EMPLOYMENT TRIBUNALS

Claimant: Mr G Gyimah

Respondents: (1) Commerzbank AG
(2) Robert McMillan
(3) Bastian Buhlmann
(4) Miro Pertusini
(5) David Clapham

Respondent to wasted costs application made by the respondents:
Ms A Onwukwe

Heard at: London Central
(Via Cloud Video Platform)

On: 3 and 4 August 2022 and 5 August 2022 (Tribunal deliberations, in chambers)

Before: Employment Judge Joffe
Ms S Brazier
Mr R Miller

Appearances
For the claimant: Mr P O'Callaghan, counsel
For the respondents: Mr S Gorton QC, counsel
For Ms Onwukwe: In person

RESERVED JUDGMENT ON COSTS

1 No order for costs is made against the claimant.

2 No order for wasted costs is made against Ms Onwukwe.

REASONS

Claims and issues

1. The claimant was unsuccessful in his claims against the respondents. The respondents applied for costs against the claimant and also for wasted costs against Ms Onwukwe, on the basis that the respondents asserted that she had been acting as the claimant's representative.

2. The respondents had two applications; the earlier application (5 July 2021) was for part of their costs. After the Tribunal Judgment was promulgated, they applied for their global costs.

3. The issues arising from those applications were agreed between the parties:

COSTS

1) Has the Claimant acted unreasonably in:

(a) the bringing of the proceedings (or part of the proceedings), and / or

(b) the way that the proceedings (or part of the proceedings) have been conducted?

2) Did any claim or part of any claim have no reasonable prospect of success?

3) If so, should the tribunal make a costs order against the Claimant?

4) If so, should the tribunal have regard to the Claimant's ability to pay?

WASTED COSTS

5) Was Ms Onwukwe a representative for the purposes of r80(2), namely was she:

a) a legal or other representative or any employee of such representative?

b) was she acting in pursuit of profit?

c) If so, for what period?

6) Did Ms Onwukwe act (or omit to act) in a way that was improper, unreasonable or negligent that was in breach of her professional duty?

7) If so, did the Respondents incur unnecessary costs as a result of that conduct?

8) If so, is it just in the circumstances just to order Ms Onwukwe to compensate the Respondents for the whole or any part of the relevant costs?

9) If so, should the tribunal have regard to Ms Onwukwe's ability to pay?

10) What amount should Ms Onwukwe be ordered to pay?

The 5 July 2021 application concerned the following:

1. The abandoned claim against Anna Lowe (previously the sixth respondent);
2. The abandoned claim against Philip Cameron (previously the seventh respondent);
3. The claims and allegations struck out as a consequence of the Claimant's failure to pay the deposits ordered by EJ Hodgson on 2 April 2021.

In particular as to the third point, the respondents said

The Claimant failed to pay these deposit orders by 21 April 2021. Despite being ordered by the tribunal to inform us of whether the deposits had been paid, the Claimant and Ms Onwukwe failed to do so, despite our numerous requests. Finally, Ms Onwukwe wrote to us at 22:40 on Monday 14 June 2021, the evening before a further PH to say that the deposit orders had not been paid and seemingly suggesting that we ought to have known this.

Those claims were struck out at the 15 June 2021 PH.

Findings

The hearing

4. We heard further evidence from the claimant and some evidence from Ms Onwukwe. The claimant also provided witness statements from some colleagues and his partner, Ms Huggett. Ms Huggett's statement provided some corroboration of the claimant's account of his thoughts and actions at the time when he was contemplating proceedings. The other statements were not of any great relevance to the issues we had to decide. The claimant had not served his witness statements in accordance with Tribunal orders and the respondents resisted them being admitted, albeit the resistance to the claimant's own witness statement appeared to be a matter of form only. We decided we would admit the claimant's and Ms Huggett's witness statement as well as that of Dr Gelemerova for reasons we explained during the hearing. By way of documentation, we were provided with the original trial bundle with some updates.

Paragraphs from the Liability Judgment relevant to 'no reasonable prospects'

5. We considered that our findings as to the poor process for appointment to the functional lead role and the lack of transparency in that appointment were relevant. We had regard to paragraph 133 and also in particular to paragraph 154:
   Mr McMillan had not had training in how to conduct the recruitment process. This was a role which carried no salary rise and was not at least structurally a promotion. Even in that context, we think the process was poor. Mr McMillan was not transparent, he did not have clearly defined criteria as he had been advised to have, he did not take notes. His account of the criteria was incoherent and his outcome did not reflect any very clear application of criteria. We concluded that he did go into the interview with a strong view that that Mr Buhlmann should be appointed and he went through an informal process which he probably thought complied with what HR had told him but which did not; he had not taken great care to ensure he complied. We think that in circumstances where he did have a strong view as to who should be appointed, he was not treating the process very seriously because it was an appointment to a position involving no formal change of status or salary.

6. The claimant was aware that the process was poor and not transparent. There was also the matter of the new starter induction pack which showed Mr Buhlmann in the role prior to any appointment having taken place. The claimant was aware of that and it very reasonably, in our view, caused him concern. At paragraph 165, we found:
   We note that the evidence of the respondents was that people did assume that Mr Buhlmann was acting as team lead and that if anyone noticed the role he was assigned in the new starter induction pack, they did not correct it.

Shouting incident

7. We did not find that Mr McMillan had discriminated against the claimant but we did find he had subjected the claimant to a detriment; at paragraph 207:

   We concluded that Mr McMillan was abrupt and peremptory with the claimant and offended the claimant. There was a contrast with his attitude and behaviour towards Mr Buhlmann.

8. We found however that there was evidence he treated others in a similar way, regardless of race.

The way McMillan handled Mr Buhlmann's involvement in the appraisal –

9. At paragraph 270 of the Liability Judgment:

   We concluded that Mr Buhlmann should not have been in the meeting without claimant having been asked in advance whether he was happy for him to attend. It was unsurprising that the claimant had not felt it was expedient to object to his presence, however, when confronted with it. The fact that

performance concerns were raised – about the KYC QA report, the claimant's involvement in the backlog, his decision to ask Ms Ruci to 4 eye a report – would have been more uncomfortable for the claimant due to the presence of Mr Buhlmann, who had until recently been his peer and in many respects still was.

10. This was another matter which we found reasonably caused the claimant concern.

Other matters

11. At paragraph 311, we made findings about Ms Jackson not dealing with the claimant's concern about his mental health being referred to.

