EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Dr Esha Sarkar	AND	University Hospital Plymouth NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY from Plymouth **ON** 8 August 2022
Video Hearing by CVP

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mr I Ley
Ms R Hewitt-Gray

Representation

For the Claimant: **Mr D Reade, Queen's Counsel**
For the Respondent: **Mr S Keen of Counsel**

JUDGMENT ON COSTS APPLICATION

The unanimous judgment of the tribunal is that:

1. The respondent's First Application for costs succeeds, and the claimant is ordered to pay the respondent's costs from 6 March 2020 to 21 December 2020 in a sum to be determined by way of detailed assessment; and

2. The respondent's Second Application for costs is adjourned pending resolution of the claimant's appeals.

RESERVED REASONS

1. This is the judgment following the respondent's applications for the claimant to pay its costs of defending this claim which was brought against it by the claimant. This judgment should be read in conjunction with our previous judgment on liability in this matter dated 18 November 2020 and sent to the parties on 24 November 2020 (which we refer to as "the Judgment").
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because all issues could be determined in a remote hearing. The documents to which we were referred are in a bundle of 354 pages, the contents of which we have recorded. The order made is described at the end of these reasons.
3. We have heard detailed submissions from Mr Keen who presented the respondent's applications. We have received a statement from Mr J Gutteridge, the respondent's solicitor who had conduct of the defence of this claim on behalf of the respondent. Mr Reade QC opposed the application on behalf of the claimant, and he made detailed submissions on her behalf. The claimant chose not to adduce evidence of her means nor on her ability or otherwise to pay any potential award of costs.
4. The General Background to This Case
5. The claimant issued these proceedings on 13 May 2018, and her claim was limited to one of alleging detriment on the ground of having made a protected public interest disclosure under section 47B of the Employment Rights Act 1996. The claimant was acting as a litigant in person at that time. The respondent entered its response resisting the claims on 3 July 2018. At a case management preliminary hearing on 21 August 2018 Employment Judge Salter ordered the claimant to provide further information of the detriments which the claimant alleged had arisen because of the one disclosure relied upon, namely a Datix Incident Form on 14 August 2017.
6. The claimant then submitted a document running to 27 closely typed pages in an attempt to comply with that order, and arguments and applications ensued as to whether the order had been complied with correctly and what sanction should be applied. This included an application by the respondent for an unless order on the basis that the claimant remained in default of the previous order. With effect from 18 October 2018 the claimant instructed solicitors to represent her, and on 3 December 2018 the claimant's solicitors served a schedule setting out further information relating to her claim. It ran to 19 pages and set out 26 separate alleged detriments said to have arisen on the ground of the one protected public interest disclosure relied upon (the Datix report).
7. The respondent objected to that schedule of detriments on the basis that a formal application to amend the existing proceedings was required and had not been made, and it applied for a preliminary hearing to determine whether the vast majority of the detriment allegations could proceed because they were out of time, or alternatively for a deposit order because they had little reasonable prospect of success.
8. At a further case management preliminary hearing on 18 January 2019 Employment Judge Harris allowed the claimant's application to amend her claim to include the schedule of detriments, and he declined the respondent's application for a deposit order. He also declined the respondent's application for a preliminary hearing on the out of time issues. It was also noted that the respondent had

conceded at this early stage that the Datix report relied upon by the claimant was a protected public interest disclosure.

9. Meanwhile the claimant (who was still employed by the respondent) had raised a formal grievance at work, and after it had been rejected, she appealed against that decision. The claimant had access to advice and assistance from the British Medical Association at this time and the BMA represented her during this grievance process. The parties remained in dispute about a number of issues. The respondent was unable to file an amended response pending resolution of the grievance process. The claimant's solicitors had earlier suggested that the full main hearing would take 15 days to resolve the issues, and the respondent objected to that possibility because it asserted that 24 of the 26 detriments relied upon by the claimant were clearly out of time, and it would not be proportionate to expend the time and costs involved in resolving them.
10. At a further case management preliminary hearing before me on 12 July 2019 I declined the respondent's renewed application for a preliminary hearing to determine the out of time issues as a separate preliminary point, but I did agree that it was disproportionate to proceed to an extended full main hearing if 24 of the 26 detriments were out of time, particularly as the claimant only needed to establish that she had suffered one of the numbered detriments as a consequence or cause of the conceded disclosure in order to succeed in her claim. Both parties were represented by Counsel at that hearing, and we all agreed that the claimant would choose up to five numbered detriments (in addition to detriments numbered 25 and 26 which were in time), referred to as the Chosen Detriments, and we would determine only those Chosen Detriments at a full main hearing. It was implicit that the claimant would choose her strongest detriments, and it was agreed that the remainder would be stayed pending determination of those Chosen Detriments. It was agreed by claimant's Counsel that this course of action was in accordance with the overriding objective and in the interests of justice, and proportionate, and in accordance with the principles in HSBC Asia Holdings v Gillespie [2010] EAT and related cases.
11. There was then another dispute between the parties during which the respondent asserted that the claimant had attempted to continue to extend her claim beyond the Chosen Detriments, and there were consequent delays with regard to agreeing the trial bundle and the exchange of relevant witness statements. One such dispute arose when the claimant appeared deliberately to have failed to comply with disclosure obligations with regard to her history of historical communication and team working deficiencies in previous hospitals. The full main hearing was eventually listed to commence on 6 March 2020 and on the day before that hearing the claimant made an application to postpone the hearing on the basis that her chosen Counsel was unwell. It became clear that alternative Counsel was available to represent the claimant and that application was refused. On the following day, 6 March 2020, (which was the first day of the hearing which was reserved the tribunal for reading), the claimant made a further application for the hearing to be postponed on the basis that she was now too unwell to attend. That application was granted, and the hearing was relisted.
12. The claim eventually came before this full tribunal sitting in the Plymouth Employment Tribunal on 4, 5, 6, 9, 10 and 11 November 2020. The claimant was represented by Counsel at the hearing. Following a subsequent meeting in Chambers on 18 November 2020 this tribunal prepared and promulgated a detailed Reserved Judgment dated 18 November 2020 which was sent to the parties on 24 November 2020 ("the Judgment"). For the detailed reasons explained

in the Judgment, all of the claimant's claims in connection with her Chosen Detriments were dismissed.

