EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Ben Plaistow	**v**	Secretary of State for Justice

Heard at: Cambridge **On:** 1 & 2 November 2022

Before: Employment Judge Ord

Members: Mr Smith and Ms Prettyman

Appearances
For the Claimants: Ms S Berry, Counsel
For the Respondent: Mr A Tolley, KC

JUDGMENT on REMEDY
(Remitted Issues)

It is the unanimous decision of the Employment Tribunal that:

1. The discount to be applied in respect of future loss to take account of the general vicissitudes of life as may impact upon:-

    1.1 The length of the Claimant's working life is:

        i. for the period up to the age of 48: 5%;
        ii. for the period thereafter up to the age of 63: 15%; and
        iii. for the period thereafter up to age 68 and retirement: 20%.

    1.2 As may impact upon the length of the Claimant's working day (this discount to be applied to the payment plus element of the Claimant's claim only) is:

        i. up to the age of 48: 5%;
        ii. thereafter up to the age of 63: 15%;
        iii. thereafter up to age 68 if promoted to Grade 5: 50%; and
        iv. thereafter up to age 68 absent promotion: 35%.

2. The parties have agreed that the Claimant would, if offered, accept the relevant promotions so that the salaries to be used for future loss claims

are at the basic figure of the current scales relevant to the appropriate grade.

3. The appropriate rate of pay for future loss calculations are, based on the 2022 figures of:

   3.1 Band 4 pensionable pay, £36,020; and
   3.2 Band 5 pensionable pay, £40,061.

   Subject to increases for inflation which are to be determined at a subsequent hearing if not agreed.

4. The base calculation for the payment plus element of the Claimant's pay is to be the 2022 value of the average figure set out in the original Remedy Judgment (i.e. £7,643.50 as at 2016) recalculated to current rates of pay.

5. The appropriate apportionment of costs in respect of the period prior to 18 May 2018 is one third, the original Order stands.

REASONS

1. Following a Telephone Case Management Discussion on 8 February 2022, it was agreed that this Hearing would deal with the following issues remitted to this Tribunal from the Employment Appeal Tribunal and its Judgment of 6 July 2021, and amended Order of 15 July 2021, should be determined prior to further matters to be determined or agreed as set out in that Order.

2. Accordingly, the matters for consideration by the Tribunal on remission at this Hearing were as follows:-

   2.1 The discount to be applied in respect of future losses to take account of the general vicissitudes of life as might impact on the length of the Claimant's working life and / or the length of his working day over the period in question;

   2.2 The impact of anticipated promotions on the calculation of salary to be used for pension loss calculations (taking into account the agreement between the parties as to the likelihood of promotion to Bands 4 and 5 as set out in the original Remedy Judgment);

   2.3 The appropriate rate of pay for calculations of annual pay rises and therefore salary to be used for future loss and pension loss calculations; and

   2.4 The apportionment of costs in respect of the period prior to 18 May 2018.

The Hearing

3. At this Hearing evidence was heard from the Claimant and from Mr David Mann (Chartered HR professional) on behalf of the Respondent. Reference was made to an extensive Bundle of documents, a supplemental Bundle and a Bundle of Authorities.

4. The Tribunal is grateful to the parties and to their Representatives for their clear and helpful submissions given at the close of the Hearing.

Background

5. The Claimant was employed by the Respondent from 28 July 2003 until 9 August 2016 when he was summarily dismissed. Following a Hearing lasting 25 days, with two further days for Tribunal deliberations, the Claimant was found (Judgment sent to the parties 5 February 2019) to have been the victim of Direct Discrimination on the protected characteristic of sexual orientation contrary to §.13 & 39 of the Equality Act 2010, Harassment relying on the same protected characteristic contrary to §.26 & 39 of the same Act, Victimisation contrary to §.27 & 39 of the Equality Act 2010 and to have been unfairly dismissed.