12. At paragraph 319 onwards we considered the lack of transparency about the award of the claimant's bonus. We could understand why he was concerned and why he felt the amount seemed arbitrary. Bonuses are a big deal in this sector and the size of his bonus understandably seemed to the claimant to convey something about his position and future in the Bank.

13. Mr Pertusini's grievance outcome letter was not well written in parts and was open to misinterpretation as to Mr Pertsusini's findings, particularly in this passage:

    I appreciate that Bastian Buhlmann's reference to your preference for chicken could have been based on an ethnic stereotype. It could also be based on Bastian Buhlmann believing that you did have a preference for chicken unrelated to an ethnic stereotype. I understand from him that, on a business trip in Frankfurt, you expressed a preference towards chicken. I am satisfied that it is in this context that the remarks were made and that they do not represent harassment. I consider that the complaint was caused by a misunderstanding and that the complaint was made in good faith by you.

    Furthermore, the lack of understanding in this particular ethnic stereotype may be a cultural one and I do not believe any comment related to the preference of chicken was intended as an insult towards you.

14. The interpretation which the claimant placed on the passage was a possible interpretation and one we accept the claimant generally believed in, given his negative feelings towards the respondents by this stage.

15. At paragraphs 380 – 382, we made findings about Mr Cameron's letter, which was the subject of one of the substantive complaints. We did not find that the tone was caused by race discrimination but we were critical of the letter and could understand why it caused offence and suspicion in a person who was already concerned about race issues.

16. We considered there were enough matters of concern that a reasonable person might have suspected that his race played a role. We considered that after he spoke with friends about the chicken remarks, the claimant was persuaded that these might have a racial element.

17. The only finding we made about the claimant being misleading was at paragraphs 297 – 299 of the Liability Judgment and paragraph 426. This finding related to a response the claimant gave under pressure of cross examination and off the cuff. Whilst it did not reflect well on him, it was certainly not, in our view, deliberate and pre-planned dishonesty.

18. In terms of our findings more generally about the claimant's credibility or reliability, we did not find that the other ways in which the respondents suggested in submissions that there had been dishonesty were made out or they would have been reflected in our findings. We found that the difference in evidence was, as it often is, a difference based on issues with memory:

    There was no contemporaneous account by the claimant relating to Mr McMillan saying he was 'useless' and 'not vice president material' which seemed to us to be surprising if Mr McMillan had made the statements alleged by the claimant; even if the claimant had not decided to bring a complaint, he could have logged what had occurred. The account he gave in his witness statement differed in material respects from what he told Mr Biggs in his grievance meeting. We ultimately found it difficult to place reliance on the claimant's account of the meeting.

    In answer to Tribunal questions, Mr McMillan said that he thought he said in the meeting that the report was an error of judgment he would not have expected a vice president to have done. We think the claimant perceived this as Mr McMillan saying he was not vice president material and was very offended. What he reported to the Tribunal was his interpretation, which may well have become his memory, of what Mr McMillan said. We did not accept that Mr McMillan has said that the claimant was useless and not vice president material.

19. This is a phenomenon often seen in the Tribunal; for an honest witness an impression of the gist or subtext of a conversation becomes a memory of what was actually said. Overall we did not have a major issue with the claimant's credibility.

New findings

20. There was one area where we recorded evidence but it had not been necessary to the issues for us to go on and make a finding of fact. That is the matter at paragraph 277 of the Liability Judgment:

    Para 277: On 27 January 2020, Mr Buhlmann said that he brought up the claimant's apparent unhappiness in a meeting with the claimant and the

claimant said he intended to bring a grievance. He said that he was going to bring up a comment Mr Buhlmann made about him liking chicken. The claimant said he did not want to do this and although he did not think it was racist he had been advised by his network that he was being naïve to think that and he should use it. Mr Buhlmann said that he said that he was unaware that his comment had had any effect on the claimant and he had not intended to make him feel uncomfortable. He said that he was sorry that the claimant felt that way

21. The respondents asked us to make a finding on this matter in support of a view that the claimant had pursued a race claim he knew to be unmeritorious.

22. We found Mr Buhlmann a credible witness and we accept that there was a conversation along the lines described. The gist of the conversation was that the claimant had not thought the chicken remarks were racist but had been told by others he was incorrect and naïve. Mr Buhlmann's self reported response to the claimant's remarks suggested to us that he understood that the claimant was at the very least concerned that his friends might be correct about the chicken comments.

23. We also bore in mind that this was a very difficult conversation, in which the claimant was accusing his colleague, Mr Buhlmann, of racism. It appeared from the evidence and was our observation that the claimant is a polite person who seeks to be obliging. We considered that the way he framed what he said to Mr Buhlmann was designed to avoid causing offence rather than being an admission that his claim had no prospects. The claimant felt he had to make use of the chicken remarks, which he had been advised had a racial element, because they were the only potentially overtly racial matter in a context of what the claimant felt, with some justification, was inexplicable unfairness in relation to a number of issues.

Further relevant chronology

24. 10 February 2020 was the date when the claimant agreed a start date of 1 July with new employers, DNB (para 300 Liability Judgment). In terms of why he did not give his contractual notice at an earlier stage, the claimant said that he saw leaving the first respondent as a risk and that his partner was against him doing it without taking all steps to resolve his situation. Changing his job would have affected their childcare arrangements. The claimant had to wait until at least March to make sure he got his bonus. The claimant was not receiving advice or support from Ms Onwukwe at this point.

25. We accepted the claimant's evidence that he was still seeking progression within the Bank at this point and that he was also suffering from stress which led to mental health problems. It appeared to us that the claimant was very uncertain what to do in the spring of 2020. He had put in a grievance without attaching the race label to many matters which were subsequently complained

of to the Tribunal as being race discrimination. We found that unsurprising at a point when the claimant was still hoping to have a career with the first respondent.

26. On 7 May 2020, Mr Pertusini produced his grievance outcome letter. It Is a fairly concise document covering about 4 ½ sides of A4.

27. On 19 May 2020, ACAS certificates were issued against a number of the respondents.

28. On 15 May 2020, the claimant submitted an appeal against Mr Pertusini's grievance outcome. He set out some brief grounds which raised inter alia issues about conflicts of interest and failure to investigate points in his grievance.