13. The respondent then made an application for its costs by letter dated 21 December 2020, partly on the assumption that the claimant would not pursue her remaining claims for detriment which had been stayed, given that her preferred Chosen Detriments had all been dismissed. The claimant then submitted an appeal against the Judgment to the EAT and the claim was stayed pending resolution of that appeal. The appeal failed to survive the sift process and on 7 June 2021 HHJ Keith rejected the appeal on the basis that it had no reasonable prospect of success. The claimant did not apply for a hearing under Rule 3(10).
14. The respondent then sought confirmation from the claimant's solicitors that the claimant's remaining detriment claims would be withdrawn, but during September 2021 the claimant decided no longer to instruct those solicitors. On 25 October 2021 the respondent applied for the stay to be lifted and for the remainder of the claimant's claims to be struck out or made subject to a deposit order. There was then a further case management preliminary hearing before me on 28 January 2022 which was listed to determine how to proceed with the respondent's application for costs and for strike out and/or deposit orders in relation to the remaining detriment claims. At that stage the claimant had instructed a new legal team and all parties agreed that it would be helpful to allow them to review the position and advise the claimant accordingly. The applications were adjourned, but the costs application was listed to be determined today, and the respondent's application for strike out and/or deposit orders was listed for a further preliminary hearing on 9 March 2022.
15. At the hearing on 9 March 2022 before me it then became clear that the claimant had refused to withdraw any of the remaining detriment claims, and I granted the respondent's application for a deposit order for each of the claimant's remaining 19 detriments, and an order to that effect was sent to the parties on 15 March 2022. Meanwhile the claimant had decided no longer to instruct her solicitors in connection with the remaining claims, save that they remained instructed in connection with this costs application under consideration today.
16. The claimant then made an application for the deposit order to be stayed, which I refused. The claimant then failed to pay the deposit within the time ordered, with the effect that her remaining 19 detriment claims were therefore struck out. The claimant then made three separate (further) appeals to the EAT: the first was an appeal dated 4 April 2022 against the Deposit Order made on 9 March 2022 and sent to the parties on 15 March 2022; the second was an appeal dated 7 June 2022 against the refusal to stay the Deposit Order; and the third was an appeal on 6 July 2022 against the striking out of the claimant's claims by reason of failure to pay the deposit.
17. By letter dated 25 July 2022 HHJ Shanks rejected the first of these appeals against the Deposit Order sent on 15 March 2022 at the sift stage because there were no reasonable grounds for an appeal. It is unclear to us whether the claimant has applied for a further hearing under Rule 3(10), nor whether there has yet been any reply to the claimant's second and third appeals explained in the preceding paragraph.
18. <u>The Application for Costs</u>
19. The respondent now makes an application for its costs under Rules 76(1)(a) and (b) on the basis that the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings and the way in which

the proceedings have been conducted, and also because the claim had no reasonable prospects of success.

20. There are effectively two applications. The first application was made by letter dated 21 December 2020, and it relates to the claimant's conduct and proceedings up to and including receipt of the judgment on liability as set out in detail in the Judgment. That application was eventually listed to be determined today. We refer to this application as the First Application.
21. The respondent has also extended that First Application to include a claim for costs in connection with the claimant's conduct in continuing with these proceedings after the Judgment and up to and including today. We refer to this as the Second Application.
22. The First Application
23. The letter of application dated 21 December 2020 runs to nine closely typed pages, which we have considered in detail. It is difficult to do justice to the detail of that application in a summary, but the more salient assertions include these: (i) the claimant is a highly educated "trainee Consultant" Doctor. Although she indicated that she was initially unrepresented, she was assisted by the British Medical Association during her grievance process and was able to instruct specialist solicitors and Counsel during the course of these proceedings; (ii) the claimant's original claim was lengthy, difficult to understand, and on the face of it largely out of time; (iii) even with the assistance of solicitors the claimant then failed to comply with clear directions from the tribunal, and the eventually accepted list of 26 detriments included 24 which were out of time, and included a number of serious allegations against fellow professionals such as that her professional team "colluded" against her; there was "constant incitement and antagonism against the claimant" by Dr Whyte; and that Dr Bethune prepared a report which was "dishonest, biased and one-sided"; (iv) the claimant through her solicitors adopted an overly aggressive and disproportionate approach to the potential resolution of her issues; (v) the claimant deliberately failed to comply with disclosure obligations particularly with regard to her history of historical communication and team working deficiencies in the three previous hospitals where she had worked and failed to complete her training (Bristol, Birmingham and Newcastle); (vi) following disclosure of these documents the respondent wrote on 4 October 2019 to the claimant's solicitors making it clear that they significantly undermined the claimant's contention that Datix report was the reason for her pleaded detriments; (vii) that letter of 4 October 2019 included a costs warning to the effect that the claimant's conduct in bringing and pursuing the claim was vexatious and/or unreasonable, particularly as the claimant was choosing to pursue claims which were out of time; her own documents did not support her assertion that the breakdown in working relationships was because of her Datix report disclosure; and the claims had little reasonable prospect of success. The claimant was urged to reflect on the merits of her claim before additional time and costs were spent on preparing witness statements and defending the claim through to final hearing; (viii) there were continued unnecessary disputes about the preparation for hearing, including the claimant's insistence that the respondent removed documents indicating her history of poor communication skills, confrontational and defensive attitude, and difficulties in relationships in other organisations, despite the fact that these were clearly relevant; (ix) the respondent emailed the claimant on 21 January 2020 to the effect that she was at risk of a costs order in circumstances where she was acting vexatiously, abusively disruptively or otherwise unreasonably; (x) there were continued unnecessary disputes about agreement of