6. The findings of fact in that Judgment were not the subject of any Appeal or Application for Reconsideration.

7. On 11 June 2019, the Tribunal gave Judgment as to Remedy and Costs.

8. The Claimant was awarded career long losses and (in addition to costs for the four days of the Hearing loss due to the conduct of the Respondent) one third of his remaining costs.

9. Aspects of the Judgment were successfully appealed with the result being remission back to this Tribunal of the matters set out above.

10. We deal with them in turn.

Discount to be applied in respect of future to loss to take account of the general vicissitudes of life as might impact on the length of the Claimant's working life and / or the length of his working day over the period in question

Length of Working Life

11. The original Remedy Judgment of 11 June 2019 found that the prospect of a voluntary cessation of employment before the age of 68 was, in the Claimant's case, remote. A discount of 5% was applied to reflect the *"very slight prospect"* of the Claimant retiring or leaving the Service voluntarily before his pensionable age (68) or recovering sufficiently to enable him to return to work.

12. That finding stands.

13. What we are required now to do (although as we pointed out at this hearing, which was not challenged, no evidence or submissions on the point were made at the original Remedy Hearing) is to consider what discount should be applied to both the length of the Claimant's working life and the length of his working day to reflect other matters which might befall him.

14. We limit this consideration to matters outwith the Claimant's own positive decision or control. Those matters were addressed in the original Remedy Hearing with the heading *"Early Resignation or Withdrawal"*.

15. What we are therefore looking at are other matters that might befall the Claimant such as ill health or early retirement. What is referred to in the Employment Appeal Tribunal Judgment, paragraph 84, as *"the more general uncertainties of life"*. The same Judgment refers to, *"a working life cut short by reason of early death, disability or unforeseen circumstances"*.

16. We have been directed to a number of Authorities in this regard, in particular:

    - BMI Healthcare Limited v Shoukrey [2021] UK EAT0356/19, where HHJ Tayler referred to the Tribunal having to consider *"what would have been"* and *"what will be"* as including *"an assessment of likelihoods"*; and

    - Mallet v McMonagle [1970] AC166, when it was stated that an assessment of damages must include *"elements of estimate and to some extent conjecture. All the chances and changes of the future must be assessed… with fairness for the interests of all concerned and… a sense of proportion"* and further, *"to assume for certainty all the most advantageous possibilities… is not to strike a fair balance"*.

17. The Judgment of the Appeal Tribunal in this case identified four matters to be considered, specifically; early death, disability, the existence and extent of continued commitment to long working hours and other unforeseen circumstances.

18. On behalf of the Respondent, Mr Tolley referred us to the possibilities of interruptions in employment due to periods out of work for reasons including ill health, care of dependents and redundancy.

19. The Claimant's evidence in this area was simple and compelling.

20. The Claimant joined the Respondent as a Prison Officer on 28 July 2003. He was 25 years of age at the time having been born on 2 May 1978.

21. The Claimant had been employed for 13 years at the time of his dismissal on 9 August 2016.

22. The Claimant joined the Prison Service because in his words it was a secure job with a first class pension. By the standards of his previous employment in catering, the pay was good and the work very much more secure and rewarding.

23. In the thirteen years he had worked as a Prison Officer, he had enjoyed the work. Even whilst he was the subject of the treatment he received at HMP Woodhill which is the subject of these proceedings, he wanted nothing more than to continue his career – at that time by transfer back to his previous posting at HMP Bullingdon where he had not been subject to any of the unlawful treatment which he received at HMP Woodhill.

24. He had suffered previous incidents of violence against him which had not deterred him from following his career.

25. Mr Mann took us to a number of statistics regarding the retention rates in the Prison Service, including resignation rates, which have been covered by the original Judgment in relation to early resignation or withdrawal.

26. This also deals with the evidence and submissions put forward by Mr Mann and Mr Tolley in relation to the impact of the Judgment in the McLoud litigation regarding pensions.