29. At about this point, Ms Ownukwe began providing support to the claimant. She had previously assisted a colleague of his, Ms Rajput, and Ms Rajput introduced the two. They spoke on the phone. Ms Onwukwe said that they became friends although they never met in person. They both described Ms Onwukwe as part of a friendship group providing moral support to the claimant.

30. Ms Onwukwe is a retired solicitor whose specialism before retirement was employment law. She became involved in corresponding with the respondents about the claimant's grievance and also to seek a settlement. Her evidence and the claimant's was that she acted pro bono.

31. It was the claimant's evidence that Ms Onwukwe sent the letters on his behalf without him having sight of them or approved them but that she had his approval to try and get a settlement. She had told him that a hearing would not be good for him. Ms Onwukwe said the letters would have been discussed with the claimant and they both said he provided the figures used for settlement negotiations.

32. On 28 May 2020, Ms Onwukwe sent a without prejudice save as to costs letter to Ms Lowe:

I represent Mr Gyimah in relation to his grievance dated 10 February 2020 ("grievance letter") and the grievance outcome dated 7 May 2020. ("outcome letter").

The letter then critiqued the grievance findings.

Given the above matters Mr Gyimah has absolutely no confidence that his appeal against the grievance outcome can result in a satisfactory resolution of his grievances. In particular, when Mr Gyimah queried with BB the candidacy of a colleague (Jagruiti Rajput) for a role in the team, BB told Mr Gyimah that she would not even be considered for the role because she was a 'trouble maker' having raised discrimination complaints. In fact Jagruti Rajput was not considered for the role and her similar discrimination complaints could not be

resolved internally and were eventually upheld by the Employment Tribunal and substantial compensation was awarded. Mr Gyimah believes that he too has no other option but to pursue his complaints in the Employment Tribunals unless an informal resolution can be reached within the next 7 days.

Towards this end Mr Gyimah is prepared to agree to the immediate mutual termination of his employment, subject to the Bank agreeing to pay him the sum of £70,000, plus costs and an agreed reference, in full and final settlement of all complaints arising from his employment and/or its termination. This sum is significantly less than the sum Mr Gyimah could reasonably expect to be awarded by an Employment Tribunal which would include:

33. The letter then set out claims which included three months notice and six months further loss of earnings 'or shortfall if another job commenced earlier ' and costs.

34. The claimant's evidence was that he believed that in the City a person was entitled to PILON even if the person got a new job during the notice period: 'My mind set was that I was owed notice period; Hope Jackson at one stage offered it. I might have got it wrong'.

35. Ms Onwukwe's evidence was that she acted on the claimant's beliefs but also that there are exceptions to having to set off mitigation in the notice period. This was just the starting point for discussion.

36. On the issue of claiming costs, Ms Onwukwe's evidence was that this would have been the costs of the settlement agreement. The claimant would have had to have advice from a solicitor to enter a valid settlement agreement. The claimant's evidence was that he believed the reference was to the saving of costs for the respondents.

37. On 1 June 2020, Ms Onwukwe sent an open letter to Ms Lowe:
Mr Gyimah has already appealed against the grievance outcome and I understand it is being progressed procedurally even if it is currently entirely missing the point. In view of the above matters I invite the Bank to consider Mr Gyimah's grievance entirely afresh within a process that is agreed with Mr Gyimah and meets the requirements of the Equality Act 2010 and ACAS guidelines, with appropriate supervision by an HR person experienced in complaints of discrimination. I would also ask that Mr Gyimah's full pay be reinstated pending the conclusion of the investigation. I understand that Mr Gyimah's absence from work is entirely caused by the on-going grievance and all delay in the grievance process has been caused by the Bank. Had the Bank acted with reasonable alacrity, or within its own procedural guidelines, the grievance process would have been concluded before Mr Gyimah became ill or before the Bank had the discretion to reduce his sick pay. I understand that Occupational Health has advised the Bank that Mr Gyimah's absence is entirely related to the on-going grievance process. Mr Gyimah believes that the reduction to his pay was a deliberate act of victimisation and if he had not

raised discrimination complaints the Bank would have exercised its discretion in the usual way to continue paying company sick pay for at least six months. It would especially assist in the restoration of some goodwill if the Bank will immediately review the conclusion on the chicken eating stereotype and acknowledge that these were acts of direct race discimination and harassment which created a hostile and demeaning work environment for Mr Gyimah. Appropriate apologies and action can then be taken and this one issue will have been resolved. This will enable Mr Gyimah to have some confidence that the Bank intends genuinely to investigate the other more serious allegations of race discrimination and is respectful to Mr Gyimah's statutory right to a dignified place of work.

38. The respondents' submission was that viewing the open and WOP letters together reveals the truth that Ms Onwukwe and the claimant were trying to force a settlement in circumstances where the claimant did not believe he had a valid case against the respondents.

39. We considered that the claimant's position at this point was far from an easy one. He had brought a grievance which was not upheld and he was off sick. His position with the first respondent was worsening, but he was nervous about switching role and did not want the respondents to get away with what he had concluded was discrimination. We could well understand why he would be uncertain as to what path to pursue. Bringing a claim against the first respondent, with its resources, was bound to be daunting and Ms Onwukwe told us that she had told the claimant that his claim would not be of very great value given that he had a new job.

40. If the claimant had given notice earlier or had started trying to get a settlement earlier, that might have provided more support for the respondents' narrative.

41. On 11 June 2020, Mr Cameron responded to Ms Onwukwe's letter and we made findings about the tone of his letter in the Liability Judgment.

42. On 12 June 2020, the claimant resigned by letter. He did not give his contractual notice period and alleged repudiatory breach of contract. Both the claimant and Ms Onwukwe said that Ms Onwukwe had not played a role in drafting this document.

43. We accepted that the claimant believed in the content of his resignation letter and that he had been constructively dismissed. We concluded that he had genuinely been trying to resolve matters before taking this step. He was genuinely dissatisfied with the grievance outcome but his domestic arrangements had caused him to hesitate about leaving the bank. He had reached a point where he needed to make a decision about the alternative role he had secured and for which the start date was looming.

44. The claimant made some reference to Mr Cameron's letter although he did not describe it as a 'last straw', as he did in his proceedings before the Tribunal:
A response was received from the bank's legal representative which details further lack of understanding of the requirements under the Equality Act 2010.

Furthermore, my medical report which I have yet to have access to been shared with bank's legal representative without my consent.