the potential trial bundle; (xi) despite the fact that the claimant had had access to legal representation since at least 18 October 2018 the claimant's allegations were roundly rejected by the Tribunal as confirmed in the Judgment (and specific extracts from the Judgment are referred to below); (xii) at the hearing both Dr Whyte and Dr Bethune were subjected to extensive cross examination in connection with the decision to subject patient JH to the challenge procedure and the extent to which this was justified, (and effectively that they had been professionally negligent) even though the appropriateness or otherwise of the clinical decisions made was never an issue in the case for the tribunal to determine, and was an unreasonable attempt to deflect legitimate feedback provided by Dr Whyte and Dr Bethune and/or to discredit them; and (xiii) these unreasonable and unnecessary proceedings have caused considerable disruption to the respondent hospital, and distress to its witnesses, and has had an adverse impact on the care which the respondent was able to provide to patients. The respondent's seven witnesses included three consultants, one clinical nurse specialist, and three managers, and patient clinics had to be cancelled to enable them to attend to give evidence, both at the first listing of the hearing when it was postponed at short notice at the claimant's request, and again when it was relisted.

24. The respondent also draws specific reference to the following paragraphs in the Judgment, which it says demonstrates the vexatious and unreasonable conduct of the claimant during these proceedings and at the hearing, and the fact that the claim did not enjoy reasonable prospects of success. For the sake of completeness, they are repeated here:
25. [24] "These behavioural and communication difficulties appear as a constant theme throughout the training records which we have seen. In particular, those supervising the claimant during her training at a number of different establishments have all consistently reported teamwork and communication difficulties, and in particular an inability to accept feedback or criticism and to respond in a positive manner to assist in training and development. A constant criticism of the claimant has been that instead she reacts in a defensive and confrontational manner."
26. [32] "… There had been a breakdown in the working relationships with the claimant in each of the three separate departments at Bristol, Birmingham and Newcastle. One consistent theme was that criticism and feedback was met by the claimant with defensiveness and even hostility, rather than as an opportunity to improve and progress, and that this had a direct impact on working relationships…" (The respondent also maintains that the documents supporting these conclusions were obviously relevant and that it had been unreasonable for the claimant to withhold these from disclosure, and subsequently to continue to dispute their relevance and inclusion).
27. [93] "… We can easily see why various educational supervisors, trainers, and colleagues found her character and attitude to be both frustrating and exasperating on the one hand, to defensive, challenging and hostile on the other. Dr Bethune knew about the claimant and her training difficulties before she joined the respondent's department in Plymouth. We have no reason to doubt Dr Bethune's evidence that she wished to help the claimant to complete her training despite the fact that this would require further time and effort on the part of senior personnel in her department. She and her colleagues tried their best to help the claimant in this respect, but within a matter of weeks the claimant's character and attitude was such that trying to provide supportive and encouraging training had made Dr Bethune ill, and the clear evidence from Occupational Health was that Dr Bethune should no longer act as the claimant's Educational Supervisor because doing so was having an adverse effect on her health and well-being. Mrs Trump had also become ill as a result of her dealings with the claimant and had received similar advice from Occupational Health. Our findings of fact and conclusions should clearly be seen in this context."
28. [115] … We find it inherently unlikely and highly improbable that any of the respondent's personnel from whom we have heard would commit any act, or to deliberately fail to act,

on the ground of the claimant's Datix disclosure. In the first place the claimant was actively encouraged to submit the Datix report. Dr Bethune thought she should be encouraged to do so, and Dr Whyte and Dr Leeman thought so too … The second point relates to the breakdown of relationships and the negative reports about the claimant which led to the ARCP Outcome 4 and her removal from the training programme. It is not the case the claimant's deficiencies suddenly became apparent after the date of the Datix report. On the contrary, the claimant had demonstrated for a number of years in a number of different hospitals the same identified performance issues which were below or well below normal expectations in her training. These included from time to time a lack of clinical expertise; failure to take responsibility for her own Reflections and filing of training information; and a worrying tendency to react to any perceived criticism with a defensive and hostile nature, leading to a severe disruption of the team dynamic. All of these professional deficiencies already existed before the claimant joined the respondent's team, and again became readily apparent in the short time that the claimant was with the respondent. They simply cannot be said to be new or imaginary deficiencies which had arisen merely because she submitted a Datix report when encouraged to do so."