27. These matters were, we find, put before us as an attempt to take a *"second bite of the cherry"* on behalf of the Respondent. The question of the Claimant voluntarily leaving the Service early by way of resignation or retirement had been dealt with in the original Remedy Judgment and was not the subject of any successful appeal.

28. Equally, Mr Mann's evidence regarding the general population's decisions on early retirement (particularly post pandemic) and the impact of the *"SANEO"* programme, which it is proposed the Prison Service will introduce to deal with what it calls its own *"inflexible working patterns"* which it is said on their own behalf, *"hinders recruitment and subsequent retention and hinders employees work life balance because it is not family friendly or flexible"*, is not part of our considerations today.

29. The issue of how long, absent impact by the more general uncertainties of life have been determined by the original Remedy Judgment. The Claimant's loss has been established as a career long loss subject to a 5% reduction for the likelihood of early resignation or withdrawal from the service.

30. Equally, the Respondent referred at length to the question of pay and reward and sought to seek discount in the Claimant's future loss of earnings because, inter alia, the United Kingdom's Public Finances had deteriorated since 2019 (making reference to the Covid-19 pandemic and

Brexit). Mr Tolley referred us to the fact that the Respondent *"has already recognised"* what he described as a *"crisis"* in both the recruitment and retention of Prison Officers as a result of pay and conditions, poor morale and low motivation.

31. The Claimant's prospect of early withdrawal from the Service ahead of pensionable age has already been dealt with and his morale and motivation have never been questioned. These again were matters which amount to an attempt to re-open a matter already determined by the Tribunal.

32. Mr Tolley then pointed us toward the risk of the Claimant suffering ill health, related or unrelated to his work, or injury and the possibility of this causing the Claimant to lose his post on the basis of either unsatisfactory attendance or medical incapacity.

33. The Claimant had suffered previous incidents of violence towards him. On each occasion he had returned to work on the first opportunity. We take account, however, of the possibility of ill health or injury so significant that it would curtail his career.

34. The Respondent has not, however, provided us with details of how the employer's schemes for compensation for those who face career ending illness or injury (particularly injury sustained at work) would impact upon this particular aspect. The Respondent accepted that compensation which it is believed would include pension enhancements would apply in those circumstances but provided no details.

35. The Respondent also referred to the prospect of the Claimant making full or partial withdrawal from work due to dependents such as a spouse, a partner, a parent, a child or other family member, who might require care at specific times in the relevant period.

36. Assuming for the moment that this is not something already dealt with in the previous assessment of early withdrawal or retirement, we reflect again upon the fact that during his employment with the Respondent the Claimant was, for part of the time, in a long term relationship and further that for some time (including whilst at HMP Bullingdon) he was caring for his father.

37. Neither of those matters caused any reduction in the Claimant's working hours, nor did he seek to pause his career as a result. The prospect of the Claimant reducing his working time as a result of these matters is in our view negligible. He did not do so previously and the likelihood of his doing so in the future is remote. The Claimant has impressed us throughout this hearing by his honest and straightforward evidence. He was committed to his work and remained so even in the circumstances of the abuse and discrimination he received at HMP Bullingdon as well as during his previous relationship and whilst caring for his father.

38. The Respondent referred to the possibility of redundancy. Between the year 1 April 2015 to 31 March 2016 and the year 1 April 2021 to 31 March 2022, as Mr Mann accepted, no Prison Officers in Band 2 or Bands 3 – 5 were either voluntarily or compulsory redundant. In the circumstances where the prison population is not falling and where the Respondent on its own admission is facing a *"crisis in both the recruitment and retention of Prison Officers"* we discount this possibility to zero. There is no basis for believing that there is any likelihood whatsoever of future redundancies on the balance of the evidence presented to us.

39. The Claimant was aged 40 at the date of the Judgment (aged 41 at the date of the Remedy Judgment) and is now aged 44.

40. The Claimant's average life expectancy, based on the evidence before us, is 84 years. But on that evidence, the likelihood of his suffering premature death prior to the age of 48 is approximately 3%, before the age of 63, 9% and before aged 68 is 15% (we have taken these figures from the graph provided to us as part of the Bundle, the only evidence available to us).

41. Those stages of life are relevant because they are the points at which it was agreed the Claimant would be promoted to Grade 4, secondly the date on which there was a 50% prospect of his promotion to Grade 5 and third his retirement age.

42. We were invited to consider whether to leave the issue of the prospect of early death to the consideration of the acutaries or to deal with it now. The Respondent was ambivalent as to which course of action we should take, the Claimant preferred that we deal with it, leaving the question of discount for accelerated payment for future calculations.

43. On the basis of the information provided to us, we are content that we can reach the conclusions that we have above regarding the prospect of early death and note the position accordingly.

Summary

44. Taking all the above matters into account, we consider that the appropriate level of discount as to the length of the Claimant's working life (in addition to the 5% already Ordered) is as follows:-

    44.1 for the period up to age 48 and his promotion to Grade 4: 5%

    44.2 for the period up from age 48 up to the age 63 and his prospective promotion to Grade 5: 15%; and

    44.3 for the period from age 63 up to retirement at age 68: 20%.

    These figures reflect the risk of early death, serious illness (reflecting on the unspecified credit which would inure to the claimant in those

circumstances) and the minimal likelihood of a reduction in working life due to caring or related responsibilities.

Impact on the length of the working day

45. We have reflected on and considered all the above matters again as they may impact upon the length of the Claimant's working day.

46. The Claimant has always worked full time and it was not his evidence that he might cease to do so at some time in the future. His expectation was that he would continue to work full time up to retirement. In particular he expressed concern over the impact on how a reduction from full to part time work would have on his pension entitlements and accruals which he said – and we accept – was and would have remained at all times a significant driving force in relation to his commitment to his work.

47. We do consider, however, that as the Claimant aged and as he achieved promotion, or promotions, the amount of overtime / payment plus work which he would carry out was likely to diminish to some extent.

48. We have concluded that the appropriate way to consider this matter is in four parts:-

    48.1 the period up to age 48 and his promotion to Grade 4;

    48.2 the period thereafter up to age 63 with the prospect of promotion to Grade 5;

    48.3 the period from age 63 up to retirement if he did not achieve promotion; and

    48.4 the period from age 63 up to retirement if he had achieved promotion.

49. We have reached the following conclusions.

50. The Claimant was a committed Prison Officer and worked a significant amount of overtime / payment plus whenever he was permitted to. This was the case even whilst being subject to the ill treatment he received at HMP Bullingdon. The opportunity to work such overtime / payment plus is undiminished on the basis of all the evidence available to us and, given the Respondent's acceptance of their *"crisis"* in recruitment and retention, it is inevitable that the opportunities to work additional hours would at least remain as high as they were previously. Those committed Officers such as the Claimant who regularly undertook work such as bed watch duties and similar additional duties to a normal working day would continue to do so.

51. Payment plus / overtime pay is non pensionable so the Claimant would, in our view, work less payment plus as time and promotions impacted on his life whilst continuing to work full time throughout the relevant period.

52. Our starting point, therefore, is that the amount of payment plus work available to the Claimant would not diminish and that, absent the impact of the matters already considered and the impact of age / promotion, he would have continued to work payment plus at the same rate as previously.

53. Accordingly,

    53.1 For the period up to age 48 we make a reduction of 5% in the amount of payment plus work which the Claimant would work. The Claimant would have continued to work payment plus as available at the rate as previously and the reduction reflects the vicissitudes of life as they might impact upon the length of his working day;

    53.2 For the period from age 48 up to age 63, at Grade 4, we make a reduction of 15%. As well as those matters reflected in our earlier comments ordering a 10% reduction in the length of the Claimant's working life, we add in the Claimant's increasing age throughout the period. Our view is that he would start this period with a very limited reduction in the amount of payment plus work he would carry out but might well, by the time he reached 63, carry out rather less payment plus work than he previously had done. Considering the matter in the round, we make a reduction of 15% in the amount of additional payment plus work the Claimant would carry out;