45. The failure to describe the letter as the last straw was perhaps unsurprising. It had arrived the day before. We accepted it genuinely offended the claimant and Ms Onwukwe.

46. On 18 June 2020, Ms Onwukwe complained to Mr Gilligan of the respondents' solicitors about the Cameron letter

47. On 22 July 2020, Ms Onwukwe wrote to Mr Cameron:
I write further to our recent communications on the above matter.

I attach a substantially completed draft of George Gyimah's Details of Complaint which will be submitted to the ET in the event that a resolution cannot be reached within the next 7 days.

It is unlikely given our exchanges to date that we will agree on the merits of George Gyimah's claim and I do not seek to engage you in that regard.

I trust you will agree however, particularly in view of the fact that George Gyimah has found more suitable alternative employment, that the Bank's costs of defending his claim will substantially exceed the value of the claim. It is therefore plainly Bank's reputation and image.

It has been widely reported that the Bank's significant shareholder, Cerberus, has called for the Bank to change it approach and to "cut costs" and to take "swift and decisive action now". It seems to me that if the Bank continues its refusal to make a proper attempt to resolve this matter informally, that would be further evidence of the "negligence and arrogance" that Cerberus cites as defining the Bank's current senior management.

Any settlement of George Gyimah's claim would need to compensate for and include the following:

a) PILON

b) sick pay deductions

c) balance of bonus

d) any difference in pay/bonus/benefits between C & BB from October 2019

c) aggravated injury to feelings

d) costs

e) a formal acknowledgment and apology that the Bank failed to address C's reasonable grievance fairly or adequately.

f) an undertaking to review how Team Heads are appointed in accordance with equality requirements.

Based on the above the total compensatory award that George Gyimah is likely to be awarded is circa. 100,000 pounds, as summarised elsewhere in my initial without prejudice communication to the Bank.

I would be pleased to discuss this with you. It may be the last opportunity for such discussion - it may be professionally inappropriate for you personally to continue your representation of the Bank once the claim is issued, when you will be an identified witness and Respondent in the proposed proceedings?

To be clear, George Gyimah had to be persuaded of the merits of seeking an informal resolution at this stage. He feels strongly that a judicial determination may be a greater satisfaction and of wider benefit than to himself. He may not continue to be so persuaded should the Bank fail to respond to this invitation with alacrity and courtesy.

Can you please let me know within the next 7 days whether the Bank is now inclined to discuss a resolution of the matter in default of which the ET1 will be presented without further reference to you or the Bank.

I await hearing from you within the next 7 days accordingly.

48. On 29 July 2020, Mr Cameron responded:

Thank you for your email.

Your email is nothing more than a transparent attempt to force a settlement. That is particularly obvious through your threat to include me as a respondent. You will be aware of the insurmountable difficulty you will have in that regard and the obvious costs consequences for you and your client of doing so. Whether or not you carry through your threat is irrelevant to the Bank's deliberations as to how it should conduct this process. Unmeritorious claims will not go unchallenged.

For the last time, please desist from communicating directly with my client. You will be aware that that is contrary to the SRA principles, by which you remain bound.

Your tactics in representing Mr Gyimah have destroyed any appetite that my client may have had towards settlement. In common with your client, it too would prefer to see a judicial determination of matters.

My instructions are not to enter into telephone conversations with you. My client wants everything between the parties to be in writing so there can be no debate.

49. On 21 August 2020, Ms Onwukwe sent a without prejudice email to Mr Cameron:

George Gyimah v Commerzbank & Others

I forward for your early information George Gyimah's claim which has now been submitted to the ET and will be formally served on each Respondent in due course in the usual way.

As has been made clear from the outset George Gyimah is open to discussing an informal resolution and you have his proposals in this regard. Should the Respondents now see the merits of such approach I would be pleased to hear from them. Alternatively George Gyimah is content for the matter to be determined by the ET and will be seek wasted costs from the Respondents.

55. The respondents submitted in evidence Ms Onwukwe's LinkedIn pages which indicated that she worked for a period on a freelance basis. She told us that these dated back to 2015 before she retired altogether. There was nothing in the LinkedIn pages which established that Ms Onwukwe was holding herself out for paid work at the time she was providing assistance to the claimant.

56. Ms Owukwe's evidence in her witness statement was:

In or around May 2020 I was introduced by telephone to the Claimant by Jagruiti Rajput ("Rajput") who at the time was also employed by the Respondents as a Senior Compliance Officer. Rajput is a personal friend of mine whom I have known for almost twenty years. At the time Rajput introduced me to the Claimant I had been assisting Rajput for some years with her own grievances with the Respondents and subsequent claims to the ET. Rajput had a range of grievances about maternity and sex discrimination, some of which were resolved informally, but most of which she pursued in the ET. Rajput's complaints of maternity and sex discrimination were upheld by the Employment Tribunal and Rajput was awarded significant compensation.

…. I acted as Rajput's formal representative in her workplace grievance and during her first successful ET claim. I continue informally to assist Rajput and her paid professional advisors in the ongoing proceedings. I also assist Rajput on an entirely pro-bono basis and have never represented her for profit. I believe that the Respondents' wasted costs application against me is as much to victimise me for the role I played in that case, as well as in the above matter (and other employees).

57. The respondents had one piece of hard evidence in their challenge to Ms Onwukwe's assertion that she acted pro bono for the claimant and for Ms Rajput; this was an invoice of 18 June 2018 in which Ms Onwuwke claimed a sum from the first respondent for representing Ms Rajput at a mediation.

58. In cross examination, Ms Onwukwe made the point that the mediation occurred in 2018. The bank had wanted Ms Rajput to take part in a mediation meeting and had agreed to pay Ms Onwukwe. She did not regard that as acting for profit.

59. The respondents submitted that we should make further findings of dishonesty by the claimant in relation to:

- The claimant's new employment and giving of notice;

- The claimant's schedule of loss. This was said to be inflated at over £420,000. The claimant's evidence was that he got help with the schedule from Ms Rajput;

- The bringing in of the sixth and seventh respondents, said to have been a tactic to force a settlement.

60. Unreasonable behaviour the respondents alleged included the amounts and categories of compensation asked for in the settlement negotiations.

61. In relation to the additional respondents who were included and then dropped, we noted this email from the claimant's then direct access barrister, Ms Chan, to Mr Gorton on 22 March 2021:

I am just emailing to introduce myself as counsel acting for Mr George Gyimah in this Friday's strike-out/deposit hearing applied for by the Respondent.