29. (In determining Detriment 2 and the claimant's allegation that she "was instructed to modify the adverse incident report (Datix) by Dr Whyte within two hours of the disclosure and the claimant felt pressurised into acting against conscience") [118] We find that this alleged detriment simply fails on its facts. It is not the case that Dr Whyte instructed the claimant to modify her Datix report … He did not instruct the claimant at any stage to modify her Datix …"
30. (In rejecting Detriment 12): [126] "We find that the claimant's position with regard to the recording of her consent clerking with the anaphylaxis patient JH was inconsistent and disingenuous … Dr Whyte had every right to investigate the position and make the comments which he did."
31. (In rejecting Detriment 14): [133] "Both the original DOPS assessment by Dr Whyte, and the Educational Supervisor's Reports from Dr Bethune, gave rise to reasonable evidence-based conclusions which were not reached by Dr Whyte or Dr Bethune on the ground that the claimant made her Datix report."
32. (In rejecting Detriment 25): [139] "We consider it frankly ludicrous to suggest that the respondent acted (or failed to act) to delay the grievance and/or provide someone clinically qualified in the grievance process (particular when the claimant never asked for it), on the ground that the claimant made her Datix disclosure. There was no requirement under the respondent's procedures to have someone clinically qualified to hear it; the claimant and her BMA Representative failed to request the same; and it became a recommendation of the appeal panel in an attempt to consider more clinically certain aspects of the claimant's grievance. There is simply no evidence that any of the respondent's officers (including Mrs Buller from whom we have heard who chaired the grievance initially) carried out the grievance in any particular detrimental way on the ground that the claimant had submitted a Datix report. We have no hesitation in rejecting this alleged detriment as well."
33. (In relation to Detriment 26 and the removal of the claimant from her training position) at paragraphs 144/145 the Tribunal held that this was for the reasons given by the ARCP training panel which included "grave concerns for patient safety if the trainee were to continue to practice" and "it was clearly a decision of an independent HEE panel, and not any act or deliberate failure to act on the part of the respondent."
34. In his submissions for the respondent Mr Keen also makes the following points. The first is that the word "scandalous" has a narrower meaning than its ordinary colloquial use, and it embraces two narrower meanings: "one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process." (Bennett v London Borough of Southwark). Similarly, with regard to the word "vexatious" in Attorney General v Barker it was held that: "the hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to

inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

35. The respondent asserts that the claimant's wholly unreasonable appreciation of the behaviour of her employer and colleagues should attract a costs award because this was the reason, rather than a mistaken appreciation of legal rights, which has driven her unreasonable approach to this case. The respondent notes that in Vaughan the original tribunal determined that the claims were misconceived and it was unreasonable of the appellant to pursue them, and that she had unreasonably refused to accept a non-discriminatory explanation for the acts of which she complained, when those explanations were plainly correct as a matter of common sense. Instead, she preferred to advance a case of "mass conspiracy" unsupported by evidence. The respondent asserts that this claimant behaved in the same way and it is clear from the Judgment and in particular the extracts above that her appreciation of the behaviour of her employer and her colleagues was significantly flawed.
36. The respondent contends that the claimant's conduct throughout this case was unreasonable for the following reasons: (a) her unreasonable approach to the conduct of the litigation; (b) her pursuit of hopeless and baseless allegations of serious dishonesty and collusion; and (c) in her pursuit of these allegations, for the ulterior purpose of impugning the respondent's witnesses' professional judgments, and with the effect of harassing the respondent and its witnesses. In support of its application the respondent makes this final point: "The tribunal conducted a full and thorough examination of the circumstances of the Claimant's employment. It held that the theme of the claimant's unreasonable conduct emerged during her employment and carried over into the allegations made in this litigation. The claimant, when faced with perfectly legitimate criticisms, reacted in an aggressive and hostile manner. This attitude manifested itself in this litigation in the claimant's allegations of dishonesty and collusion. She pursued those allegations even though she had little to no evidential basis for making them and irrespective of her prospects. The allegations were wholly rejected by the tribunal."
37. The respondent's First Application for costs from the commencement of these proceedings until December 2020 is in the sum of £115,293.20 exclusive of VAT.
38. The Second Application
39. The Second Application is made on the same grounds but relates to the period after 21 December 2020. The respondent asserts that effectively having lost the case the claimant unreasonably refused to withdraw any of her remaining detriments with consequential costs ramifications, including attendance at the preliminary hearing on 9 March 2022, at which the Deposit Order was made. The claimant did not then pay the deposit in compliance with the order. In her application for a stay of the deposit order on 11 April 2022 the claimant continued her unreasonable attack on the first respondent's integrity including the comments: "The respondent has objected to staying the Deposit Order out of malice towards the claimant as the claimant is pursuing the claim and is preventing the respondent from burying their clinical negligence, professional misconduct, and the victimisation of the claimant for disclosing clinical negligence with patient care."
40. When the tribunal decided to reject the claimant's application to stay the deposit order the claimant described that decision in an email on 29 April 2022 as: "Nothing less than a punitive measure against the claimant for not withdrawing the claim and not enabling the respondent to bury Dr Whyte's clinical negligence with patient

care, ongoing risk to patient safety and professional misconduct of covering up clinical negligence." The respondent asserts that despite the terms of the Judgment which had drawn attention to all the relevant issues, the claimant still persisted in arguing, wholly unreasonably, and vexatiously, that Dr Whyte was guilty of "clinical negligence" or "professional misconduct" when those allegations had already been firmly rejected.