    53.3 In the period thereafter up to retirement, if the Claimant did not achieve promotion, it is likely that he would work substantially less payment plus work. Notwithstanding the Claimant's commitment to his role we consider that in this period it is likely that there would be a further diminution in the amount of payment plus work carried out, over the five year period starting at the 15% figure we have ordered above and thereafter on a sliding scale so that we consider an appropriate figure to be applied for the relevant period to be 35%;

    and

    53.4 If the Claimant was promoted to Grade 5 then the additional level of responsibility and pay would, we consider, further reduce the likelihood of the Claimant carrying out additional hours. These are significant factors. We have heard from the Claimant that others at Grade 5 do carry out such additional duties and we are assured the Claimant would continue to do so to some degree. For this period, however, if the Claimant was promoted we consider a reduction of 50% in the amount of payment plus work he would carry out to be appropriate.

The impact of anticipated promotions on the salary to be used for future loss and pension loss

54. This matter has been agreed between the parties.

55. The Claimant would have accepted promotion to Grade 4 in 2026 and if achieved promotion to Grade 5 in 2041.

56. The applicable rates of pay for the calculation of future loss and pension loss are therefore the rates applicable to those posts.

The appropriate rate of pay to apply for calculations of annual pay rises and therefore salary to be used for future loss and pension loss calculations

57. The starting point for these calculations must be, in our view, the current rate of pay. The Claimant's loss of earnings to date can be calculated on the basis of pay rates actually prevailing in the Prison Service from time to time and the future loss calculation should be based on the current rates of pay both as to pensionable pay and payment plus work (based on the same amount of payment plus work being carried out prior to dismissal).

58. In relation to future earnings and pension losses, the Respondent says that given the economic uncertainty at the present time and its likely impact on public finances, the pay scale for 2022 should be applied without increment.

59. We disagree.

60. The Claimant seeks to rely on Dr Pollock's expert Report on future pension losses which indicates that the Claimant's earnings, ignoring promotional increments, would have outpaced the consumer price index by 1% per annum. They point out that this is the same assumption made by the Government's Actuaries Department in their Report on the Claimant's pension losses.

61. Given the need for continued recruitment and retention and given the Respondent's apparent desire to address these matters, it is inappropriate to consider making no increment upon the rates of pay going forward.

62. The Respondent praise and aide the Prison Service Pay Review Body's Twenty First Report (2022) and the recommendation from the Respondent of another Award. However, as Mr Man confirmed, the actual award made in 2022 by the appropriate Review Body, was for a 4% pay rise that in his words, the Government would only depart from that recommendation in *"exceptional"* circumstances.

63. In previous years the pay increases have been pegged by Government control on Public Service Pay, but the previous year's award was at 2.5% with a recommendation for this year now of 4%.

64. Given the financial restraints on the Government we consider the 4% pay rise this year as an appropriate figure for future pay awards being a realistic assessment of the likely pay progression in the Service.

The appropriate apportionment of costs in respect of the period prior to May 2018

65. We have taken full note of the Employment Appeal Tribunal's decision on this point and the remission back.

66. Our concern is that perhaps due to a lack of precision or elegance in the wording of the Costs Judgment this matter has developed something of a life of its own.

67. None of the Representatives who are before us today were involved at the time of the Costs Hearing nor at the time of the matters which led to the loss of Hearing days in May 2018.

68. It is therefore appropriate for us first to set out what the intention (we believed at the time it was clear) was when the Costs Order of 18 May 2018 was made.

69. The intention of the Costs Order (that the four lost days of Hearing should be paid by the Respondent to the Claimant on the indemnity basis) was simply to ensure that the Claimant suffered no loss as a result of the loss of four days of Hearing time and thus extra days being necessary. Nothing more and nothing less.