I was wondering if you were proposing to prepare a skeleton argument/ grounds for the strike-out/deposit order. This is because whilst I have GQ Littler's letter of 2 December 2020, this does not really give any grounds on which it is said that various claims stand no reasonable or little reasonable prospect of success. It would be helpful if I could understand the basis on which the applications are pursued, particularly as the allegations are based on what are extremely fact-sensitive disputed situations and conversations.

There are some allegations which my client is willing to drop as separate discrimination allegations. I can let you know these if you wish. This may to some extent (though maybe not that much!) reduce the time spent arguing about the different allegations this Friday.

Mr Gyimah is also content to drop GQ Littler as a named respondent (although the allegations of discrimination will remain against GQL, as long as the First Respondent Commerzbank accepts that it would be vicariously liable for any proven discriminatory actions by GQ Littler).

62. Mr Gorton replied:

Apologies for the delay but I have been detained on other matters and I have taken instructions on your email
I am proposing to produce a skeleton argument and chronology - but I do not envisage that I will get to that and have it finished anything before 3-4pm on Thursday

About the nature of the applications, they are quite self evident but in an endeavour to be helpful:
(i) deposit orders relates to the inherently unreliable and weak nature of all your client's claims
(ii) s/o in respect of Mr Cameron speaks for itself and I would also rely on Bird v Sylvester

(iii) s/o in respect in respect of Ms Lowe is clear: she is not responsible for any act of discrimination

(iv) the s/o in respect of the indirect race claim speaks for itself: it is misconceived in law

(v) the s/o in para 7 of the 2/12/20 letter are self evident

If you wish to withdraw claims then I suggest that you get on and do that so that we all know where we stand

As relating to Mr Cameron (not GQL who are not a party), my client would welcome an unqualified withdrawal of the claim in that regard, but will pursue your client for the costs of adding Mr Cameron to the proceedings without any legitimate reason for having done so

63. Ms Chan understandably then wrote to ask:

Can I ask whether you are intending to make similar costs applications in respect of any claims we withdraw in advance of Friday's hearing?

My suggestion of withdrawal of some claims was in an attempt to narrow the issues co-operatively going forward, potentially saving some time on argument this Friday.

But if that will just trigger numerous costs applications from you, I simply cannot see what legal or practical benefit there would be in Mr Gyimah voluntarily agreeing to withdraw any of his claims. In that case, it would probably be more prudent for my client to wait and see what the ET makes of them.

Findings on claimant's conduct with respect to Tribunal procedure

64. On 26 March 2021, Employment Judge Hodgson at a case management preliminary hearing made deposit orders. He said:

I have confirmed that it is for the claimant to plead the case properly. I have invited the claimant to review carefully the claim as it stands. The claimant must now prepare a list of issues which specifically sets out the claims as they currently exist in the claim form. The claimant

should be careful to limit himself to the facts which are pleaded. All specific allegations should be set out in narrative form. The claimant should also produce a Scott schedule which refers to the allegations and sets out in a separate box the wording relied on in the claim form. The respondent should then confirm whether it accepts that the allegation is pleaded and is contained in the claim form.

2.10 I confirmed that if the claimant fails to take this opportunity, he should assume that the tribunal may not give him any further opportunity to clarify his claim.

65. On 11 April 2021, the claimant submitted a list of issues in Scott schedule form.

66. On 26 April 2021, Mr Cameron wrote to Ms Onwukwe about some disclosure issues and said:
Last, perhaps you would like to reply to our email asking whether your client has paid his deposits.

67. On 28 April 2021, Ms Onwukwe wrote to Mr Cameron:
I still await your reply to my questions with regard to your status in these proceedings. I think you should respond to these matters before raising any further questions to me.

Whilst writing, and for the avoidance of doubt, I am not the Claimant's formal representative. I am a retired solicitor freely assisting the Claimant as and when required.

68. On 29 April 2021, the claimant wrote to Mr Cameron, querying the points Mr Cameron had made about disclosure but not replying to the question about deposit orders.

69. On 30 April 2021, the claimant wrote to say he was representing himself:
I also confirm that whilst Audrey Onwukwe, a non-practising solicitor, has been freely assisting me in this matter she is not my formal representative.

70. He also wrote on 30 April 2021 to Mr Jacob of the respondents' solicitors:
I refer to the email below and attached letter from Mr Cameron of GQ Littler. In relation to ET Case reference 2205007/2020, Can you please confirm that the Bank accepts responsibility for the letter and its contents?
Last month, my Barrister provided your Barrister an opportunity for the Bank to accept responsibility for the attached letter and its contents but it was declined. This is a further opportunity to provide such confirmation. Please respond to this email by Midday 5th May 2021.
Please confirm receipt of this email. Should in case you are not the right person for this email, please point me in the right direction.

71. The claimant received no response to that email.

72. There was an ongoing dispute about disclosure at this point and the claimant was applying to postpone the full merits hearing because of concerns about disclosure and because he had responsibilities to his family which made it difficult for him to prepare for the hearing. His partner was unwell and he had various childcare responsibilities including for an infant. It was apparent he was under some stress.

73. On 4 May 2021, Ms Onwukwe wrote to Mr Cameron on the subject of deposit orders:
I repeat, until you have responded to the questions raised as to your status in these proceedings it is inappropriate for you to continue raising questions of me or the Claimant. You continue to ignore this which shows your continued disrespect both for myself, the Claimant and the legal process

74. On 4 May 2021, Mr Cameron wrote to Ms Onwukwe:

Despite repeated requests, you have failed to let us know whether or your client has paid any of the deposits ordered by EJ Hodgson. You are aware that there is a PH listed for Friday this week, before which it is imperative that we know the extent of the case your client is pursuing.

We fail to understand why neither you nor your client had responded to our request. Can we please have an answer by 5pm today.

This is clearly unreasonable conduct and we reserve our clients' position on costs.

75. The respondents wrote to the Tribunal 11 June 2021:

We write in relation to the conduct of the Claimant and his representative.

EJ Hodgson ordered the Claimant to pay deposits to continue with certain aspects of his claim. EJ Hodgson described these as key to the majority of the Claimant's claim. Those deposits were to be paid by 4pm on 21 April 2021. Whether or not the Claimant continues with those aspects of his claim is fundamental to trial preparation; the trial starts on 9 July 2021.