41. The respondent's claim for costs arising from December 2020 until 22 July 2022 is in the further sum of £21,704.50, exclusive of VAT.
42. <u>The Respondent's Costs Warning Letter:</u>
43. During the extensive correspondence between the parties' respective solicitors referred to above, the respondent's solicitors sent a letter dated 4 October 2019 to the claimant's solicitors, the last five paragraphs of which were headed "Costs Warning". That warning read as follows:
44. "As we have previously indicated the claimant should be aware that she will be at risk of a costs order being made against her such as if it is considered that she 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 where she has been in breach of any order.
45. Not only do we have concerns that relevant unfavourable documents have been and still are being withheld by the claimant, and this is both unreasonable conduct and in breach of the tribunal's disclosure order, but it does seem that the claimant's conduct in bringing and pursuing this claim overall is vexatious and/or unreasonable.
46. The claimant is continuing to pursue claims that are out of time and which the Tribunal does not have jurisdiction to consider. The claimant also appears to have acknowledged in previous documents filed with the Tribunal that she is not going to be able to provide any witness evidence to show that the alleged detriments leading up to the ARCP outcome in December 2017 were on the grounds that she had made a protected disclosure.
47. The claimant is aware that the respondent considers the claim to have little reasonable prospect of success. An application for a deposit order was made even prior to the disclosure of documents but this has not been actively considered by the Tribunal given the decision reached that jurisdictional points should be addressed at the final hearing. In any event, the claimant's contention that her Datix from August 2017 was the core/real reason for the breakdown in working relationships at the Respondent and the various pleaded detriments is not supported by the documents that have been disclosed between the parties.
48. Significant costs have already been incurred by the respondent in defending this claim and we would urge the claimant to reflect on the merits of her claim and her potential liability for costs before additional time is spent in preparing the bundle and witness statements; and in defending the claim through to a final hearing."
49. <u>The Claimant's Opposition to the Applications</u>
50. The claimant's solicitors originally opposed the First Application in a detailed letter dated 18 March 2021 which runs to just over seven pages. Inter alia it disputes the respondent's assertions about the claimant's alleged unreasonable conduct during the interlocutory hearings and during the preparation of the case for its main hearing. We have read and considered that letter, which Mr Reade adopts in the course of his submissions in opposition to the respondent's applications.
51. Mr Reade has set out the claimant's position in detail, which for convenience only (and not in substitution for the full submissions) we summarise as follows: (i) The Employment Tribunal is not a forum in which costs "follow the event". The making of costs orders is exceptional and the threshold for making one is a high one; (ii) the fact that the claimant lost her claims does not justify any costs award of itself: (iii) the Judgment does not contain findings of disingenuous evidence or conduct in bad faith in the sense of wilful misconduct. Any flawed appreciations of the

behaviour of her employers and colleagues is not the same as disingenuous evidence or bad faith on the part of the claimant; (iv) The claimant had a perception of the way that she was treated by the respondent, and the Judgment does not find that the claimant did not believe her perception of events. It might reflect the findings in the Judgment as to her personality and character traits, but the fact that her beliefs were found to be wrong does not make her vexatious, abusive or unreasonable in the presentation of the claims. It is commonplace for Courts and Tribunal to find that genuinely held opinions or perceptions of events are found not to be correct or are misguided, but this cannot be equated with vexatious or unreasonable conduct, still less in the normal non-costs environment of the Tribunal; (v) Mr Gutteridge's lengthy witness statement on behalf of the respondent merely reflects hard fought but not unreasonable conduct of proceedings in which the solicitors were acting vigourously in the interests of their clients, as has already been addressed in the letter from the claimant's solicitors on 18 March 2021; (vi) the respondent's suggestion that the claimant recognised at an early stage that she faced evidential difficulties and that therefore she knew her claims would fail is a bad point. The claimant made it clear that her complaint concerned the hostility from her entire team, and she recognised that none of them were likely to provide a statement in support of her treatment. She recognised that the only evidence to support the claims would be hers, but this does not mean that the pursuit of the claims was vexatious or unreasonable, still less that she did not believe the allegations or that they were deliberately malevolent; (vii) The protected disclosure was conceded which meant that in this case the key issue was causation of the alleged detriments. The claimant had genuinely held beliefs and opinions about the clinical issues which lay at the heart of the disclosure. Some of the seven detriments were established and the claimant was entitled properly to bring the claim because the evidential burden rested upon the respondent to show the reason for the detriments. The claimant suggests that explanations had not been given to her before and she was entitled to look for an explanation and to test that in evidence. Any direct parallel with the case of Vaughan is therefore misconceived; (viii) the respondent's assertion that the claimant pursued her claims with "the ulterior purpose of impugning the respondent's witnesses' professional judgments, and with the effect of harassing the respondent and its witnesses" is a baseless assertion unsupported by the Judgment; (ix) the fact that there was cross examination of the respondent's witnesses on their clinical decisions was necessary to test the motivation for the detrimental treatment, and properly so. The claimant's solicitors have already made these points in the letter of 18 March 2021; and (x) The context of the protected disclosure was an issue as to patient care, and the issue of the motivation for the established detriments had to involve the testing of the professional witnesses. It is wrong to assert this is a manifestation of an ulterior purpose because this would effectively amount to the assertion that where there is a protected disclosure in such a context the claimant cannot invoke a challenge to the motivation of those alleged to have inflicted the detriments. That would place an improper fetter on the important public interest in the protection of those making protected disclosures. In any event this assertion of ulterior purpose is not supported by any finding in the Judgment.

52. Mr Reade also makes the following points with regard to the statutory test. As Lord Justice Mummery observed in Yerrakalva: "The power to order costs is more sparingly exercised and is more circumscribed by the Employment Tribunal's rules than that of the ordinary courts … In the ET costs orders are the exception rather than the rule …" Mr Reade has also provided statistics from the Employment

Tribunal service, including that to the year to June 2017, when the Tribunals accepted 88,476 cases but costs orders were only made in 0.5% of these.