70. Those four days were lost as a result of the matters we referred to in our Costs Judgment, paragraphs 6 – 10 refer.

71. The question of whether the Costs Order in relation to the Hearing days lost, 14, 15, 16 and 17 May 2018, *"drew a line in the sand"* as Mr Allsopp then put it, was considered and rejected.

72. The intention – we thought clearly and fully spelled out in those paragraphs (we may be in error in so believing) - was to ensure that absent any other Application for Costs the Claimant did not suffer any losses for the extension of the Hearing by four days.

73. It is with worth recalling what had occurred.

74. The Respondent had throughout the period before the Hearing and during the first days of the Hearing denied the existence of certain documents. The Claimant had asked for them through his Representatives and they were not forthcoming.

75. The claim form in this case was presented on 18 May 2016. The matters complained of by the Claimant covered the period 18 February 2015 to 9 August 2016.

76. The Hearing began on 8 May 2018, almost two years to the day after the presentation of the claim form. Disclosure had been Ordered at a Preliminary Hearing before Employment Judge Sigsworth on 14 July 2016 and was to be undertaken by 1 September 2016.

77. We were told by Counsel for the Claimant at the Hearing the documents which the Tribunal identified on the first morning of the Hearing as being absent from the Bundle – some of them documents which were required either by statute (such as Reports to the Health and Safety Executive) or the Respondent's own internal processes (Use of Force forms) - had been sought by the Claimant throughout the period since the disclosure date.

78. The Respondent's position was that they did not exist or could not be found.

79. It was only after the Tribunal required the Claimant to further explain (and confirm through legal Representatives by sworn statement) what steps had been taken to identify and find such documents that they began to appear. They appeared piecemeal and at each stage the Claimant required, reasonably, time to consider the relevant documents.

80. One document disclosed by the Respondent and in respect of which the electronic 'footprint' was interrogated by the Claimant or at the Claimant's request, had been created the day before it was presented to the Employment Tribunal. It had, however, borne a date contemporaneous with the events in question. A witness for the Respondent on oath said this was probably due to someone *"plugging gaps"*.

81. What was happening, therefore, was a piecemeal remedy of a situation which, had the Respondent and its legal advisors dealt with the requests and orders for disclosure properly and conscientiously (and in the case of the Respondent itself, honestly) would not have occurred. This caused a loss of Tribunal time of four days. Those days were lost because the Respondent, belatedly and without explanation for its previous failings, its untruthful denials of the existence of documents and the misleading creation of at least one document during the Hearing – provided documents that had been requested many times and which were clearly disclosable.

82. The intention – which as we say we believed was adequately expressed – was to ensure that the Claimant's costs of those lost days would, whatever the outcome of the Hearing and whether or not any general Costs Order was made, not be borne by him. This was to cover the four days lost due to the Respondent finally remedying (to the degree it did) its previous failings and not the consequences of its failure to deal with disclosure properly.

83. Accordingly, there was never any intention, as we thought we had made clear, to consider the failure of the Respondents prior to the Hearing and

whether or not to Order costs in that regard, but rather solely to protect the Claimant from the costs of the lost Tribunal days when Counsel was present and Tribunal time was lost. The costs of those days were Ordered on the indemnity basis to reflect that point.

84. The Order was made in reply to a wider Application from the Claimant for strike out of the Respondent's case which was rejected.

85. The Costs Order made at the conclusion of the proceedings reflected, as per paragraph 24 of the Costs Judgment, that in addition to the lost four days the Claimant had been put to unnecessary costs by the conduct of the Respondent. We applied what has been, fairly, described as a 'broad brush' approach to these costs and they were assessed at one third of the total costs.

86. We note that the one third assessment was not challenged by the Respondent, only the question of whether the Order had – as it was put by the Respondent – *"dr[awn] a line in the sand"*.

87. That was never the intention of the Tribunal for the reasons we have stated and that was, we believe, evidently clear to the parties and their Representatives who were present at the time, including those who instructed Mr Siddiq of Counsel who was then Counsel instructed on behalf of the Respondent and who continue to instruct Counsel for the Respondent today.

