EMPLOYMENT TRIBUNALS

Claimant: **Dr. S Shaikh**

Respondent: **DB Engineering & Consulting GmbH**

Heard at: **Nottingham**

On: **29th June 2022**

Before: **Employment Judge Heap**

Members: **Mrs. F French**
Mr. A Wood

Representation
Claimant: **Ms. S Hubbard - Solicitor**
Respondent: **Ms. R Swords- Kieley - Counsel**

COSTS JUDGMENT

The Respondent's application for costs succeeds and the Claimant is Ordered to pay to the Respondent the sum of £20,000.00.

REASONS

BACKGROUND & THE ISSUES

1. Following a hearing which took place on 15th, 16th, 17th and 18th November 2020 and a further day of deliberations in chambers on 3rd December 2021 we dismissed all of the claims advanced by the Claimant against the Respondent and that was communicated to the parties by way of a Reserved Judgment sent to the parties on 1st February 2022 ("The Judgment").

2. The Claimant had presented her claim to the Employment Tribunal by way of an ET1 Claim Form received on 10th July 2020. The complaints pursued by the Claimant at the stage of presentation of that Claim Form were as follows:

    a. Discrimination relying on the protected characteristic of race;
    b. Discrimination relying on the protected characteristic of sex;
    c. Discrimination relying on the protected characteristic of disability;
    d. Victimisation; and
    e. A complaint about unpaid holiday pay.

3. A number of the complaints were withdrawn before the full merits hearing and by the time that the matter came before us the remaining claim consisted of three complaints of discrimination arising from disability, four complaints of a failure to make reasonable adjustments and two complaints of harassment related to the protected characteristic of disability.

4. As we have already observed above, the Judgment dismissed all of the remaining complaints advanced by the Claimant.

5. On 25th February 2022 the Respondent made an application for costs. There have been some variances in the amount of costs said to have been incurred but these have been confirmed at the hearing today as just shy of £25,000.00. Ms. Swords-Kieley has made plain today that the Respondent is limiting its costs application to the sum of £20,000.00. That is the VAT exclusive amount given that the Respondent will be able to reclaim that element of the costs incurred.

THE HEARING

6. Following the application being made the parties were asked as to their preferences as to whether it should be dealt with on the papers or at a hearing. The Claimant expressed a preference for the matter to be dealt with on the papers and the Respondent did not reply. This Employment Judge directed that the application would be dealt with on the papers but unfortunately that was not communicated to the parties and the Notice of hearing that was sent set out that it was to be an attended hearing.

7. That error was not picked up by the Tribunal until the day before the hearing and at that stage the parties were informed that the application would proceed on the papers. The Respondent objected to that course because, amongst other things, they had instructed Counsel and would have dealt with the advancement of their arguments differently had they known previously that the application would be dealt with on the papers. The Claimant objected and contended that the matter should be determined on the papers without an attended hearing.

8. Given that the parties had been under the impression that there was to be an attended hearing and the Respondent had instructed Counsel it was directed that the hearing would go ahead. Shortly after that the Claimant, via Ms. Hubbard, made an application to adjourn and that it be relisted to be determined on the papers. That application was not referred to us until shortly before the hearing was due to commence. We informed the parties that we would consider the application at the outset of the hearing and we heard further representations from both Ms. Hubbard on behalf of the Claimant and Ms. Swords-Kieley on behalf of the Respondent. We refused the Claimant's application with reasons given orally at the time. Neither party has requested that those reasons be included within this Judgment and therefore we say no more about them.

9. At the same time we also permitted the Respondent to rely on an invoice in respect of Counsel's fees although it had not been disclosed in accordance with Orders that had earlier been made. The Claimant also disclosed a spreadsheet in respect of her income and expenditure which had been

prepared by Ms. Hubbard although no supporting documents were adduced. We nevertheless took that document into account in reaching our decision although as we come to below we were not able to place weight upon it.

THE RESPONDENT'S APPLICATION

10. The Respondent contends that the Claimant acted both vexatiously and unreasonably in bringing the proceedings at all. They rely upon the following in support of the application:

    a. Her approach to the issue of knowledge of disability;
    b. Her dishonesty in respect of material facts in the claim namely being permitted to work from home and her work in Dublin; and
    c. Her conduct of the proceedings including at the full merits hearing and, particularly, her reliance on at least two fabricated documents.

11. We do not rehearse all of the more detailed arguments made on those points both orally and in the Respondent's skeleton argument but the parties can be assured that we have taken all of those into account before making our determination on the application.

THE CLAIMANT'S RESPONSE

12. The Claimant makes a number of points in resisting the costs application. Again, those are summarised here but the parties can be assured that we have taken into account in detail both the written and oral submissions which have been made by Ms. Hubbard on the Claimant's behalf. Those points can be distilled into the following matters:

    a. That the Claimant denied any unreasonable conduct either in issuing the claim or in her conduct of the litigation;

    b. That the Claimant denied that she had been dishonest in her evidence or representations to the Tribunal and that whilst the Tribunal preferred the evidence of the Respondent's witnesses they were professionally represented and did not share the Claimant's disability. A preference in evidence did not of itself demonstrate unreasonable conduct;

    c. The Claimant's disabilities were exacerbated by the stress and pressure of the hearing and acting as a litigant in person and that she did not and could not given the best account of herself and her evidence;

    d. That the criticisms that the Tribunal made of the Claimant were consistent with the effects of her disabilities;

    e. That the Claimant had acted reasonably throughout and had relied on advice given to her by her previous representative, Cheshire, Halton & Warrington Race & Equality Centre and that she had entered into a damages based agreement which implied that the Claimant was advised that she had meritorious claims;

f. That the Claimant had complied with all Orders made, had given prompt instructions at a time that she was represented and as a litigant in person had done all that was asked of her;

g. That a costs warning letter that the Respondent relied upon was woefully inadequate as it did not engage with the basis on which any such application would be made and a request for further detail went unanswered;

h. The Claimant was only provided with details of the Respondent's defence to the claim at a late stage because they had changed their witness statements on 29th October 2021, were still adding evidence to the bundle at the final hearing and it was only at the commencement of the hearing that the Claimant had the full information about the defence of her claims;

i. That the costs sought by the Respondent were excessive and representations made on 20th April 2022 went into detail about that; and

j. That the Claimant does have savings but those are earmarked for personal matters. We were made aware what those personal matters are but given that this Judgment will be published we do not consider it necessary or appropriate to expressly set out the detail. It was accepted by Ms. Hubbard, however, that an Order for costs in the sum sought by the Respondent would not cause the Claimant undue hardship.

13. In view of point (e) above we asked Ms. Hubbard whether the Claimant was waiving privilege. Ms. Hubbard confirmed that she was not. We were accordingly provided with no details of the advice given to the Claimant upon which she says that she relied in taking the decision to proceed to hearing not the instructions which led to any such advice.

THE LAW

14. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of whether an Employment Tribunal should make an Order for costs.

15. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs and the relevant parts of that Rule provide as follows:

> **"*When a costs order or a preparation time order may or shall be made***
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> ***76.***— *(1) 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."

16. In short, therefore, there is discretion to make an Order for costs where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings. Equally, the discretion is engaged where a party pursues either a claim or defence which has no reasonable prospect of succeeding or, to put it as it was termed previously, where a claim or defence is being pursued which is "misconceived". That only issues that we are considering for the purposes of this Judgment is whether the Claimant acted vexatiously or her conduct was unreasonable.

17. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where a claim or response has no reasonable prospect of succeeding, it does not automatically follow that an Order for costs should be made. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. When deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.

18. For something to have been pursued in a vexatious manner it must be that it is pursued not with the expectation of success but to harass the other side or out of some improper motive – **ET Marler Ltd v Robertson 1974 ICR 72** or, more widely, as something that is an abuse of process.

19. With regard to unreasonable conduct it is necessary for the Tribunal to consider *"the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had." (***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78).**

20. In accordance with Rule 84 of the Regulations, a Tribunal is entitled to have regard to the ability to pay any award of costs both in relation to the making of an Order at all, or the amount of any such Order. However, it is not a mandatory requirement that such consideration must automatically be given.

CONCLUSIONS

21. We deal here with our conclusions on the application made advanced by the Respondent. We start by acknowledging that costs in the Employment Tribunal are the exception and not the rule and that in discrimination cases, as with the striking out of claims, it is an important public policy consideration that those who have been discriminated against should not feel dissuaded from pursuing litigation. However, there will be some cases where an Order for costs is justified and we consider that this is one such case given that the claim was pursued unreasonably for the reasons that we shall come to and there are no mitigating factors which weigh against the making of a costs Order.

22. However, before turning to our conclusions as to the Claimants unreasonable conduct we deal with the argument advanced by the Respondent that the Claimant had acted vexatiously in her pursuit of the proceedings. We do not accept that that was the case. There is nothing before us to suggest that the Claimant commenced or continued with these proceedings for the purpose of causing inconvenience, harassment or spite to the Respondent.

23. However, we turn then to the Respondent's contention that the Claimant acted unreasonably in pursuit of the proceedings and remind ourselves that they rely on the following in support of that argument:

    a. Her approach to the issue of knowledge of disability;
    b. Her dishonesty in respect of material facts in the claim namely being permitted to work from home and her work in Dublin; and
    c. Her conduct of the proceedings including at the full merits hearing and, particularly, her reliance on at least two fabricated documents.

24. We are in this regard satisfied that the Claimant acted unreasonably in her pursuit of these proceedings. The issue of either actual or constructive knowledge of disability was key to the claim that the Claimant was advancing (and we return to that further later) and her approach before us was firmly that she had told both Mr. Hunefeld and Ms. Attridge about her mental health conditions. She therefore asserted quite firmly that the Respondent had actual knowledge of her disability and little was said as to constructive knowledge.

25. The Claimant's position on the issue of actual knowledge has fundamentally altered between the termination of her employment with the Respondent and these proceedings to underpin her contention that there was actual knowledge of disability. It is worth setting out the relevant parts of the Judgment which dealt with those issues and which were as follows:

    "The Claimant's account at various stages has not been consistent. As we come to further below, her accounts of what she told Ms. Hennings about the Respondent knowing about her disability differed considerably to her evidence before us and she has not given any satisfactory account of the reasons for that;

    The Claimant had also included within the bundle as if accurate notes of a grievance meeting that she had made (see pages 272 to 275 of the hearing bundle). In fact those notes were not accurate and included commentary that she had added which were on her own admission not said during the meeting. One key issue was the inclusion of words which made it plain that she had had conversations with Ms. Attridge and Mr. Hunefeld on "multiple occasions" about her disability. It is plain that the Claimant had included that to try and bolster her claim that she had told Ms. Attridge and Mr. Hunefeld that she suffered from depression. By the point that those notes were provided the Claimant knew full well that knowledge of her disability was an issue and we received no reasonable explanation why she had included such references. The Claimant had titled those notes as "minutes" suggesting that they provided an accurate account of the meeting and it was plain that the additions of this nature were not just after the event notes as the Claimant contended given references to "SJS stated". Her explanations about that in cross examination were entirely lacking in credibility. She initially contended

that it may be an issue as to her husband's handwriting and then that the Respondent's notes – which she had previously expressly agreed were entirely accurate – had been in some way corrupted. The presentation of those notes as "minutes" was clearly an indication that she was contending that those statements were what she had actually said in the meeting. It was actually a far cry from what the Claimant had really said as she told Ms. Hennings that she could not remember the content of any discussions about disability and that "it was a long time ago during chit chat" and that upon speaking about mental health in general she knew that she "must have told them". At best those notes were misleading and the Claimant's various explanations about that matter lacked credibility;

We have not had any reasonable explanation as to how the Claimant could now recall at the hearing before us over 18 months later specific conversations that she contends that she had with Ms. Attridge and Mr. Hunefeld which she could not recall anything other than general chit chat when she was asked about that by Ms. Hennings;

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"The Claimant attended a meeting with Ms. Hennings on 20th April 2020 to discuss her grievance. The Claimant produced a set of "minutes" of that meeting which appears in the bundle at pages 272 to 275. As we have already set out above, we are satisfied that those notes were not accurate and included commentary that even on her own account the Claimant had added which were not said during the meeting. That included the claim that she had had conversations with Ms. Attridge and Mr. Hunefeld on "multiple occasions" about her disability. That was not said at the meeting and what the Claimant had really told Ms. Hennings was that she could not remember the content of any discussions about disability and that "it was a long time ago during chit chat" and that upon speaking about mental health in general she knew that she "must have told them" (see page 338 of the hearing bundle). The lack of clarity of that statement compared to the detailed account that the Claimant now gives over 18 months later again leads us to prefer the evidence of Ms. Attridge and Mr. Hunefeld that the Claimant never told them that she suffered from depression and anxiety and that the first that they knew of it was when they saw the Claimant's grievance letter".

26. The Claimant's position had therefore changed demonstrably from what she was telling Ms. Hennings during the course of the grievance process. Her account at that time about "chit chat" and that she "must have told them" altered significantly by the time that it came to these proceedings and the hearing particularly where she gave a very detailed account (albeit one that we rejected) of what she then said that she told Ms. Attridge and Mr. Hunefeld. In contrast to the position during the grievance meeting, by the time of these proceedings and the hearing the Claimant knew full well that knowledge of disability was a significant issue. That was at the heart of the case and given that radical change in position and the fact that minutes had clearly been created to support discussions which we were satisfied had never happened, it is a claim that should not have been brought and certainly not have been advanced to a full hearing. That was unreasonable conduct.

27. Particularly, the Claimant's actions in altering the notes of the grievance meeting and the meeting with Mr. Hunefeld (the latter of which also

underpinned a complaint of harassment) and suggesting that those were an accurate representation of what had happened could have served no purpose other than to bolster her argument as to actual knowledge when that was not at all the reality of what had been said. Her explanations about those matters at the hearing entirely lacked credibility and it was plain that her additions of *"SJS stated"* were plainly intended to convey that that was what she had actually said during those meetings. Those additions were made after the Claimant was aware that knowledge of disability was going to be an issue in these proceedings. The creation of what were, at best, misleading "minutes" to support a position that was not at all accurate was of itself clearly unreasonable conduct.

28. Moreover, when the Claimant appeared to recognise that her position on actual knowledge of disability faced difficulties, she sought to advance a new argument in closing submissions which had hitherto not been mentioned at all in the Claim Form, either of the two Preliminary hearings held before the full merits hearing, in the Claimant's Further & Better Particulars of the claim, within the list of issues or at the time of discussing the list of issues at the outset of the full hearing. That was to suggest that the grievance hearing held by Ms. Hennings had been an extension of the dismissal process and the reason for that was in our view the fact that knowledge of disability was not at issue post the Claimant having raised her grievance. The addition of a new issue in that regard to seek to bolster a floundering case built on an assertion that the Respondent had actual knowledge of disability was also unreasonable conduct.

29. We turn then to the question of whether the Claimant was unreasonable in respect of dishonesty having regard to material facts in the claim namely being permitted to work from home and her work in Dublin. Whilst we made no finding in the Judgment that the Claimant had been dishonest, it was plain to us that at best she had placed a deliberate spin on the position with regards to both working in Dublin and working from home. She was well aware that those were real issues for the Respondent and, particularly, from the meeting with Mr. Hunefeld on 21st January 2020. Those issues were plainly the reason for the Claimant's dismissal as confirmed in the dismissal letter itself and given the content of the earlier discussions on 21st January.

30. Again, the Claimant had disclosed and presented a document which again purported to be minutes of that meeting with Mr. Hunefeld which were entirely inaccurate as to what had in fact been said. That could only have been to bolster her claim that her dismissal was an act of discrimination arising from disability when it was in fact plain from what had been said at the meeting and what was in the dismissal letter why her employment had been terminated and she would have been well aware of that fact. To again represent a document as minutes of a meeting which were anything but in order to bolster her claim cannot be anything other in our view than unreasonable conduct.

31. In short, on both the knowledge point and the reason for dismissal issue, this is a claim which should not have been brought and the Claimant's actions in doing so; in manufacturing documents in support and in altering her position on both knowledge and the issues (i.e. the "appeal" point) amounted to unreasonable conduct.

32. The final strand of the application is in respect of unreasonableness relating to the Claimants conduct of the proceedings, including at the hearing. We have already dealt with that in the context of the documents which the Claimant fabricated and concluded that that amounted to unreasonable conduct.

33. For all of those reasons we are satisfied that the first stage of the test is met in that the Claimant has acted unreasonably in the bringing and conduct of these proceedings. However, that is not the end of the matter and it is necessary for us to consider whether we should make any Order for costs and, particularly, if there are mitigating factors which point away from us making one.

34. We consider in that regard and in turn each of the points on which the Claimant, via Ms. Hubbard, relies in contending that no Order for costs should be made.

35. The first of those is that the Claimant denied any unreasonable conduct either in issuing the claim or in her conduct of the litigation. Whilst Ms. Hubbard has in this regard made it plain that the Claimant does not agree with the decision that we reached (about knowledge of disability and generally) she has neither applied for Reconsideration nor appealed the Judgment. Whatever the reasons for that, the findings and conclusions that we made still stand and it is not open to the Claimant in defence of the costs application to seek to reopen those matters and say that our decision was wrong.

36. The second point is that the Claimant denied that she had been dishonest in her evidence or representations to the Tribunal and that whilst the Tribunal preferred the evidence of the Respondent's witnesses they were professionally represented, did not share the Claimant's disability and that a preference in evidence did not of itself demonstrate unreasonable conduct. Whilst we made plain that we did prefer the evidence of the Respondent's witnesses, that was on the basis that core elements of the Claimant's case had, as we have set out above, been supported by documents that she had created and sought to present as "minutes" but which she accepted in cross examination were not accurate. That went far beyond a preference in evidence.

37. Whilst she was at times acting as a litigant in person, the Claimant was aware from a very early stage that knowledge of her disability was a key issue and determinative certainly of the claims of discrimination arising from disability and a failure to make reasonable adjustments. It inevitably also impacted the harassment complaints given the arguments that the Claimant sought to run in relation to allegations against Mr. Hunefeld. That was recorded in the Respondent's ET3 Response, in the list of issues agreed at a Preliminary hearing before Employment Judge Ayre on 5th February 2021 (some 9 months before the final hearing) and in the Respondent's witness evidence. Whilst by the time of the hearing the Claimant was a litigant in person, her representation by professional advisers had only ceased in June 2021. The Claimant is an intelligent and professional individual and cannot have failed to appreciate what she was doing when she created her "minutes" of both the grievance meeting and meeting with Mr. Hunefeld on

21st January and that the sole purpose was to support what were core issues in the case.

38. The third issue relied upon by the Claimant is that it is said that disabilities were exacerbated by the stress and pressure of the hearing and acting as a litigant in person and that she did not and could not give the best account of herself and her evidence. We have no doubt that it is difficult for litigants in person to participate in Court and Tribunal proceedings and even more so for those with disabilities. Particularly, we acknowledge that mental health conditions particularly can present a barrier to presenting a case effectively and also have an effect on the evidence that is given. However, none of those issues go any way to explaining why the Claimant gave an entirely different account as to knowledge of disability than she had given to Ms. Hennings and created misleading documents so as to support the case that she wanted to advance in that regard and in respect of the meeting with Mr. Hunefeld of 21st January and which she claimed amounted to unlawful harassment.

39. The next point raised on behalf of the Claimant is that the criticisms that we made of her in the Judgment were consistent with the effects of her disabilities. For the same reasons as we have given immediately above that is not an answer to the changing position on knowledge of disability and the documents that the Claimant created which were plainly done in order to bolster her claim.