53. With regard to the alleged unreasonable conduct, as Lord Justice Mummery also observed in Yerrakalva: "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."
54. The respondent's application is based on the two grounds under Rule 76(1)(a) and (b) as noted above. There is considerable overlap between these grounds and the claimant relies on the findings of HHJ Auerbach in Radia: [61] It is well established that the first question for a tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay. [62] … There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a) that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did. [63] in this regard, the remarks in earlier authorities about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion. [64] This means that, in practice, where costs are sought both through the Rule 76(1)(a) and Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, are they, reasonably, to have known or appreciated that? [65] I should say something further about how the Employment Tribunal should approach an application seeking the whole costs of the litigation, on the basis that the claim "had no reasonable prospects of success" from the outset. It should first, at Stage I, consider whether that was, objectively, the position, when the claim was begun. If so, then at Stage 2 the tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering these questions, the tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it

may have regard to any evidence or information that is available to it when it considers these questions and which casts light on what was or could reasonably, have been known, at the start of the litigation."

55. Mr Reade goes on to contend that in a protected disclosure or discrimination case the tribunal may hear and accept the explanation of the respondent's witnesses and thus it might appear that the claim had no reasonable prospects of success. However, this does not illuminate what the claimant could have been taken to have known or ought to have known at the earlier point in time. The claimant is faced by the problem that he or she cannot look into the mind of the alleged perpetrators (and see the comments of Underhill J as he then was on exactly this point in Martin v Devonshire Solicitors).
56. It was held in Kapoor that even a finding that a party has lied does not automatically lead to the conclusion that the party has acted unreasonably. Taking that proposition further, in this case the claimant has not been found to be a dishonest witness. The reference to her account being disingenuous at paragraph 126 of the Judgment does not relate to her evidence before the Tribunal and the findings suggest that the claimant was confused (which is repeated at paragraph 129 of the Judgment). None of the findings in the Judgment upon which the respondent relies conclude that the claimant was dishonest in her evidence. At best the submissions set out findings about the claimant's personality but that is not the basis for suggesting that her conduct was unreasonable, still less that she appreciated that the claims would not succeed. It cannot be said at the point before the evidence is heard that the claimant reasonably ought to have known that the respondent's witnesses' accounts would be accepted, and that could not be assessed until the evidence had been tested. Ultimately the tribunal accepted the respondent's explanations but the fact that the respondent had to explain the position, and those explanations were accepted, does not mean that the claimant's claims are unreasonable. This was particularly so in this case where the claimant has to challenge but does not know what exactly is in the mind of the respondent's witnesses and thus their motivation. There has been no finding that the claimant knew her allegations would fail.
57. The claimant also makes the point that the respondent made two applications for a deposit order which were both refused. This demonstrates that the case was not demonstrably lacking in merit on the face of the claim or on the face of any documents advance by the respondent. It was plain that there were properly triable issues.
58. With regard to the allegations of unreasonable conduct of the proceedings by the claimant or her solicitors in broad terms both parties are bound to have criticism of the other in hard fought litigation. That is evidenced by the correspondence between the respective solicitors. This case was case managed with intervention from the Tribunal on occasions, but no costs orders were made in relation to any of the issues raised by the respondent throughout the course of the litigation. The vigour with which the claimant's solicitors pursued the claim should not be recast with the history of the findings in the Judgment. The claimant repeats the objection that she advanced the case for an ulterior purpose which is said to be a baseless assertion.
59. For all the above reasons Mr Reade asserts on behalf of the claimant that the application should be refused.
60. With regard to the Second Application, which relates to the claimant's pursuit of the remaining detriment claims after December 2020, these claims have not been determined on their merits but rather have been struck out because of the

claimant's failure to pay the deposits as ordered. Rule 77 allows an application up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. However, in this case although the proceedings have been determined, the claimant has entered three subsequent appeals to the EAT. To recap these are (i) an appeal dated 4 April 2022 against the Deposit Order made on 9 March 2022 and sent to the parties on 15 March 2022 (which has been rejected at the sift stage); (ii) an appeal dated 7 June 2022 against the refusal to stay the deposit order; and (iii) an appeal on 6 July 2022 against the striking out of the claimant's claims by reason of failure to pay the deposit.

61. For these reasons the Second application is premature because the claimant's remaining detriment claims may yet be determined on their merits, and the application should be adjourned or stayed
62. The Rules
63. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").
64. Rule 76(1) 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.
65. Under Rule 77 a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.
66. Under Rule 78(1) a costs order may – (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …"
67. Under Rule 84, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.
68. The Relevant Case Law
69. We have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; FDA and Others v Bhardwaj [2022] EAT 97; Vaughan v London Borough of Lewisham [2013] IRLR 713 EAT; Brooks v Nottingham University Hospitals NHS Trust [2019] WLUK 271, UKEAT/0246/18; NPower Yorkshire Ltd v Daley EAT/0842/04; Radia v Jefferies International Ltd [2020] IRLR 431 EAT; Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Kovacs v Queen Mary and Westfield College [2002] IRLR 414 CA; Martin v Devonshire Solicitors [2010] KEAT 0086-10-0812; Bennett v London Borough of Southwark [2002] IRLR 407 CA; Attorney General v Barker [2000] EWHC 453; Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06; Single Homeless

Project v Abu [2013] UKEAT/0519/12; and Raggett v John Lewis plc [2012] IRLR 906 EAT.

70. The Relevant Legal Principles
71. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had." However, the Tribunal should look at the matter in the round rather than dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.
72. In FDA and Others v Bhardwaj it was held that: "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 addressing 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.
73. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
74. In Brooks v Nottingham University Hospitals NHS Trust the EAT confirmed that dealing with an application for costs requires a two-stage process. The first is whether in all the circumstances the claimant has conducted the proceedings

unreasonably. If so, the second stage is to ask whether the tribunal should exercise its discretion in favour of the claiming party, having regard to all the circumstances. In the case of reasonable prospects of success, the first stage is whether that ground is made out, and if it is, then to apply the exercise of discretion as to whether or not to award costs.