88. In any event, as the Employment Appeal Tribunal Judgment sets out (paragraphs 108, 109, 110) the first Order did not preclude any subsequent Application for Costs.

89. In relation to the issue of costs, we have further noted of the terms of the Employment Tribunal's Remission. First that the Judgment applied a 'broad brush' approach (which approach is not criticised). secondly, that it failed to distinguish between costs prior to 18 May 2018 and after that date and third, that matters other than those covered in the Costs Order of 18 May 2018 relating to different aspects of the Respondent's unreasonable conduct pre-dating that award might warrant an award of costs.

90. We note that in fact the Employment Appeal Tribunal Judgment gives us the opportunity to consider the question of costs afresh for the periods both before ***and after*** (our emphasis) the 18 May so as to reflect our overall intention although we have heard no submissions whatsoever on that point, only on the issue of the costs prior to 18 May 2018.

91. For the Respondent, Mr Tolley says there is *"no principled basis for making any further Order for costs in respect of the period up to 18 May 2018"* – we take this from his written submissions.

92. That, however, is quite contrary to the Judgment of the Appeal Tribunal and no such Order is precluded by the Employment Appeal Tribunal's Judgment.

93. Further, for the Claimant Miss Berry simply invited us to retain our original decision. She referred to matters beyond the issues of disclosure and witness availability (the latter was not apparent until the days of the Hearing itself) and referred to in the Costs Judgment of 11 June 2019 in particular,

    93.1 the Respondents continued on reliance of the statutory defence throughout the period up to the first day of the Hearing; and

    93.2 the fact that the Respondent contested every single point raised by the Claimant when – on any analysis of its own evidence – there were matters such as the inadequacy of the Respondent's own investigation, reference to *"unwritten practices"* and the fact that there were two versions of at least one document (an email from the Governing Governor which had clearly been fiddled with at some stage) and the evidence of the Officer instructed in relation to the Claimant's Grievances who said he did not know that he was dealing with a Grievance.

94. We refer to paragraphs 12 and 13 of the Costs Judgment.

95. The truth is that prior to, and during the Hearing, the Respondent's approach was obstructive, misleading, ill prepared and (see paragraph 14 of the Costs Judgment) involved treating the Orders of the Tribunal with a degree of contempt.

96. In the circumstances we have reconsidered the position on costs generally.

97. We are satisfied that our original decision to award the Claimant one third of his costs (outside the four days of Tribunal time lost) should stand. The matters which gave rise to the loss of four days was the Respondent's belated attempts to remedy its previous failures. Those failures had caused costs up to those days and the lost days were a separate matter.

98. There were other issues, beyond disclosure and witness availability which fully justified an Order for Costs prior to 18 May 2018. The continued denial of every aspect of the claimant's complaints, the purported reliance on the "statutory defence" and the obstructive nature of the respondent's approach to the issue of disclosure might of itself warrant an award of costs of more than the one third previously ordered.

99. Equally, the respondent continued – right up to the end of the evidence in the hearing - to deny all matters notwithstanding the matters set out at length in the merits judgment concerning the presentation of witnesses and the way their evidence was presented so that further tribunal time was

incurred. This conduct was unreasonable and would of itself have warranted an award of costs which might well have exceeded one-third had we been minded to revisit this further.

100. In the circumstances we have considered afresh whether the previous award of costs properly meets our intentions. Overall we consider that it does. We note that there is no requirement to assess what conduct of the respondent (and we note the respondent does not deny that its conduct of these proceedings warranted an award of costs against it) caused what loss. The appropriate figure for costs in our Judgment remains at one third of the overall costs of the Claimant (in addition to the costs for the four days of Tribunal time lost) for the reasons stated.

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Employment Judge Ord

12 December 2022

Sent to the parties on:

5 January 2023

For the Tribunal: