THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH (by CVP)**
BEFORE:	**Employment Judge Martin**
MEMBERS:	**Ms G Mitchell**
	Mr T Okitikpi
BETWEEN:	**Dr Hasiba Hamoud** **Claimant**
	and
	Spencer Private Hospitals Limited **Respondent**
ON:	**16 January 2023 and 17 January 2023 and 7 March 2023 in chambers**

For the Claimant:	**Mr Wareing – Counsel**
For the Claimant's former representative	**Mr Kohanzed - Counsel**
For the Respondent:	**Ms Scriven – Solicitor**

RESERVED JUDGMENT ON COSTS

1. The Tribunal's unanimous decision is that the costs application against the Claimant succeeds.
2. The application for wasted costs and ordinary costs against the Claimant's former representative is dismissed.

RESERVED REASONS

1. This was a hearing to consider an application for costs made by the Respondent on 26 June 2022, following the judgment of the Tribunal, dismissing the Claimant's complaints of race discrimination, age discrimination, sex discrimination and

discrimination on the grounds of religion and belief. The application was made against the Claimant personally and her former representative.

2. The parties were given notice of the hearing and directions were given including that the Claimant and her representative should provide evidence of their ability to pay and that if they did not, then the Tribunal would assume they had the means to pay any costs award made. No such representations were made.

3. The Respondent stated that it was seeking a detailed assessment of costs to be carried out by an Employment Judge. The Tribunal considered first whether the threshold for the making of a costs order had been made and if it had the Tribunal would issue directions for a detailed assessment of costs to be heard later. It had been hoped to deliver judgment orally on the last day of the hearing, however the Judge was unwell and unable to do this.

4. The Tribunal had before it various documents including:

a) the Respondent's application for costs
b) the Respondent's second application for costs
c) the Claimant's written response
d) the Claimant's witness statement (read by the Tribunal but no live evidence heard)
e) the Claimant's former representative's written response
f) witness statement of Mr Piera (read by the Tribunal but no live evidence heard)
g) a bundle of documents – Key Documents
h) a bundle of correspondence documents

The hearing

5. The hearing was listed for two days to allow time for Tribunal deliberation. At the start of the hearing, the Tribunal did not have all the documents. The Respondent agreed to email the Tribunal with the bundle of documents. The first attempt failed as the email was bounced back as the attachment was too large. The Respondent then sent a link to access the document which did not work. A second link was sent and again the Tribunal could not access the bundle. In the end the Respondent split the bundle and it was sent in four sections. This took time to do, and meant that submissions were delayed until 2 pm.

The Respondent's applications for costs

6. The Respondent made five applications for costs. The Respondent withdrew number four following discussion at the start of the hearing. The applications are set out below as set out in the cost's applications.

7. **The first application** for costs is against the Claimant on the following grounds:

a. That the Claimant has conducted the proceedings in an abusive, vexatious and/or unreasonable manner (Rule 76(1)(a)).

b. That bringing a claim for age discrimination was unreasonable and/or had no reasonable prospect of success (Rule 76(1)(b)).

c. Bringing claims for direct discrimination was unreasonable and/or had no reasonable prospect of success (Rule 76(1)(b)); and

d. Relying on Martin Farrugia as an actual or appropriate comparator was unreasonable and/or had no reasonable prospect of success (Rule 76(1)(b)).

8. **The second application** for costs is made against the Claimant's Representative in accordance with 76(1)(a) ET Rules, on the ground that:

a. The Claimant's Legal Representative has conducted the proceedings in an abusive vexatious and/or unreasonable manner (Rule 76 (1)(a)).

b. That bringing a claim for age discrimination was unreasonable and/or had no reasonable prospect of success (Rule 76(1)(b)).

c. Bringing claims for direct discrimination was unreasonable and/or had no reasonable prospect of success (Rule 76(1)(b)); and

d. Relying on Martin Farrugia as an actual or appropriate comparator was unreasonable and/or had no reasonable prospect of success (Rule 76(1)(b)).

9. **The third application** for wasted costs is made against the Claimant's Representative in accordance with Rule 80(1)(a) on the ground that:

a. The Claimant's Representative has acted improperly, unreasonably, or negligently in conducting these proceedings.

10. The application noted that: The Claimant's Legal Representative Firm is on the Tribunal's record as Harding Mitchell Solicitors, of DX34005 Tooting North. However, the Claimant's Legal Representative has also held himself out at the firm, Fadiga & Co of 29-30 Abbey Parade, Merton High Street, London, SW19 1DG. This application is therefore made against all firms held out to represent the Claimant.

11. There was a second letter with applications number four and five dated 6 January 2023.

12. **The fourth application** (withdrawn)

13. **The fifth application** is for the payment to compensate the additional costs the Respondent has incurred due to the Claimant's legal representatives conduct, under rule 78(1)(a) of the ET Rules. The Claimant's representative acted vexatiously, abusively, disruptively, and unreasonably contrary to Rule 76(1)(a) of the ET Rules throughout proceedings relation to the Costs Application. In the alternative the Respondent submits that he Claimant's legal representative conduct in these proceedings has been improper, unreasonable and/or negligent for the reasons set out below and pursuant to Rule 80(1) an order of wasted costs should be made against the Claimant's representative.