75. We also note the dicta of HHJ Auerbach and the principles in Radia v Jefferies International Ltd which are set out above in the body of Mr Reade's submissions.
76. With regard to costs warning letters, while it is good practice to warn a claimant of the weakness of his or her case where the respondents may be minded to apply for costs should they succeed at the end of the case, the failure to do so will not, as a matter of law, render it unjust to make a costs order even against an unrepresented claimant. In Vaughan v London Borough of Lewisham, the EAT upheld a substantial order for costs against the claimant, notwithstanding the absence of a costs warning letter, and in doing so had regard to the likely effect such a letter would have had. Underhill P pointed out that the claimant had never suggested that she would have discontinued her claim if she had received such a letter, and, even if she had, such an assertion would not have been credible. The claimant was "convinced, albeit without any rational or evidential basis, that she was the victim of a conspiracy and of a serious injustice, and it seems to us highly unlikely that a letter from the respondents, however well crafted, would have caused the scales to fall from her eyes."
77. Ability to Pay:
78. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu. The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay see Arrowsmith v Nottingham Trent University which upheld a costs order against a claimant of very limited means and per Rimer LJ "her circumstances may well improve and no doubt she hopes that they will." One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means.
79. Assessment of Costs
80. Under Rule 78(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000. Under Rule 78(1)(b) a costs order may order the paying party to pay an amount to be determined by way of detailed assessment, carried out either by the County Court or by an Employment Judge applying the principles of the Civil Procedure Rules 1998. Where the receiving party does not regard the limit of £20,000 to be sufficient an order for summary assessment should not be made in those circumstances, see Kovacs v Queen Mary and Westfield College.
81. Recovery of VAT
82. VAT should not be included in a claim for costs if the receiving party is able to recover the VAT, see Raggett v John Lewis plc which reflects the CPR Costs Practice Direction (44PD).
83. Conclusion
84. Our unanimous judgment with regard to the First Application is as follows.
85. In his persuasive submissions on behalf of the claimant in response to this application, Mr Reade has reminded us of the statutory framework for public interest disclosure detriment claims as set out in the Employment Rights Act 1996. First there must be a public interest disclosure, which must be made in such a way

as to be protected. If detriment is said to have arisen, then the detriment must be established. Once detriment has been established, it is then for the respondent to show the ground on which any act, or deliberate failure to act, was done. This is the effect of section 48(2) of that Act (as we set out in paragraph 112 of the Judgment). We refer to this as the "statutory framework".

86. In this case the respondent conceded that there was a protected public interest disclosure in place (the Datix report), and it was always the case that the claimant would be able to prove that she suffered at least one detriment in respect of which the proceedings were issued within time (Detriment 26 and her removal from specialist training). Mr Reade reminds us that in these circumstances it is then for the respondent to show the ground on which any act was done, and the claimant is entitled in these circumstances to pursue her proceedings so that the respondent's motivations can be tested. There is also a public interest in determining public interest disclosure cases, particularly those involving public authorities. The claimant did not know the motivation of those who took the decisions on behalf of the respondent, and she was entitled to pursue litigation to enable that to be established. The fact that the proceedings were ultimately unsuccessful, and/or rejected at least partly because of the claimant's own personality traits, does not mean either that the claimant acted unreasonably in pursuing the proceedings, or alternatively that the proceedings had no reasonable prospect of success from the outset.
87. Even bearing this in mind, we are of the view that the claimant did act vexatiously, disruptively and otherwise unreasonably in the way that these proceedings were conducted (in accordance with Rule 76(1)(a)), and that the claimant's claim had no reasonable prospect of success (in accordance with Rule 76(1)(b)), for the following reasons.
88. We have considered in detail the history of the litigation and the various interlocutory disputes along the way. We agree with Mr Reade that generally speaking the vast majority of the disputes between the parties arise from their respective solicitors acting forcefully in the best interests of their clients, and that this is to be expected as part of the "cut and thrust" of litigation. However, there is one important exception to this, which concerns the disclosure process. It is clear to us that the claimant deliberately failed to disclose documents about her failings in the three previous assignments at three different previous hospitals, and then subsequently failed unsuccessfully to remove these documents from the proposed trial bundle even though they were clearly relevant. That in itself was unreasonable conduct in the course of this litigation.
89. Even though a costs warning letter is not a required constituent element before an award of costs can be made, it is worth noting that the claimant was on notice following the letter on 4 October 2019 of the respondent's reasoning as to why the relevant documents did not support the claimant's case and the fact that the claimant faced a potential liability for costs.
90. As a reminder the full main hearing in this matter was first listed to commence on 6 March 2020, but it was postponed on that first day because of the claimant's illness. As at that time there was an agreed trial bundle in place, and the written witness statements of all those witnesses who were due to give evidence had been exchanged. As at that stage on 6 March 2020 the claimant had in her possession the agreed trial bundle, the respondent's witness statement evidence, and had access to professional advice from her solicitors and from Counsel (or Counsel's late substitute) who been instructed for the hearing. The claim was relisted for hearing and it commenced some nine months later on 4 November 2020. The

claimant therefore had a significant period to reflect on the evidence which the Tribunal consider, and to seek professional advice on her position, and the reasonableness or otherwise of proceeding.

91. We also unanimously find that the claimant's conduct in the course of the final hearing of this matter in November 2020 was unreasonable conduct in the course of these proceedings. The claimant was faced with the respondent's evidence (both documentary and witness evidence) which gave a clear explanation as to the respondent's actions and motivations for the various acts or omissions and detriments of which the claimant complained. The weight of evidence against her was damning. She failed to accept that there was a legitimate or reasonable explanation for the respondent's actions. Instead, the trial was conducted on her behalf on the basis that the respondent's witnesses had deliberately colluded against her and/or were professionally negligent and/or motivated against the claimant to hide their own shortcomings.
92. Mr Keen for the respondent draws the comparison with the facts in Vaughan, (where a costs award was upheld) after the claimant repeatedly failed to accept that there could have been a non-discriminatory explanation for the treatment of which she complained, even though on the face of the evidence that was the common-sense conclusion.
93. We are also unanimously of the view that this claim did not enjoy reasonable prospects of success from the outset. Despite the statutory framework in place, and the claimant's right to challenge the motivation of the respondent's decision makers, nonetheless the claimant is a qualified professional who had access to the BMA and specialist legal advice whenever she wished to instruct lawyers. She must have known that her own personality traits and training deficiencies were the reasons why she had been unsuccessful in trying to complete her consultant training in not one but all three of her previous hospital assignments before the respondent. If she did not know this then she should have done because it was clear on the face of the documents which she subsequently fought so hard to suppress. She failed her consultant training with the respondent for reasons which were strikingly similar to her previous failures, which was of course a decision made by an independent panel (and not by the respondent). Given this background we conclude that the claim did not enjoy reasonable prospects of success from the outset.
94. Having made these findings, we now apply the law.
95. We remind ourselves that an award of course is the exception rather than the rule. We also have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?" This two-stage process is discussed further in both Brooks and Radia. We remind ourselves following Yerrakalva "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had".
96. We have identified that conduct above, and why it was unreasonable, and the effects that it had were to put the respondent and its witnesses to considerable, time, trouble, expense and stress in meeting the claimant's continuing allegations. In addition, the claimant's proceedings were disruptive within the hospital and with regard to patient care because the respondent had to cancel clinics for both trial

hearing dates in order that their professional witnesses were available to attend and to give evidence.

97. With regard to Rule 76(1)(a) we find that the claimant acted vexatiously, disruptively, or otherwise unreasonably in the bringing of these proceedings and in part in the way in which they have been conducted, for the reasons set out above. We also find with regard to rule 76(1)(b) that the claim had no reasonable prospect of success, for the reasons explained above. We unanimously decide that the costs threshold is triggered.
98. We now turn to the exercise of our discretion. With regard to Rule 76(1)(a) we note that it was arguably unreasonable to have commenced these proceedings in the first place. The claimant acted unreasonably in failing to disclose and/or trying to suppress the relevant documents relating to her previous failed assignments. The claimant continued with her claim despite the clear costs warning on 4 October 2019. As at 6 March 2020 when the first hearing was postponed the claimant had to hand the agreed trial bundle and the respondent's witness statements, and had access to advice from her solicitors and Counsel at that time. She was in a position to receive clear advice at that stage on the strengths or otherwise of her claim, and whether she should continue to pursue it. Some nine months later the trial did continue, and it was conducted unreasonably for the reasons we have set out above.
99. We have in mind Mr Reade's submissions with regard to the statutory framework and the right for the claimant to seek to establish the motivation behind the detrimental conduct in question. However, it is clear to us that the claimant must have known of the respondent's evidence against her at the time of the postponement of the first hearing on 6 March 2020 (if not before). The fact that she wished to challenge the respondent's evidence does not make her immune from a costs award if it is unreasonable to do so on the face of the evidence, and/or if it is done at trial in an unreasonable way. We therefore decide to exercise our discretion to make an award of costs, but only with effect from 6 March 2020.
100. With regard to Rule 76(1)(b) although we conclude that the claim had no reasonable prospects of success from the start, we do not exercise our discretion to award costs from the commencement of these proceedings. Applying Radia we find that the position objectively was that at the time the claim was begun it did not enjoy reasonable prospects of success. We next need to consider whether the claimant knew this to be the case, or at least reasonably ought to have known it. In this respect we give the claimant the benefit of the doubt, and we are careful not to be influenced by the hindsight of taking account of things that arguably could not have reasonably been known at the start of the litigation. We also bear in mind Mr Reade's comments about the statutory framework. Nonetheless, for the record, we find that the position was different after 6 March 2020, where it must have been plain at that stage bearing in mind the agreed bundle and the statements exchanged that the claim no longer had reasonable prospects of success. We would also have exercised our discretion to award costs from 6 March 2020 under this subsection
101. The respondent therefore succeeds in its First Application for costs, but only with effect from 6 March 2020, and until the application of 21 December 2020. The costs claimed from this date exceed the limit of £20,000 above which a detailed assessment is required. Accordingly, we order that the claimant pays the respondent's costs under the First Application subject to detailed assessment. Separate directions in that respect have been issued today.

102. With regard to the Second Application, the respondent's claim for costs arising from December 2020 until 22 July 2022 is in the sum of £21,704.50, exclusive of VAT.

103. Technically this application is capable of determination now, because the dismissal of the claimant's remaining detriment claims following non-payment of the deposit under the Deposit Order is a determination of the claimant's remaining claims. However, we unanimously agree with Mr Reade that this application is premature in the sense that if the claimant is successful during her appeal process to the EAT then the legal position with regard to the remaining claims might be very different. We do not dismiss the Second Application, but it is adjourned, and the respondent may (if so advised) re-present that application following conclusion of the apparently ongoing appeal process.

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Employment Judge N J Roper
Date: 8 August 2022

Judgment sent to Parties on
18 August 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE