed a witness statement relying on her legal advice at the last minute and then refused to disclose the legal

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advice, claiming that privilege had not been waived, when it apparently had, and then dropped her privilege claim on the second day of the hearing, by which time both days originally allocated to the costs applications had been lost.

145. I agree with the decision of the President of the EAT, Choudhury J, under rule 3(7) of the EAT rules that the cross appeal is unarguable. Although it has been pursued under rule 3(10), I dismiss it.

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