40. That fifth point relied on by the Claimant is that it is said that she had acted reasonably throughout and had relied on advice given to her by her previous representative, Cheshire, Halton & Warrington Race & Equality Centre and that she had entered into a damages based agreement which implied that she was advised that she had meritorious claims. We do not consider that there is an answer to the costs application in that the Claimant was initially advised by the Race & Equality Centre and that they entered into a damaged based agreement with her. We are invited to conclude that that must inevitably mean that the Claimant was advised that she had a meritorious claim and that it should be pursued. There are two main problems with that argument. The first of them is that the Claimant has expressly said that she is not waiving privilege. Accordingly, we do not know what advice the Claimant was given and whether that remained consistent throughout the period of the adviser's instruction. Secondly, the advice given can only be as good as the instructions that it is made in connection with. There is nothing to suggest that the instructions that the Claimant gave to those advisers was not consistent with the evidence that she deployed before us – that is that she had expressly told Mr. Hunefeld and Ms. Attridge about her disabilities and that she had permission to work from home and work three days per week in Dublin. For those reasons, she cannot hide behind undisclosed advice and the instructions that it was provide in connection with.

41. The next issue relied upon by the Claimant is that it is said that she had complied with all Orders made, had given prompt instructions at a time that she was represented and as a litigant in person she had done all that was asked of her. Whilst it may (and that point is disputed by the Respondent) be the case that the Claimant complied with Orders and gave prompt instructions, that has no relevance to the Claimant's position on the knowledge issue, creation of documents that were misleading at best and

advancing a claim that should in reality never have been brought. The Claimant also relies on the fact that she withdrew some complaints before the full hearing. However, the fact that she withdrew some unmeritorious claims but continued with ones which remained unsustainable on the facts known to the Claimant and then created documents in support is not in our view an answer to the application.

42. It is also said in this regard that the proceedings have placed a huge strain on the Claimant emotionally and having regard to her mental health. However, again that is not an answer to the costs application because it was the Claimant's own choosing to commence these proceedings when, in fact, she should never have done so given the knowledge issue and the fact that she was relying on, at best, misleading documents to support her position.

43. The Claimant also relies on the fact that costs warning letters that the Respondent relied upon was woefully inadequate and did not engage with the basis on which any such application would be made and that a request for further detail went unanswered. We agree that the costs warning letters did not engage properly with the basis upon which any application would be made and at that time the Respondent was not represented and so the costs position was uncertain. However, a costs warning letter is not a pre-requisite to a costs Order being made and, as we have already observed above, the Claimant knew full well that the knowledge issue was firmly in dispute and was a key issue in the case. The deficiency of the costs warning letters, which was in all events sent at a time when the Respondent was not legally represented, is therefore not an answer to the costs application.

44. The next point on which the Claimant relies is that it is said that she was only provided with details of the Respondent's defence to the claim at a late stage because they had changed their witness statements on 29th October 2021, were still adding evidence to the bundle at the final hearing and it was only at the commencement of the hearing that the Claimant had the full information about the defence of her claims. We do not accept that that is an accurate description of matters. As we have already set out above the issue of knowledge (or more accurately a lack of knowledge) of disability was set out in the Respondent's ET3 Response and recorded clearly in the list of issues which were set out at the Preliminary hearing before Employment Judge Ayre. The Claimant was clearly aware of the knowledge issue because of the creation of the "minutes" which we have already described above. It is therefore not the case that in respect of the points where we have found the Claimant to have acted unreasonably that she was not fully aware of what the position was significantly prior to the commencement of the full merits hearing.

45. Finally, (albeit linked to the third issue identified and dealt with above) there is a medical report that is relied upon by the Claimant but in our determination that is not an answer to the costs application either. Even leaving aside that it is not clear whether the adviser had seen the Claimant's medical records, almost all if not all that is reported is what the Claimant herself has said and general effects of anxiety and depression. Moreover, the focus of that report was firmly upon the Claimant's presentation and behaviour during the hearing. Whilst that was an aspect of the costs application it focused only on the Claimant's attitude during her own cross examination of the Respondent's witnesses and when she was giving

evidence. It did not engage with why the Claimant's disabilities were the cause in whole or in part of her reliance on documents which had been created to bolster her claim or why her case as advanced at the hearing on the knowledge point and the permission to work from home and for three days per week in Dublin lacked credibility and was not in accordance with the contemporaneous documents.

46. As we have already set out above as to the knowledge point itself, that had caused the Claimant to produce a set of "minutes" which she advanced as being an accurate record of a meeting but which were anything but and could only have been designed to bolster her case that she had told the Respondent about her disabilities. She was also advancing an entirely different account about what she alleged that she had said about her disabilities to Mr. Hunefeld and Ms. Attridge than that which she had deployed when specifically asked about that matter by Ms. Hennings as part of her investigation into the Claimant's grievances. Furthermore, she had sought to alter the scope of her claim by suggesting that that process amounted to an appeal when she had specifically eschewed the suggestion that her grievance should be treated as such because she was well aware that the only time that the Respondent had knowledge of her disabilities was as a direct result of her grievance letter. The medical report did not engage with any of those matters or why her mental health had been the cause or part cause of that conduct.

47. Having considered the position carefully and having concluded that the Claimant did act unreasonably we then need to consider in view of the arguments set out above in mitigation whether it is appropriate to make an Order for costs. We consider that it is appropriate in this case. Whilst having regard to the fact that costs are the exception and not the rule and that there are public policy considerations against actions which might discourage people from bringing discrimination claims, this is a case where there are in our view no mitigating factors against the making of such an Order. It is therefore in our view appropriate to make a costs Order in favour of the Respondent.

48. The Claimant's final two points as set out at paragraph 12 above deal with the quantum of costs and so we have dealt with those below.

THE AMOUNT OF THE COSTS ORDER

49. Having determined that there should be an Order for costs, it falls to us to consider the amount of that costs Order. The Respondent has incurred costs, which we accept have been documented, just shy of £25,000.00 exclusive of VAT. The application is limited to £20,000.00 and so we consider matters as a summary rather than a detailed assessment.

50. Ms. Hubbard had produced a spreadsheet of the Claimant's income and expenditure but we were unable to accept that at face value as no supporting documentation was provided to evidence the figures set out in that document and the Claimant was not called to give evidence as to her means. Whilst Ms. Hubbard made the point that savings that the Claimant has have been earmarked for personal matters, we also had no documentation supporting the level of savings that the Claimant actually has and no detail was provided about equity which we presume that she has in her home. Moreover, she is

currently earning a substantial salary of just shy of £70,000.00. The Claimant continues to have that significant earning capacity and even if she was not immediately able to pay the costs sought by the Respondent she will clearly be in a position to do so in the future. Moreover, Ms. Hubbard made it plain that she was not saying that the Order sought by the Respondent would cause the Claimant hardship.

51. Whilst Ms. Hubbard also made a number of challenges to specific items from the costs claimed by the Respondent, we remind ourselves that this is not a detailed assessment. Moreover, we accept that the costs were both reasonably and necessarily incurred – particularly in view of the serious allegations made by the Claimant; the Respondent does not seek all of the costs incurred and they had acted so as to minimise the amounts incurred by acting on their own behalf for significant periods of time during the course of these proceedings.

52. Ms. Hubbard also contends that there is no evidence that Counsel's fees incurred at the full merits hearing have or will actually be paid by the Respondent and not someone else, such as their solicitors. We accept that that is not the case and it would in our experience be a most unusual situation to say the least for solicitors instructed by a party to meet or be expected to meet Counsel's fees personally or that Mr. Greaves (who appeared at the full merits hearing) would otherwise agree to forgo them. We are satisfied that those fees fall due to be paid by the Respondent.

53. Having found that the costs have been reasonably and necessarily incurred, that the Claimant does have the means to meet them and for the reasons given above we are therefore satisfied that the costs sought of £20,000.00 are reasonable and that we should make an Order in those terms.

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Employment Judge Heap

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Date: 17th August 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.