14. The application went on to detail the areas that the Respondent said were in issue.

Submissions

15. All parties provided written submissions which were read by the Tribunal which were amplified by oral submissions. The Tribunal emphasises that this not intended to be a comprehensive recital of everything written and said but summaries of the submissions made.

The Respondent's submissions

16. The Respondent supplemented its written submissions as summarised below.

The first application

17. The Respondent's written submission focuses on the age discrimination claim and Mr Farrugia being cited as a comparator and that the Claimant alleged that he was instrumental in the decision to remove practicing privileges. It is said that this claim had no reasonable prospect of success. The written submissions refer to the costs warning letters which are discussed in more detail in the conclusions below.

18. The Respondent submitted that the Claimant did not provide full particulars of the claim such that it could fully understand her pleaded case and referred to correspondence it wrote about this. It is said that on 28 December 2019 the Claimant said in an open letter that she would withdraw her claim if they reinstated her practicing privileges. It is

suggested that this shows that the Claimant in pursuing her claims was acting vexatiously and cynically to overturn the decision to remove the privileges.

19. It was submitted that the Claimant's age discrimination and harassment claims were not properly particularised. It was pointed out the Claimant's own Counsel confirmed in his closing submissions that he did not consider the Claimant had been discriminated or harassed due to her age and that Mr Farrugia was not an appropriate comparator. The Respondent submitted that all the Claimant's claims failed and had no reasonable prospect of success. She additionally conducted her claim in an abusive, vexatious, disruptive, and unreasonable manner by continuing with unmerited claims and in the way she pursued the claims as set out in the second application.

20. The Respondent spoke to the written submissions and submitted that the Claimant never believed that she was discriminated against and that all her claims were found to be unfounded, so the Respondent was asking for full payment of its costs from the outset relying on **McPherson v B&P Paribas (London Branch) [2004] EWCA Civ 569**.

21. The Respondent referred to the Claimant's application for reconsideration following the final judgment where the Claimant accused the Tribunal of preferential treatment to the Respondent, said the Tribunal was biased across the whole case, accuses Respondent witnesses of lying under oath and so on. It was submitted that this letter provides evidence of motivation of the Claimant's motivation when bringing her claims so is relevant in considering the totality.

The second application

22. This application related to additional costs the Respondent incurred due to the Claimant's legal representatives conduct. It was submitted that the correspondence relating to costs warnings showed the Claimant's representative consistently acted improperly, unreasonably, and negligently in the way it handled the Claimant's case. This included behaviour and conduct throughout the proceedings, conduct at the preliminary hearing on 12 May 2021 and in preparation for the final hearing.

23. In relation to the preliminary hearing listed for 12 May 2021 it was said that the conduct complained of was the Claimant requesting a postponement of the hearing on the basis that preferred Counsel was not available and the Claimant was not available. The application for a postponement said that the Claimant needed eight weeks notice of a hearing to arrange her surgical lists to be able to attend. There was no response to this application until the day before the hearing when it was refused. The hearing went ahead, and Mr Pieria attended on behalf of the Claimant without the Claimant being there. It was submitted that he had not prepared for the hearing and made another application to postpone at the start of the hearing notwithstanding his application had already been refused. The postponement request was refused, and the hearing went ahead.

24. It was submitted that this behaviour both before and during the preliminary hearing was completely disruptive and unreasonable and led the Respondent to incur further unnecessary costs in handling it. It was said to be unacceptable for a further application to postpone to be made once the first application was refused.

25. In relation to the preparation for the final hearing, it was submitted that the Claimant's conduct in relation to exchange of witness statements was unreasonable. The Respondent sent the Claimant its final index to the bundle to seek approval of the documents put into it. This was sent on 7 April 2022. The deadline for service of the bundle was 8 April 2022. The Claimant did not respond and therefore the Respondent served its bundle electronically on 8 April 2022.

26. The Respondent asked for a short extension of time to exchange witness statements as certain witnesses were away and there was a change in the lead solicitor handling the case. The Claimant rejected this. The Respondent, despite the difficulties that had led to this request, did get its witness statements ready to exchange. On 12 April 2022, which was the date of exchange, the Respondent contacted the Claimant to confirm a time for exchange of statements. They did not receive a reply so sent an email that evening (at 17.45) asking the Claimant to confirm that witness statements could be exchanged at 12 noon the following day.

27. The Claimant representative then sent at email at 20.01 saying he had not received the bundle and needed a further four days to complete the witness statements. He demanded the bundle by return. Rather than waiting until the next day when the Respondent solicitors would be in the office he sent an email to the Tribunal saying that the Respondent had failed to comply with the order to serve the final bundle. It was submitted this was unreasonable and put the Respondent to additional costs to defend this untrue allegation. When witness statements were exchanged only one was signed.

28. The Claimant's witness statement contained without prejudice matters and evidence in relation to claims that had not been allowed to be added and go forward. The Respondent made an application to the Tribunal that a different Employment Judge to the one hearing the case made a ruling about the offending parts of the statement. This was not possible, so it had to be dealt with at the start of the hearing when the Tribunal ordered the Claimant to produce a revised redacted statement removing the offending parts. After an adjournment, the Claimant had not done this and therefore the Tribunal had to proceed on the basis that it would ignore the offending parts and that no evidence should be given about them. Notwithstanding this direction the Claimant referred to this evidence in her cross examination.

29. The Respondent referred to telephone communication with the Respondent's representative which it described Mr Pieria as being vexatious, unreasonable, and

abusive. This was in relation to communications about the delivery of the bundle. The Respondent's position is that it sent the Claimant the bundle by different forms and for each got a read receipt showing it had been delivered. It said the Claimant's representative stance on the bundle was unreasonable.

30. The Respondent submitted that the Claimant's representative knew the Claimant's claim had no reasonable prospect of success and pointed out that the Claimant was unsuccessful in all her claims despite having been represented for most of the proceedings.

The third application

31. The Respondent repeated its submissions in relation to the second application and submitted that the Claimant's legal representative's conduct in the proceedings has been improper, unreasonable and/or negligent referring to paragraphs 20 to 34 of its submissions and submitted that a wasted costs order should be made against the Claimant's representative.

The fifth application

32. This application was to compensate for the additional costs the Respondent incurred due to the Claimant's representative's conduct in dealing with the Respondent's costs application. This relates to the Claimant's representative writing to the Tribunal on 7 September advising that they had just become aware of the application and requesting a copy of it together with a request to extend time for a response. They wrote again on 16 September 2022 saying they still did not have the application. The Respondent sent a further copy of the application on 23 September 2022 and received confirmation it was successfully delivered. The Claimant then wrote to the Tribunal again on 28 September saying they had not received a copy of the application asking for a further extension of time. The Respondent submitted it had sent the Claimant's representative a copy of its application at the time it was first sent to the Tribunal.

33. The Respondent wrote twice to the Tribunal on 30 September 2022 and on 3 October 2022 saying that the application had been properly served on 23 September 2022. On 4 October it wrote to the Tribunal saying no response had been received to the application and objected to any extension of time for one to be served pointing out that this behaviour was indicative of the conduct the Respondent had been subjected to throughout the proceedings which was one of the reasons for the cost's application being made.

34. The Claimant asked the Respondent on 4 October 2022 to send the application by One Drive. This was done on 11 October 2022. On 12 October 2022, the Claimant's representative wrote to the Tribunal again saying he did not have the application. The Tribunal gave an extension of time to 26 October 2022. On that date the Claimant's

representative asked for a further extension until 11 November 2022, on the basis that neither the Claimant or her representative had received the emails sent by both the Respondent and the Tribunal. The Claimant wrote to the Tribunal on 31 October 2022 saying she had been abroad and would respond to the application as soon as she could.

35. A further extension of time to 30 November 2022 was requested by the Claimant's representative on 17 November 2022 as Counsels opinion was wanted to be obtained. That request was refused by the Tribunal.

36. On 24 November 2022, the Respondent was contacted by the Claimant's representative who said that he had not received a copy of the bundle attached to the application. The Respondent resent it the same day. The Claimant's representative's response was provided on 28 November 2022.

37. The Respondent submitted that the behaviour set out in the other applications continued and was improper, unreasonable, and negligent.

The Claimant's former representatives' submissions

38. Mr Kohanzed made oral submissions on behalf of the Claimant's former representative in addition to written submissions. The first application was not directed to his client.

The second and third applications

39. It was submitted that this application relating to no reasonable prospect of success focussed on the use of Mr Farrugia as a comparator and refers to costs warnings which also suggest that the age discrimination claim was misconceived because it relied on Mr Farrugia as a comparator. There is also criticism for failure to particularise matters in relation to Mr Farrugia.

40. It was conceded that Mr Farrugia was not a statutory comparator, but he may well have been an evidential comparator (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285). It was submitted it was quite common for a Claimant to identify the wrong comparator and that appeal courts can and do identify different comparators as the litigation moves through the courts. Reference was made to paragraph 23 of the liability judgment and that it was easy to see that Mr Farrugia was not an appropriate comparator. It was submitted that this was not something that should have exercised the Respondent or increased costs as it was so clear that Mr Farrugia was not an appropriate comparator. In any event the Claimant relied on a hypothetical comparator as an alternative.

41. It was submitted in the written submissions that the Respondent's application does not identify why the remainder of the discrimination claims were misconceived. Mr Kohanzed submitted that even after hearing the Respondent's oral submissions (in which Ms Scriven was invited by Mr Kohanzed to expand on this aspect of the application) there was still no identification as to why the remainder of the discrimination claims were misconceived.

42. It was said that it was a mistake not to have withdrawn Mr Farrugia as a comparator but that did not mean the claim was misconceived in that a hypothetical comparator was also being used and the Respondent would always have to defend the claim whether Mr Farrugia remained as a comparator. This was one part of a larger claim. It was submitted that if the Tribunal were to consider it unreasonable for the Claimant not to have withdrawn Mr Farrugia as a comparator, then it should not exercise its discretion to award costs particularly not of the whole litigation.

43. It was submitted that the claims were properly particularised.

44. In relation to the preliminary hearing in May 2021, it was submitted that it was reasonable to apply for a postponement on the grounds of Counsel's unavailability even if a judge does not grant a postponement. The hearing was listed on 21 April 2021 with the hearing on 12 May 2021. This did not leave much time before the hearing, and it was reasonable for the Claimant wanting to have her preferred barrister at that hearing. The unavailability of Counsel is sometimes a good reason to postpone a hearing. It was not unreasonable to repeat that application at the hearing. The refusal of the postponement was not made until 11 May 2021 the day before the hearing despite the application being made within days of the notice of the hearing date being sent out no doubt due to lack of judicial resources.

45. The failure to provide a signed witness statement did not hinder the hearing in that it went ahead. It is recognised that it may not have gone as smoothly as it may have done but it was concluded on the day. There was therefore no additional costs associated with the application to amend.

46. Mr Pereira explained that he was not ready for the hearing because the Claimant was not present (part of the hearing was to consider whether the Claimant had presented her claims in time, so her evidence was necessary) because she was unable to take leave because of her surgical lists at short notice. She needed eight weeks notice. In the event Employment Judge Nash allowed the Claimant's claims of race, age, and religious discrimination claims to go ahead together with associated harassment claims.

47. In relation to the issues relating to bundles and exchange of witness statements it was submitted that the delay of six days to exchange witness statements was not a lot and a

costs application relating to this was absurd. The reason is the difficulty that the Claimant's representative had in receiving emails with attachments and he notified the Respondent of these problems. The Respondent did not challenge this at the time. The Claimant's representative, not having received the bundle assumed that the exchange of witness statements would therefore be delayed pending receipt of the bundle. Once the bundle was received the witness statements were dealt with promptly.

48. The Claimant's representative accepts that without prejudice matters and matters relating to claims that were not allowed to proceed should not have been put in the witness statement. However, it was submitted that there were no costs associated with this conduct, even if considered to be unreasonable.

49. In oral submissions Mr Kohanzed referred **to Attorney General v Barker**, [2000] F.L.R 795 in which Lord Bingham held that the notion of vexatiousness is specific to where a party uses legal proceedings to harass and inconvenience the other party and this is not the same as unreasonable conduct. It was submitted that what happened in this case came nowhere near this.

50. Mr Kohanzed said that he was at a loss to understand how the aspect of the claims being misconceived was being put by the Respondent. The Respondent did not expand on this during its submissions despite saying that it would. There is no analysis of the evidence other than the comparator point.

51. It was accepted that a costs warning does not have to be given for an award of costs to be made but it is useful if it was submitted early. The costs warnings were however poorly drafter and not fully articulated i.e., it is explained why the party would lose. This was a pre-requisite if relying on a costs warning letter. The costs warning letters gave no detail of why the claim was misconceived.

52. It was submitted that it was difficult on face of it to be awarded costs for the claim being misconceived, as turns on mindset of decision maker. The Respondent's submission about the Claimant's offer to withdraw proceedings if her practicing privileges were restored was rejected on the basis that she wanted to get back to work at the Respondent and there was no suggestion it was suggested out of spite or an intention to harass.

53. In relation to the Claimant's letter requesting a reconsideration of the judgment it was submitted that it was common for a dissatisfied Claimant to consider unfairness in the process. She was merely expressing dissatisfaction about the decision. This is not unreasonable.

54. It was submitted that the Respondent made unmeritorious applications for strike out against a party who was unrepresented at the time when it applied for the claim to be struck out on the basis that the Claimant had used the wrong name for the Respondent. This happens often.

55. Mr Kohanzed pointed out the difficulties the Tribunal had in accessing a bundle of documents sent by the Respondent at the start of this hearing. This reflects the difficulties the Claimant's representative was having in receiving documents. He suggested that the delivery receipts did not show that the documents could be accessed as they said that delivery was complete but that no delivery notification was sent by the recipient's server.

56. Finally, it was submitted that the Claimant's application to amend her claim was not unreasonable. It was submitted that when preparing further and better particular is it not uncommon for other heads of claim to come to light. What happened here is that some amendments were allowed, and some were not. This happens on a regular basis in the Employment Tribunals.

The Claimant's submissions

57. In addition to written submissions Mr Wareing on behalf of the Claimant made oral submissions which are summarised below:

58. Only the first application was relevant to the Claimant personally the others being directed to her former representative. It was submitted that costs awards in the Employment Tribunal are the exception rather than the rule.

59. Reference was made to **Wentworth-Wood v Maritime Transport Ltd UKEAT/0184/17** which emphasised the exceptional nature of an award of costs and the need to consider whether the specific conduct is improper, or unreasonable or, negligent.

60. It was submitted that the Claimant's witness statement explains that as a lay person she took advice regarding her case, its content, and the manner of its presentation from her solicitor and counsel as she was entitled to do. She maintained her claim was soundly based and had reasonable prospects of success having been guided by the advice given to her. It can not be unreasonable to bring a claim when the legal advice was that she had a good case.

61. Mr Wareing referred to there being two preliminary hearing and that in neither did the Tribunal strike out the claims of its own volition as it was entitled to do. Further the Respondent having made an application to strike out the claim then withdrew that application the inference being that the Respondent had accepted that the claims were not misconceived, and they had some substance that required challenge and that by extension they did not believe the Claimant to have acted or to be acting unreasonably.

62. Reference was made to **Ridehalgh v Horsfield (1994) Ch 205** which said: "Unreasonable*' also means what it has been understood to mean in this context for at least half a century. 'Unreasonable' 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."* Therefore, simply because the Claimant lost her case does not mean she acted unreasonably.

63. A competent employment lawyer would swiftly have realised that Mr Farrugia was not an appropriate comparator and in any event the Claimant was also relying on a hypothetical comparator.

64. It was submitted that the Respondent has failed to make a causal connection between assertions of unreasonable conduct and the costs they say were incurred because of that

conduct. Mr Wareing referred to the **Wentworth-Wood v Maritime Transport Ltd** case in which it was held that this "*particular conduct caused the opposing party unnecessary costs*." It was submitted that the Respondent has not shown this necessary causal link.

65. Further it was said that to suggest that ignoring costs warnings is evidence of unreasonableness or vexatious pursuit was incorrect. It was submitted that the costs warnings were an attempt to frighten and intimidate the Claimant. The Claimant said in her witness statement that she saw them as threats. The Respondent does not make out in its costs warnings that the Claimant's case was doomed to failure. The warning letters were incompetently drafted with no proper reasons and amount simply to threats rather than a proper costs warning. The Claimant was strong enough to resit such threats which made her a person of reasonable fortitude.

66. In relation to the suggestion that the Claimant's offer to withdraw her claim if the Respondent reinstated her practicing privileges was evidence of unreasonable conduct is misplaced. Mr Wareing agreed with Mr Kohanzed that such behaviour was usual if all she wanted was to go back to work at the Respondent. It was not unreasonable it was normal human behaviour. It is not a reason to award costs against her. He also agreed with Mr Kohanzed that the costs warning letters were not well drafted and should not be relied on to found a costs award.

The Tribunal's conclusions

67. As a starting point, the Tribunal accepts that costs do not follow the event in this jurisdiction and are still relatively unusual. Where they are awarded they are intended to be compensatory, not punitive.

68. The Tribunal has considered the parties' submissions both written and oral, together with the various documents and witness statements before it. It has also had regard to the relevant authorities and the general approach to be taken in costs cases. Finally, it has had regard to the overriding objective to deal with cases justly.

The first application

69. When considering whether the Claimant's claim was misconceived, the Tribunal considered the case of **Scott v Commissioners of Inland Revenue [2004] ICR 1401** in which Sedley LJ held that the relevant question in considering whether the pursuit, or defence, of a claim was misconceived was not whether the party in question thought they were right but whether they had reasonable grounds for so thinking.

70. The Claimant's practicing privileges were removed by the Respondent because of an incident during an operation when, in breach of national guidelines and normal practice, the Claimant did laparoscopic surgery without an assistant balancing the camera on her

shoulder. The assistant would have managed the camera whilst the surgeon used both hands to manipulate the surgical equipment. The full details of the incident are set out in the liability judgment. In essence the Tribunal asked itself why the Claimant's privileges had been revoked. The answer was not difficult to discern. It was because of the seriousness of the incident and patient safety.

71. The Claimant's claim is that the reason for the privileges being removed was discrimination on the grounds of race, religion or belief, age, and sex. The Claimant was unable to provide facts from which the Tribunal could conclude that discrimination was the reason the privileges were revoked. She cited an actual comparator, Mr Farrugia, however her own counsel in submissions conceded he was not an appropriate comparator. She did not address the characteristics of any hypothetical comparator.

72. This is not the reason that the Tribunal has decided that a costs award is appropriate. The Tribunal accepts the arguments put forward by both the Claimant and her former representative that this is not enough to say the claim was misconceived. It is something the Tribunal dealt with succinctly and quickly in the judgment. It should not have troubled the Respondent who immediately identified that Mr Farrugia was not an appropriate comparator.

73. The most telling document which explains the Claimant's thinking is her application for reconsideration of the judgment hearing. This was referred to by the Respondent as indicating her vexatiousness and unreasonableness. We do not agree with this interpretation instead preferring the interpretation given by the Claimant and her representative. The Claimant was entitled to apply for a reconsideration and express her views on the robustness of the decision made. That she is critical of the Tribunal is unimportant. What the Tribunal considered was the part where the Claimant (who put in the application personally) wrote:

"I think that the unfair dismissal point is to be reconsidered very carefully as if there is no specific reason to explain the unfair dismissal from my position then it should be assumed that I was treated unfairly due to the discrimination of protected characteristics".

74. The reference to unfair dismissal is a reference to the Claimant's practicing privileges being removed as there is no unfair dismissal claim before the Tribunal. This gives insight into the Claimant's thinking. She says here that there is *"no specific reason to explain the unfair dismissal from my position"* which ignores the specific reason given by the Respondent namely her actions during the operation coupled with her inability to recognise the seriousness of the incident or satisfy the Respondent that she would not do the same again. This was clearly set out as the reason for the removal of her privileges and the reason found by the Tribunal. As the Tribunal pointed out in its liability judgment, simply having a protected characteristic and there being what is perceived to be unfair

treatment is not sufficient for a claim of discrimination. There is not an automatic assumption that discrimination has occurred. A reasonable person would understand why the practicing privileges had been removed.

75. The judgment concluded that the Claimant did not establish a prima facie case in relation to any of her claims and her assertions were not supported by the evidence.

76. The Tribunal does not find it significant that the Respondent made an application to strike out the Claimant's claims on the basis that they had no reasonable prospect of success and later chose not to purse that application or to pursue a deposit order. This was a decision that the Respondent was entitled to make. It is rare that a discrimination case would be struck out at a preliminary hearing and the Respondent appears to have taken a pragmatic and commercial view about continuing with its application.

77. Similarly, the submission that the claim was not misconceived in that the Tribunal did not at two preliminary hearings strike out the claim of its own volition, is rejected. It is very unusual that a discrimination claim is struck out at a preliminary hearing, and something discouraged by the appellate courts.

78. Whilst costs warning letters are not a necessity in an application for costs, they are an important factor to consider. The Tribunal studied the correspondence relied on by the Respondent in its submissions. These start from an early stage in the proceedings, 20 December 2019. The Claimant presented her claim herself but at some point early on appears to have been represented by Dr Lord. Harding and Mitchell were instructed by the Claimant in June 2020 after the first preliminary hearing had taken place.

79. Mr Kohanzed for Harding and Mitchell and Mr Wareing for the Claimant discount these letters as being mere threats without the necessary detail to explain why it believes the Claimant's claims would fail. The Tribunal considered these letters carefully. The Respondent set out in its submissions the letters it relies on.

80. The Claimant presented her claim on 27 November 2018. On 20 December 2019 the Respondent wrote to the Claimant's then representative Dr Lord:

"It is clear from the documents that Miss Hamoud's claims lack any merit and that Miss Hamoud will not be successful in pursuing such claims through to a full hearing.

As you are aware, our client considered Miss Hamoud's appeals and all aspects of the case when determining the incident as serious and removing her practising privileges. Our client treats all of its employees equally and strongly denies that the Claimant has been subject to any form of discrimination. It is our view that Miss Hamoud's claims have no reasonable prospect of success and are misconceived.

Whilst we believe the Claimant's claim will fail our client is concerned that costs will have to be incurred to defend its position. Accordingly, we are instructed to request that Miss Hamoud

withdraws her claims by 31 December 2019, before our client proceeds to defend the claims at the Tribunal and incur costs.

If, however, Miss Hamoud does not withdraw her claims by this date, our client will instruct us to pursue Miss Hamoud for the recovery of our client's legal costs. We reserve the right to draw the Employment Judge's attention to this correspondence when seeking recovery of our client's legal costs from Miss Hamoud."

81. This letter is discounted by the Claimant and the Claimant's representative as being poorly drafted and lacking in detail. Whilst this letter is short, it sets out the essential elements as to why the Respondent believed the Claimant's claim was misconceived. It says that the Respondent considered the incident as serious. It is pointing to the reason for the revocation of the Claimant's practicing privileges. Whilst more detail could have been included, it sets out the salient element, namely the incident was serious.

82. The next letter is dated 24 July 2020. This is headed "*Without Prejudice and Save as to Costs*". It refers to open letters dated 8 and 24 July 2020. The Tribunal has therefore considered these three items of correspondence together. The main thrust of the without prejudice letter is in relation to an application the Claimant had made to amend her claims. This was described as "*misguided*" and it was pointed out that they were significantly out of time.

83. The application to amend the claim, followed a preliminary hearing on 1 April 2020, which was held by telephone because of the pandemic. The Claimant represented herself at this hearing. The Claimant was ordered to provide further and better particulars of her claim and was told that this was not an invitation to expand on the claims she had already brought but to better articulate the claims she had already brought. In her further and better particulars, she included matters not pleaded and the application to amend was made. The Respondent set out in detail why it considered the Claimant's application would not be successful. The letter said that if the Claimant continued with the applications the Respondent would be seeking costs against her.

84. Within this letter is a heading "*Cost Warning*" This also relates to the application to amend rather than the case more generally. In the event, what happened is that the hearing was eventually heard on 12 May 2021 (it was postponed in November 2020 due to lack of judicial resources) and the Claimant was permitted to add race discrimination to her claim. Other amendments applied for were dismissed. Further matters arising out of this hearing are dealt with elsewhere in this judgment.

85. The open letters dated 8 July 2020 and 24 July 2020 on the other hand, were written to the Employment Tribunal. The one dated 8 July 2020 referred to the application to amend and the Claimant's application for reconsideration of the case management orders made by Judge Harrington. The Respondent quite reasonably pointed out that the latter application was misconceived as there is no provision for reconsideration of orders. Other than this, it only deals with the merits or otherwise of her application to amend. The letter says:

"We contend Claimant's applications for the reasons outlined below. They are misconceived, not particularised at all, and insufficiently justified…..

Should the Claimant not withdraw this application, we anticipate a further Preliminary Hearing will be required. For the avoidance of doubt, we reserve the right to seek costs against the Claimant with regard to its application."

It is a long and detailed letter running to four pages.

86. The letter dated 24 July 2020 is also four pages long. This letter addresses the further and better particulars provided by the Claimant dated 11 July 2020 pointing out that they lacked particularity and included previously un-pleaded new allegations. The key discrepancies were set out in some detail. It was pointed out that whilst religion and belief was ticked on the ET1 the facts pleaded did not reference or allude to this. The letter criticises the comparators cited by the Claimant as the named comparators were mentioned but there was no detail of why they were appropriate comparators. It was pointed out that there was no detail as to the race or religion or age of the Claimant. These comments were in relation to the Claimant's proposed amendments only and not to her case more generally.

87. The letter concluded:

"The Claimant has produced acts which are lacking in substance, detail and clarity. The Respondent needs to understand the claims pleaded and what it is defending. Understanding the claim against it is a fundamental tenet of ensuring the Respondent is on an equal footing and avoiding prejudice to the Respondent, in addition to being able to manage the case and keep costs to a minimum. We anticipate the Judge will now require a further Preliminary Hearing to understand the Claimant's pleadings. For the avoidance of doubt, we reserve the right to seek costs against the Claimant."

This letter does not say that the claims were misconceived as such.

88. The next letter relied on is dated 2 September 2020 and is also an email to the Tribunal. This referred to the Claimant's representatives' letter to the Tribunal of 3 August 2020. The reason for the Respondent's email is that the letter sent by the Claimant's representative referred to without prejudice correspondence. It was said that "*Such correspondence is continuing to incur the Respondent unnecessary and additional costs. We reserve the right to seek costs against the Claimant and wasted costs against the Firm*."

89. The final document relied on is an email chain between the Respondent's solicitor and the Claimant's solicitor starting on 2 November 2020. This was in anticipation of the preliminary hearing which had originally been listed in November 2020. There was discussion about witness statements and what they needed to include given that by then, the Respondent had withdrawn its application to strike out the Claimant's claims. An

email sent to the Claimant stated: "*Please take note that we are taking instructions and intend to seek costs incurred as a result of your client's application for reconsideration of the Tribunal's Judgment dated 9 April 2020 (described by the Tribunal as "misconceived") and application and withdrawal of the holiday pay claim without explanation."*

90. The Tribunal assumes that all correspondence between the solicitors was copied to the Claimant so that she was appraised of what the Respondent were saying. There was nothing to suggest that she had not been provided with them.

91. The Tribunal accepts the submissions made by the Claimant and the Claimant's representative that the costs warning letters relate to specific applications, the comparator point and preparation for the preliminary hearing. What they do not say is set out that the claims were misconceived and precisely why the Respondent was of that view. However, the first letter addressed to Dr Lord did say that the Claimant's claims were misconceived. This is the only letter that says this. The other correspondence relates to various applications made by the Claimant.

92. As conceded by the Claimant and the Claimant's representative, there is no requirement that a costs warning letter is sent for a costs order to be made. In some circumstances it is obvious that the claim is misconceived, and this is, in the Tribunal's opinion one of those cases. The Tribunal is satisfied that the claim was misconceived and that the Claimant's decision to pursue it to the end amounted to unreasonable conduct. It was abundantly clear what the reason for the removal of practicing privileges was. It was clear it was to do with patient safety and breach of national guidelines about how to conduct this type of operation. We have taken account of the case of **Scott v Commissioners of Inland Revenue [2004]**. The Claimant is convinced that she did nothing wrong or what she did was a minor matter given that the patient was not harmed. That is not the test. The test is not whether the Claimant thought she was right, but whether she had reasonable grounds for so thinking. The Tribunal finds that she had no such reasonable grounds given the circumstances of the operation and the potential harm to patient safety.

93. We heard during the liability hearing about the national guidelines for laparoscopic surgery; we heard of the potential impact on patient safety if the guidelines were not observed. It was good that the patient was not harmed but that was not the point. It was clear that the investigation panel were shocked by what they heard. That panel comprised senior consultants in gynaecology with extensive experience of this type of surgery. The Tribunal is not medically trained; however, it was obvious to it that to hold a camera on a shoulder when doing the surgery rather than having an assistant present to operate the camera as the guidelines state is what should be done, would be unsafe or have the potential to be unsafe. There are reasons why guidelines of this type are issued.

94. It was also made clear that it was not only that the Claimant had done the operation as she had, but that she did not give them confidence that she would not do it again. That is

reinforced by her application for reconsideration referred to earlier, where she said that there was no substantive reason for removing her practicing privileges. This means she still did not consider what she did what wrong or potentially unsafe. This coupled with the Claimant's witness statement produced for this hearing further emphasises her view. She says:

> *"In comparison, they removed me from the practice because of a simple mistake in my not waiting for my planned assistant to arrive in theatre, before undertaking a fairly routine Laparoscopic procedure, which was ultimately successful and which caused no harm to the patient."*

95. The Tribunal is satisfied that a reasonable person would understand that the reason that the Claimant's practicing privileges were removed was because of her conduct during the laparoscopic operation and find that the threshold for a costs order against the Claimant has been met. As stated, the Tribunal has not taken the Claimant's means into account in assessing the threshold test as no evidence of her means was provided.

96. The Tribunal was referred to **Marler v Robertson** [1974] ICR 72, NIRC which said*:*

> *'Ordinary experience of life frequently teaches us that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms'.*

97. The Tribunal does not find this to be the case here. The reason for the removal of practicing privileges for the Claimant was clear from the outset. It was the way she conducted the operation in breach of national guidelines which had serious implications for patient safety coupled with her not recognising the seriousness of the situation or providing reassurance that such an event would not happen again.

98. The Tribunal finds that the threshold test for costs to be awarded against the Claimant has been met. The Claimant's claims had no reasonable prospect of success and were misconceived.

Applications against the Claimant's representative

99. The Claimant's representative came on record in June 2020. Therefore, any consideration of the merits of the Claimant's claims is from that date rather than their inception.

100. The applications against the Claimant's representative are two-fold. That the claims were misconceived and should not have been continued and the way the Claimant's representative conducted the case.

101. The Tribunal is mindful that when considering whether to make a wasted costs order, a three-stage test should be applied[1]:

(i) Has the legal representative of whom complaint was made acted improperly, unreasonably, or negligently?

(ii) If so, did such conduct cause the applicant to incur unnecessary costs?

(iii) If so, is it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

102. It was not suggested that the Claimant's representative acted improperly i.e., engaged in conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty.

103. *'Unreasonable'* in this context describes conduct, which is vexatious, designed to harass the other side rather than advance the resolution of the case. The Tribunal will look to the explanation given for the conduct complained about.

104. It has been held that the term *'negligent'* should be understood in an untechnical way to indicate failure to act with the competence reasonably to be expected of ordinary members of the profession using the same test as in a negligence case.

105. We have jurisdiction to make a wasted costs order only where the improper, unreasonable, or negligent conduct complained of has caused a waste of costs and only to the extent of such wasted costs. Demonstration of a causal link is essential. Given that legal professional privilege has not been waived we do not know what advice was given to the Claimant[2]. It may have been that advice was given about the strength of her case that she chose to ignore. The Tribunal considered what the Claimant may have done had her representative removed itself from the record as acting for her. Given the stance taken by the Claimant in the letter applying for reconsideration of the judgment, which is referred to earlier in this decision, the Tribunal takes the view that the Claimant would have continued with her claim in person or with other legal representation, if her representative had refused to act further. Therefore, the costs would have been incurred in any event.

[1] Ridehalgh v Horsefield [1994] Ch 205, [1994] 3 WLR 462

[2] Medcalf v Mardell [2002] UKHL 27, [2003] 1 AC 120

106. The Tribunal is also mindful that wasted costs must be approached with care and that from the point of view of the Claimant's representative in this case, the jurisdiction is penal and such an order should only be made as a last resort. [3]

107. Taking all this into account the Tribunal is not minded to make a wasted costs order or any other costs order against the Claimant's representative.

108. The Respondent has also complained that the way the Claimant's representative conducted the proceedings should give rise to wasted costs. The Tribunal accepts that there were some issues with the exchange of witness statements and preparation for the preliminary hearing in May 2021. However, the Tribunal takes note of the difficulties it had in accessing documents sent by the Respondent and therefore this lends some credence to what the Claimant's representative submitted about the difficulties he had accessing documents and emails. It is commonplace that there is some slippage in the execution of Tribunal orders. The Tribunal notes that the delay in exchanging witness statements was only some six days. Whilst it would have caused inconvenience to the Respondent it is not something that would attract an order of costs of any kind.

109. Similarly, the issues surrounding the preliminary hearing heard in May 2021 do not attract costs. The application for a postponement was made promptly when the notice of hearing was sent to the parties. It was not dealt with until the day before the hearing due no doubt to lack of judicial resource. The time between the notice of hearing and the hearing date was only about three weeks which is unusual. The Tribunal accepts that until a request for a postponement is granted the parties should assume that the hearing is going ahead. The hearing did go ahead even if it did not go as smoothly as it would have if the Claimant's representative had been fully prepared. There was no increase in costs for the Respondent save for a letter objecting to the postponement request.

110. The Tribunal rejects the application for wasted costs in relation to the main hearing. For the same reasons it rejects the application for ordinary costs in relation to the main hearing.

111. The Tribunal also dismisses the application for costs in relation to this costs hearing against the Claimant's former representative.

Detailed assessment of costs

[3] Ridehalgh v Horsefield [1994] Ch 205, [1994] 3 WLR 462

112. The Tribunal notes that the schedule prepared by the Respondent amounts to £99,482.82. The Employment Tribunal will do a detailed assessment of the Respondent's costs on a standard basis. Separate orders are made in relation to the preparation for this. Given the costs warning sent at a very early stage in the proceedings, costs shall be awarded for the whole of the case.

Employment Judge Martin
Date: 8 March 2023