Despite our repeated efforts to find out from the Claimant and his representative whether or not he has paid those deposits, both he and his representative, Ms Onwukwe, have refused to tell us:

• There was no response to our email of 21 April asking whether any of the deposits had been paid. [This correspondence was missing from the bundle]

• We emailed again on 26 April asking whether the deposits had been paid and received the following extraordinary refusal from Ms Onwukwe on 28 April: "I still await your reply to my questions with regard to your status in these

proceedings. I think you should respond to these matters before raising any further questions to me."

• On 4 May (in advance of the PH on 7 May) we raised the matter again with Ms Onwukwe and received the following reply by return in similar vein to that of 28 April: "I repeat, until you have responded to the questions raised as to your status in these proceedings it is inappropriate for you to continue raising questions of me or the Claimant. You continue to ignore this which shows your continued disrespect both for myself, the Claimant and the legal process."

• On 6 May and 21 May we again raised with Ms Onwukwe whether or not her client had paid the deposits but we have received no response

We have therefore had to produce a final hearing bundle (the tribunal ordered that it be agreed by 28 May 2021) and prepare witness statements (the tribunal ordered that they be exchanged by 18 June 2021) without knowing the full extent of the Claimant's claims. That is unacceptable conduct and we will be making an application for costs in the event the Claimant has not paid those deposits.

76. On 17 June 2021, there was a preliminary hearing in front of Employment Judge Sutton. Decisions were made on various applications. Materially to these applications:
a) The four matters in respect of which deposit orders had been made were struck out as the deposit orders had not been paid;
b) The claimant withdrew claims against Ms Lowe and Mr Cameron.

77. The respondents sought a number of further deposit orders, which Employment Judge Sutton declined to make. In declining to make the orders, Employment Judge Sutton commented:

I also take account of the extent to which individual allegations have been jettisoned in the course of the proceedings – a factor which might be said to undermine the credibility of the claim. But it can also be said that fine-tuning of the complaints reflects a degree of realism on the claimant's part.

78. We comment in passing that a reasonable litigant will take account of judicial indications about the strength of claims and will act on those. The claimant had been seeking to withdraw claims against Ms Lowe and Mr Cameron by agreement but had been threatened with a costs application.

79. The claimant told us that he had joined Ms Lowe as she had overall responsibility for HR and he had raised with her concerns about the grievance process. Mr Cameron was joined because of the letter which formed the basis of one of the claims. The claimant had asked the first respondent about who was responsible for the letter but not received a response. He said he removed these respondents because of advice from the judge at the second preliminary hearing that his claims could be pursued against the first respondent.

80. On 22 June 2021, the claimant applied to postpone the full merits hearing due to his partner's ill health and the effect caring for his family had had on his ability to prepare for the hearing. That application was refused on 23 June 2021.

81. The claimant said in relation to his failure to tell the respondents that he had not paid the deposit orders that there was a lot of pressure and he found the respondents' solicitor's tone very aggressive. He understood from speaking with other people who had brought tribunal proceedings that he only had to inform the respondents if he paid the deposit orders.

82. Employment Judge Sutton commented in his case management orders:

Having reasonably made attempts on repeated occasions to ascertain whether the deposits had in fact been paid, which unhelpfully the claimant was unwilling to disclose, the respondents were finally notified on 14 June 2021, the day before this preliminary hearing, that the deposits had not in fact been paid and that the claimant had decided not to pursue the arguments which were subject to the order.

Evidence about claimant's means

83. We were provided with detailed evidence about the claimant's income and outgoings which we ultimately did not have to take into consideration and therefore do not set out in these Reasons.

Law

Wasted costs

84. Rule 80 of the Employment Tribunals Rules of Procedure 2013 provides:

(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs-
(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
(b) which in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

85. Rule 82 provides:
A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in

response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

86. The leading authority on wasted costs is Ridehalgh v Horsefield [1994] Ch 205. It establishes a three stage test for the award of wasted costs:

- first, has the legal representative acted improperly, unreasonably, or negligently?
- secondly, if so, did such conduct cause the applicant to incur unnecessary costs?
- thirdly, if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

87. The following passages from Ridehalgh further elucidate the tests for deciding wasted costs applications:
"*Improper, unreasonable or negligent"*

A number of different submissions were made on the correct construction of these crucial words in the new section 51(7) of the Supreme Court Act 1981. In our view the meaning of these expressions is not open to serious doubt.

"Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.

"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

The term "negligent" was the most controversial of the three. It was argued that the Act of 1990, in this context as in others, used "negligent" as a term of art involving the well known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent

unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach. (1) As already noted, the predecessor of the present Ord. 62, r. 11 made reference to "reasonable competence." That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders. (2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.

We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and so breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence: "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well- informed and competent would have given or done or omitted to do;" an error "such as no reasonably well-informed and competent member of that profession could have made:" see Saif Ali v. Sydney Mitchell & Co. [1980] A.C. 198, 218, 220, per Lord Diplock.

We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended.

Pursuing a hopeless case

A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. As Lord Pearce observed in Rondel v. Worsley [1969] 1 A.C. 191, 275: "It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system

came to provide no reputable defenders, representatives or advisers for the latter."

As is well known, barristers in independent practice are not permitted to pick and choose their clients. Paragraph 209 of their Code of Conduct provides:

"A barrister in independent practice must comply with the 'Cab-rank rule' and accordingly except only as otherwise provided in paragraphs 501 502 and 503 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded: (a) accept any brief to appear before a court in which he professes to practise; (b) accept any instructions; (c) act for any person on whose behalf he is briefed or instructed; and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person."

As is also well known, solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect the public policy underlying it by affording representation to the unpopular and the unmeritorious. Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure.

But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it.

It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.

[Per Lord Bingham MR at 232C – 234F]

88. A feature of wasted costs applications is that they are against legal representatives whose communications with their clients will be covered by

legal professional privilege which is not their privilege to waive. Lord Bingham went on to consider the implications of that at p 237B of Ridehalgh:

Privilege

The respondent lawyers are in a different position. The privilege is not theirs to waive. In the usual case where a waiver would not benefit their client they will be slow to advise the client to waive his privilege, and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do that, and may be unwilling to waive if he does. So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received. In some cases this potential source of injustice may be mitigated by reference to the taxing master, where different rules apply, but only in a small minority of cases can this procedure be appropriate. Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order.

89. Before a wasted costs order may be made against a legal representative on the ground that he has presented a hopeless case, that representative has to be shown not only to have acted improperly, unreasonably or negligently, but also to have lent assistance to proceedings which amounted to an abuse of the court: Mitchells Solicitors v Funkwerk Information Technologies York Limited [2008] 4 WLUK 194

Procedure

90. Lord Bingham at p 239 of Ridehalgh under the heading ‘Show cause’ says that: ‘A wasted costs order should not be made unless the applicant satisfies the court, or the court itself is satisfied, that an order should be made. The representative is not obliged to prove that it should not. But the rule clearly envisages that the representative will not be called on to reply unless an apparently string prima facie case has been made against him and the language of the rule recognises a shift in the evidential burden.’

91. HHJ Burke in Mitchells Solicitors recorded counsel’s submission on the proper approach as derived from Ridehalgh:

vii. The court or tribunal must exercise a discretion at two stages; it must first consider whether the merits and circumstances of the application render the application justified and proportionate; if it exercises its discretion in favour of the complaint proceeding at that first stage, the application will proceed to a hearing at which the court or tribunal has to exercise a further discretion if the central prerequisites for an order are made out, as to whether to make an order or not.

It was argued that the tribunal had missed out the first stage. HHJ Burke said this:

As to the first stage at which the discretion arose, Mr Scott raised no objection at the CMD to the giving by the Tribunal of directions for the substantive hearing of the wasted costs application. If he had wished to persuade the Tribunal that there was no real substance in the application and that they should not permit it to go forward to such a hearing, he had on that occasion the opportunity to do so. He did not take it then or at any other time. The hearing went ahead without any demur from Mr Scott; and it is too late now for it to be said on his behalf that the Tribunal should have set about a task at the CMD stage which neither party invited them to undertake.

Ordinary costs

92. The Tribunal Rules enable a represented party in employment tribunal litigation to make an application for a cost order and an unrepresented party to make an application for a preparation time order.

93. The test which the tribunal must apply is the same in both cases and can be found in Rule 76. The relevant parts of the rule for the purpose of this hearing are 76(1)(a) and (b) which say:

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.
(b) any claim or response had no reasonable prospect of success

94. The tribunal must consider an application in two stages:

- we must first decide whether the threshold test is met, i.e. has the relevant party acted vexatiously, abusively, disruptively or otherwise

- if we are satisfied the test has been met, we should then decide if we should exercise our discretion to award costs

Each case depends on the facts and circumstances of the individual case.

95. Although the 'threshold test' is the same whether a litigant is or is not professionally represented, the decision in AQ Ltd v Holden [2012] IRLR 648, EAT requires us to take the status of the litigant into account.

96. The value of a costs order is determined by Rule 78(1) which says:

"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*"

97. Awards are intended to be compensatory, not punitive *(*Lodwick v Southwark London Borough Council [2004] IRLR 554). This means that where costs are claimed because a party has acted unreasonably in conducting a case, the costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct. In other words, the party is entitled to recover the cost of any extra work that had to be undertaken because of the unreasonable conduct. The causal relationship between the conduct and the costs should not be subject to very minute analysis: Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA

98. Rule 84 is also relevant. It says:

*"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."*

99. Where a costs application is based on the merits of the case, we should take into account what the party knew or ought to have known about the merits of the case. A factor relevant to the exercise of our discretion may be whether there has been any warning of a risk of costs, but such a warning is not a prerequisite to the making of an order; nor is it a prerequisite that the receiving party must have put the paying party on notice of any application.

No reasonable prospects

100. The EAT in Radia v Jefferies International Ltd EAT 0007/18 gave guidance on the approach to costs applications under this limb. It emphasised that the test is whether the claim had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. The Tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. It should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time. The mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not necessarily mean that the tribunal cannot properly conclude that the claim had

no reasonable prospects from the outset, or that the claimant could or should have appreciated this from the outset. That still depends on what the claimant knew, or ought to have known, were the true facts, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts.

Lies and false evidence.

101. A lie on its own will not necessarily be sufficient to found an award of costs; it is necessary to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct: Arrowsmith v Nottingham Trent University 2012 ICR 159, CA.

102. Costs may be awarded where a claimant has not been dishonest but has pursued misconceived and unreasonable allegations based on an unreliable and damaged sense of reality: Topic v Hollyland Pitta Bakery and ors EAT 0523.

Submissions

103. We received detailed written and oral submissions from the parties. We took these into account but refer to them only insofar as is necessary to explain our conclusions.

Conclusions

Wasted costs

104. We had to reach a conclusion as to whether Ms Onwukwe was the claimant's representative for the purposes of the wasted costs jurisdiction.

105. The main issue for us was whether we had cause to reject the evidence of Ms Onwukwe and the claimant that she was not acting for profit, the claimant was not paying her and she had no expectation of being paid.

106. There was no hard evidence that Ms Onwukwe was acting for profit but the respondents made a number of challenges to Ms Onwukwe's credibility. It was said that the references to costs in the without prejudice correspondence indicated that she expected to be paid for her services. The claimant and Ms Onwukwe had disclosed no documents passing between them and this was said to be material from which we could draw inferences. The claimant and Ms Onwukwe said there were no such documents; they spoke on the phone.

107. Ms Onwukwe's representation that she had worked pro bono for Ms Rajput was said to be undermined by the invoice for the mediation. That was said to affect her credibility more generally.

108. Another issue was the fact that Ms Onwukwe in the without prejudice correspondence included a sum for pay in lieu of the claimant's full notice period although she knew the claimant had obtained a new job ln a higher basic salary starting well before the end of his notice period. The respondents said that this showed she was dishonest.

109. We did not consider that the inclusion of the claim for pay in lieu of notice was indicative of dishonesty. There are circumstances in which a claim for the notice period may be made even though a new role has been obtained before the end of the notice period. We think that Ms Onwukwe had not troubled to consider or research whether the claimant's were such circumstances before drawing up the figures in the WOP correspondence. But she did not conceal in that correspondence that the claimant had a new role and she said repeatedly that the figures were a starting point for negotiation. Ultimately we did not conclude that she was trying to deceive the respondents. She could and should have taken more care with her starting figures but she knew the figures would be challenged and carefully scrutinised by the respondents. She was going in high with a view to being negotiated down.

110. The potential non-disclosure of documents we took very seriously. It seemed improbable that there had been no emails or text messages passing between the claimant and Ms Onwukwe. The fact that none were disclosed could have led us to conclude that the claimant and Ms Onwukwe were concealing financial arrangements between them which would have been revealed in such documents.

111. It seemed to us that we could not reasonably draw that inference. We bore in mind that if there had been such documents, many would have been covered by legal professional privilege and immune from disclosure. In the case of Ms Onwukwe, her position throughout the wasted cost application process had been that she should not have to defend herself against the application. The claimant had largely been defending himself in the costs application as a litigant in person; it was not clear to us that he had had any advice as to what disclosure he was obliged to make or that he would have been able without such advice to ascertain what documents passing between him and Ms Onwukwe were disclosable.

112. So far as the mediation in Ms Rajput's proceedings was concerned, we accepted that Ms Onwukwe did not have it mind when she prepared a statement saying that she acted for Ms Rajput pro bono only.

113. We considered that her explanation of 'costs' in the without prejudice correspondence was plausible. Again, we suspect it was a standard head of claim she included without necessarily analysing it in any great detail.

114. After anxious consideration we could not conclude on the balance of probabilities that Ms Onwukwe was acting for profit in these proceedings. The worst we have found in relation to her behaviour is that she at least carelessly overegged some settlement figures in circumstances where she would have been fully aware that they would be unpicked by the respondents. That is on a very different scale from lying to the Tribunal under oath as to whether she was acting for the claimant for pay or the expectation of pay. The circumstances and documents were consistent with her acting pro bono and there was no hard evidence that she was not doing so.

115. That conclusion disposed of the wasted costs application against Ms Onwukwe. We should make clear that had we had to consider whether wasted costs should be awarded, we would not in any event have found the test in Ridehalgh to have been met.

Costs

116. Was the threshold test for an award of costs met?

No reasonable prospects of success

117. We considered whether the claimant could reasonably have believed at the outset of the proceedings that his claims had reasonable prospects of succeeding. We considered that he could.

118. We have highlighted in these Reasons the findings we have made which would have caused the claimant to be concerned about his treatment. Putting those matters together with what the claimant came to believe about the chicken remarks after consulting with friends, we took the view that he could reasonably have thought he might be able to establish that race was a reason for his treatment. That is so even in light of our finding that the claimant had said he liked chicken. It did not inevitably follow that Mr Bulhlmann was not playing on a racial stereotype in then remarking on the claimant's liking for chicken, although we ultimately found that his comments were not made by reference to any such stereotype

119. A finding that the burden of proof does not shift after careful analysis of facts and evidence is not the same as a finding that a claim had no reasonable prospects of success at the outset. In many ways this was a classic discrimination case where the outcome was wholly unclear at the outset of proceedings; as has been said many times, there is rarely overt evidence or an admission of discrimination.

Unreasonable behaviour [the argument about not believing in claims but trying to extort a settlement]

120. One argument the respondents ran was that the claimant cooked up a 'last straw' in order to leave the first respondent's employment in circumstances where he had a start date for his new job and had not given contractual notice in time.

121. We did not accept that analysis of what occurred. The facts were consistent with the claimant's own narrative that he wanted to resolve things internally and was uncertain whether he wanted to leave the first respondent. That, together with the desire to secure his bonus, explained why he did not give notice earlier.

122. Although it was clear that once he had decided to leave, the claimant was interested in reaching a settlement, we did not see evidence that he was doing so in way which was unreasonable. We have not found in any event that he had no reasonable belief in his claims.

123. The fact that Ms Onwukwe included a claim for the whole of the claimant's notice period did not seem to us to show that there was some wider unreasonableness in the attempt to enter into without prejudice correspondence. The respondents did not engage with that correspondence in any event.

124. The fact that Ms Onwukwe and the claimant at times used histrionic language and suggested that the claims might cause the first respondent reputational damage did not, it seemed to us, take the correspondence into territory where it could be considered improper.

125. The respondents said that Mr Cameron was joined vindictively and in order to put pressure on the respondents to settle the claims. We could not understand that argument since it was not clear to us how joining Mr Cameron would put particular pressure on the respondents.

126. The claimant and Ms Onwukwe were understandably offended by Mr Cameron's letter. He was joined in circumstances where it was possible the first respondent would not have accepted liability for the letter; it was not an unreasonable step by a litigant in person.

127. So far as Ms Lowe was concerned, the allegations in the claim form relating to her were:

37. On 1 June 2020 C's representative (a retired lawyer), Audrey Onwukwe, wrote to AL and outlined why the serious and multiple deficiencies in the grievance procedure to date and reflected in the Outcome Letter were

undermining C's trust and confidence in R1. C's representative explained why the conclusion reached in relation to the racial stereotype was particularly hurtful and offensive to C and perverse having regard to the legal definition of direct discrimination and/or race harassment. C's representative made various suggestions towards repairing the deficiencies in the grievance procedure in order to restore trust in the process. xl) AL acknowledged receipt of C's representative's letter but did not otherwise reply or take any kind of remedial or other conciliatory action.

128. We did not conclude that the claimant had behaved unreasonably in joining Ms Lowe. He had not had a substantive response to his open letter and had had Mr Cameron's response to his without prejudice letter which had caused offence to the claimant. The circumstances at the time were that the claimant was at home with stress and felt his grievance had not been dealt with properly. We did not conclude that he had an improper purpose in joining Ms Lowe of trying to force a settlement or that the claimant was seeking to harass Ms Lowe and Mr Cameron , as alleged by the respondents. He withdrew these and other claims after advice from EJ Sutton.

129. So far as the failure to inform the respondents that he had not paid the deposit orders was concerned, we considered that there had been a failure by the claimant to cooperate with the respondents and the Tribunal, however we also took the view that there were faults on both sides in the conduct of the proceedings and that it was in part the tone of Mr Cameron's initial correspondence which led to an unhelpful and uncooperative, at times aggressive, relationship between the parties, which included what seemed to us to be unhelpful correspondence in response to Ms Chan's suggestions about dropping respondents. In that context, it did not seem to us that we should exercise our discretion to make an award of costs against the claimant.

130. For all of these reasons, we dismissed the respondents' applications for costs and wasted costs.

Employment Judge Joffe
14/10/2022

Sent to the parties on:

14/10/2022

For the Tribunal Office: