EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Dr Theodore Piepenbrock v **The London School of Economics and political Science**

Heard at: London Central
On: 17 – 29 July 2023

Before: Employment Judge G Hodgson
Mr D Kendall
Mr D Clay

Representation

For the claimant: Did not attend
For the respondent: Mr P Michell, counsel

JUDGMENT

1. **The claimant shall pay the whole of the respondent's costs of defending the claim.**
2. **The costs shall be assessed on an indemnity basis.**
3. **There shall be a detailed assessment.**
4. **The detailed assessment will take place in the County Court.**
5. **The respondent's application for an interim payment on account of costs is refused.**

REASONS

1. Following a judgment with reasons sent to the parties on 8 June 2022 The respondent applied for costs on 5 July 2022. That costs application was listed to be heard by the original tribunal on 17 July 2023.

<u>Procedural history</u>

2. The costs application was made on 5 July 2022. The claimant responded on 5 August 2022. On 22 December 2022, EJ Hodgson gave directions for the management of the costs application and the hearing was set to start on 17 July 2023. The timetable was varied by an order of 9 January 2023. In compliance with those orders, the respondent filed a further detailed costs application, sent on 20 January 2023 and the claimant filed a response on 17 February 2023. It appears all orders were complied with, at least in part, save the claimant did not serve a response to form N260 or state the level of costs he conceded had been reasonably incurred.

<u>Applications to adjourn</u>

3. The hearing was listed on 22 December 2022. On 10 July 2023, the claimant applied to adjourn the hearing. The respondent objected. The application to postpone was refused on 13 July 2023. Full written reasons were given.

4. At 09:41, 17 July 2023, Mr Garry Piepenbrock sent the following email:

> **To Whom It May Concern,**
>
> **I continue to write on behalf of my disabled autistic father, Dr Theodore Piepenbrock.**
>
> **As Judge Hodgson has refused to accept Dr Piepenbrock's well-documented and undisputed autism diagnosis and has not made sufficient reasonable adjustments, including for Dr Piepenbrock's well-documented long-term disability, Dr Piepenbrock has suffered another highly-foreseeable and easily-preventable autistic meltdown/shutdown, and he will therefore not be able to attend the hearing. As Dr Piepenbrock is unable to attend the hearing due to medical reasons, I will not be able to act as his legal representative as I will not be able to receive adequate instruction from the absent, disabled Dr Piepenbrock, just as I was unable to receive adequate instruction from the absent, disabled Dr Piepenbrock during his landmark five-week trial in 2022, causing an unfair trial, which is the subject of an ongoing appeal.**
>
> **After Dr Piepenbrock's ET trial in 2022 in which he was discriminated against and harassed into a series of debilitating autistic meltdowns/shutdowns, causing him to miss approximately half of his five week hearing and causing him to be unable to therefore give sufficient instruction to his teenage son who is untrained in the law, we have subsequently been informed by multiple shocked legal observers that Judge Hodgson should have immediately declared an adjournment until Dr Piepenbrock could return to participate in his landmark trial as a Litigant in Person, as High Court Judge Williams and EAT Judge Shanks both**

ethically and professionally did each and every time that Dr Piepenbrock suffered a debilitating autistic meltdown/shutdown.

My priority remains my father's health as I am his primary caregiver.

5. That email was considered at the hearing. The following response was sent as instructed by the tribunal:

> **At 09:41, (BST) 17 July 2023, Mr Garry Piepenbrock sent an email stating that Dr Piepenbrock was unable to attend the hearing due to medical reasons, Mr Garry Piepenbrock would not attend the hearing as he would not be "able to receive adequate instruction." The email referred to a failure to make "sufficient reasonable adjustments."**
>
> **It was unclear if the email was a request for an adjournment. The email has been treated as a potential request for an adjournment. The costs hearing stands adjourned and will resume at 10:00 (BST) on 18 July 2023.**
>
> **The claimant is invited to confirm if an adjournment of the hearing is sought. If so, any grounds on which the claimant relies should be set out. The claimant's attention is drawn to the presidential guidance – The Employment Tribunal's (England and Wales) Presidential Guidance – Seeking a Postponement of the Hearing (2013). https://www.judiciary.uk/wp-content/uploads/2014/08/Presidential-guidance-postponement.pdf**
>
> **If the claimant wishes to rely on medical evidence, that medical evidence should be provided by 02:00 (BST) 18 July 2023. The tribunal notes that it appears Dr Piepenbrock is resident on the West Coast of America and the time has been adjusted to facilitate his obtaining medical evidence.**
>
> **If the claimant wishes to seek further adjustments, those adjustments should be set out."**

6. The hearing resumed at 10:00, 18 July 2023

7. We received the following response at 09:40, 18 July 2023:

> **To Whom It May Concern,**
>
> **I continue to write on behalf of my disabled autistic father, Dr Theodore Piepenbrock, the Litigant in Person Claimant whom I continue to endeavour to assist.**
>
> **I am writing in response to Judge Hodgson's letter dated 17 July 2023. First, I note that Judge Hodgson stated: "The email referred to a failure to make 'sufficient reasonable adjustments.'" Judge Hodgson seems to have failed to acknowledge the full explanation of the cause of Dr Piepenbrock's autistic meltdown/shutdown, which I made clear when I stated: "As Judge Hodgson has refused to accept Dr Piepenbrock's well-documented and undisputed autism diagnosis…". I therefore note that there does not appear to be any change in this cause of Dr Piepenbrock's recent debilitating autistic meltdown/shutdown.**
>
> **Second, although Judge Hodgson did not previously request in writing evidence from Dr Piepenbrock's doctors when he suffered debilitating autistic meltdowns/shutdowns on Monday 14 March 2022 and again on Thursday 17 March 2022, as a result of Judge Hodgson's written request for medical information today, we have made the earliest appointment**

possible with Dr Piepenbrock's Primary Care Provider (or GP), which will be on Wednesday 26 July 2023. We also attempted to make an appointment with the County Medical Health Services and they informed us if they do not get back to us by the end of the day on 18 July 2023, that we should contact them again. In spite of our best efforts, we are therefore unable to provide relevant medical information within the time frame set out.

Third, it is noted that Dr Piepenbrock has informed judges on five separate occasions since 2021 during hearings in the High Court, EAT and ET that he had suffered a debilitating autistic meltdown/shutdown which prevented him from continuing to participate in the respective hearings in which he was the Litigant in Person Claimant, supported only by his young son. In four out of these five situations the judges immediately, without any formal applications for adjournment and without new medical evidence, granted an adjournment. The first time was on 30 November 2021 in the EAT, when Judge Shanks immediately terminated the hearing upon learning about Dr Piepenbrock's debilitating autistic meltdown/shutdown and without any formal application for adjournment/postponement and without any new medical evidence, he rescheduled the hearing for when Dr Piepenbrock was well and could be present. The second time was on 24 June 2022 in the High Court, when Mrs Justice Williams immediately terminated the hearing upon learning about Dr Piepenbrock's debilitating autistic meltdown/shutdown and without any formal application for adjournment/postponement and without any new medical evidence, she rescheduled the hearing for when Dr Piepenbrock was well and could be present. In fact the LSE explicitly made an application to Mrs Justice Williams before the hearing that Dr Piepenbrock must be present at all times during the hearing in order to avoid the scenario where his young son, Garry might misrepresent his father's case, undermining a fair hearing. The third time was on 14 March 2022 in the ET, when Judge Hodgson granted a postponement without any formal application for adjournment/postponement, without any new medical evidence and against the unreasonable protestations of the Respondents. (Garry Piepenbrock's email to Judge Hodgson informing him of Dr Piepenbrock's debilitating autistic meltdown/shutdown was deemed to be an informal application). The fourth time was on 17 July 2023 in the ET, when Judge Hodgson granted a postponement without any formal application for adjournment/postponement, without any new medical evidence and without any protestations from the Respondents. (Garry Piepenbrock's email to Judge Hodgson informing him of Dr Piepenbrock's debilitating autistic meltdown/shutdown was deemed to be an informal application). On each occasion, whenever Dr Piepenbrock was asked by a Judge to provide medical evidence, he did so (and will do so) as soon as he was (is) able. The only time that Dr Piepenbrock informed a judge that he had suffered a debilitating autistic meltdown/shutdown which prevented him from continuing to participate in the hearing in which he was the Litigant in Person Claimant, supported only by his young son, and the Judge refused to act on this application and even refused to acknowledge Dr Piepenbrock's debilitating autistic meltdown/shutdown in the judgement, was on 18 March 2022 in the ET, which is the subject of an ongoing appeal in the EAT, Court of Appeal and Supreme Court, if necessary. As a mentally-disabled Litigant in Person, Dr Piepenbrock is therefore unaware of whether a formal application for adjournment is required, as it has been his legal experience that the act of informing judges of his debilitating autistic meltdown/shutdown which prevented him from continuing to participate in his hearings in which he was the Litigant in Person Claimant, supported only by his young son was enough for Judges in the High Court, the EAT and the ET to immediately adjourn/postpone hearings without a formal application, without new medical evidence and in spite of the

> **unreasonable protestations from the Respondents. If Judge Hodgson wishes to interpret Garry Piepenbrock's alerting him of the fact that Dr Piepenbrock had suffered a debilitating autistic meltdown/shutdown which prevented him from continuing to participate in his hearings in which he was the Litigant in Person Claimant, supported only by his young son, as an informal application to postpone/adjourn a hearing (as Judge Hodgson had previously done on 14 March 2022), then Dr Piepenbrock will not challenge this wisdom.**
>
> **Finally, while I am grateful to Judge Hodgson for finally providing me in writing the reference to the ET's 2013 Presidential Guidance on Postponements, I would have appreciated receiving the same information in writing from Judge Hodgson after I believe he informally mentioned it on the morning of 14 March 2022 and that he could send it to me. Unfortunately, I never received this important document from Judge Hodgson, nor from the Defendant, and as my requests for assistance in taking notes due to my disabled father's absence from his autistic meltdown/shutdown were rejected by Judge Hodgson, I was unable to write it down and remember it during the extremely challenging five-week hearing in 2022, when as a teenager, I was caring for my incapacitated disabled autistic father, while simultaneously endeavouring to assist him in his landmark lawsuit (in spite of my lack of legal training), and having had my multiple applications for reasonable adjustments rejected in spite of the fact that I provided all of the medical information that I possess and I could afford which indicated that I am autistic like my father, and in spite of the fact that I have suffered from learning disabilities which has been well-documented since I was 15, which when reasonable adjustments were granted by ethical organizations, did not limit my achievements, nor should they limit anyone's achievements in a fair and just society.**
>
> **As Dr Piepenbrock has recently suffered a highly-foreseeable and easily-preventable autistic meltdown/shutdown, he will therefore not be able to attend the hearing. As Dr Piepenbrock is unable to attend the hearing due to medical reasons, I will not be able to act as his legal representative as I will not be able to receive adequate instruction from the absent, disabled Dr Piepenbrock, just as I was unable to receive adequate instruction from the absent, disabled Dr Piepenbrock during his landmark five-week trial in 2022, causing an unfair trial, which is the subject of an ongoing appeal. I will provide any and all doctors notes if/when they become available. My priority remains my father's health as I am his primary caregiver.**

8. The tribunal notes that throughout all hearings, reasonable adjustments were considered and implemented. Significant reasonable adjustments were made at the full merits hearing, as detailed in the reasons for that hearing. The claimant sought no specific adjustments to this hearing.

9. Adjustments had been considered previously, and provided for, in the directions of 22 December 2023.

10. Mr Piepenbrock's email of 17 July 2023 referred to a failure to make reasonable adjustments, but failed to identify what those adjustments were. The claimant was invited to clarify. The email of 18 July 2023 failed to identify any adjustments. Instead, it appears to assert the statement "As Judge Hodgson has refused to accept Dr Piepenbrock's well-documented and undisputed autism diagnosis" was the request for reasonable adjustments. It appears the claimant is taking issues with the findings made in the liability hearing. The tribunal does not accept this is a

request for an adjustment, nor that it is a fair summary of the liability findings. It remains the position that the tribunal accepts the claimant is disabled and that adjustments should and have been made.[1]

11. Applications for costs can be complicated and we were concerned to ensure the claimant should have an opportunity to consider the application in detail so he could respond. For that reason, reasonable adjustments were actively considered when making the order on 22 December 2022. Having noted the claimant's difficulty in attending, and participating in, oral hearings, specific adjustments were made. First, the majority of the representations would be on paper. The respondent was ordered to set out full details of the particulars cited in support of the application, and to provide a full skeleton argument. Second, an extended timetable was put in place to allow the claimant to consider the application, and to facilitate Mr Piepenbrock and Dr Piepenbrock liaising. Third, oral submissions were limited to a maximum of two hours each. It was envisaged that this would provide the maximum opportunity to identify and respond to the respondent's allegations whilst minimising the need to make oral representations, and in turn reduce the stress of the hearing. EJ Hodgson was conscious that stress may lead to the claimant having an "autistic meltdown" as he terms his difficulties.

12. Mr Piepenbrock's email of 17 July 2023 states that he will not attend because he is not able to receive adequate instructions. It follows that Mr Piepenbrock, who has been representing his father, was not constrained himself by any medical issue. His concern was whether he could receive adequate instructions. However, since the directions were given in December 2022, Dr Piepenbrock has had many months to give instructions and it is unclear why Mr Piepenbrock could not proceed, particularly given it was always envisaged that oral submissions, if needed at all, would be limited. Moreover, the parties have previously been given the opportunity to file supplemental submissions after a hearing and Dr Piepenbrock had no reason to believe that provision would not apply again. This would have mitigated any difficulty faced by Mr Piepenbrock.

13. It remained unclear if the claimant was seeking an adjournment. The emails are equivocal and at their height refer to not objecting to it being considered as an "informal application to postpone/adjourn." Mr Piepenbrock's further email filed no medical evidence. It did not explain adequately why Dr Piepenbrock could not attend on the second day of the hearing. It gave no prognosis. It did not confirm if Dr Piepenbrock would attend or when. It identified no further adjustments that could be made that would assist Dr Piepenbrock to attend.

14. The email confirmed that the claimant was aware of the 2013 presidential guidance on seeking adjournment. We do not accept the claimant was unaware of this. It was referred to in the liability hearing, but no

[1] We consider disability in the FMH. See in particular paragraphs 7.1 – 7.20. We did not decide if the claimant was autistic see 7.11.

clarification was sought from the tribunal. The respondent submitted that it would have been supplied to the claimant had the claimant requested the respondent to assist. The guidance was referred to at 4.102 of the liability reasons.

15. It is wrong to say we did not adjourn the hearing when we were informed the claimant could not attend on 17 July 2023. We did adjourn for a day to enable Dr Piepenbrock to attend or to make a proper application and to allow him to obtain medical evidence. We concluded that Mr Piepenbrock could attend. There was insufficient evidence as to why Dr Piepenbrock could not attend at all, or when he would attend in the future. There were no further identified adjustments that could be made. Simply adjourning indefinity would frustrate the process and potentially deny the respondent a fair hearing. We proceeded.

<u>The costs application</u>

16. In reaching our decision, we have had regard to all the documents filed. It is sufficient to summarise the applications. To the extent we need to deal with detail, we will do so in our discussion below.

17. The application for costs was made pursuant to rule 76(1) (a) and (b) Employment Tribunals Rules of Procedure 2013 on three grounds:

    a. The claim (or significant parts of it) had no reasonable prospect of success;
    b. The claimant acted unreasonably and/or vexatiously in bringing, or continuing to prosecute, the claim; and/or

    c. the claimant conducted the proceedings in an unreasonable and/or vexatious manner.

18. The allegations made by the respondent fall broadly under the following headings:

    a. First, the claimant pursued "misconceived" claims. This is brought pursuant to section 76(1)(b) we take this to mean that he pursued claims that had no reasonable prospect of success.

    b. Second, it is alleged the claimant conducted the proceedings in a vexatious, and unreasonable manner. It is alleged that the claimant's behaviour was dishonest, vexatious, and destructive over a long span of time. This is brought pursuant to rule 76 (1 (a).

19. Whilst the respondent's allegations are set out under the two main headings, the conduct relied on may be relevant to each basis on which the claim for costs is pursued.

20. The respondent specifically relies on the claimant being put on notice of potential cost applications under the cover of ‘without prejudice save as to

costs' letters dated 20 April 2018 and 12 July 2021. In addition, it is said that the claimant's approach to settlement was unreasonable, and the value of the claim inflated. It is said he refused to engage in settlement discussions. The respondent relies specifically on an offer to settle both the High Court and ET proceedings in the sum of £100,000 of 20 April 2018 and on the subsequent offer on 12 July 2021 to settle the ET proceedings in the sum of £50,000.

21. The initial application sought an order for costs to be subject to detailed assessment; the original application did not seek costs on an indemnity basis.

22. The claimant's initial response alleged the costs application was out of time because it had not been sent directly to EJ Hodgson. That contention has been rejected.

23. From a consideration of all the documents filed by the claimant, it is possible to identify the main points of defence as follows:

    a. First, it is said the "overarching reason" that the application has "no merit" is because the respondent's applications to strike out, prior to the hearing, were rightfully rejected. It is said the tribunal confirmed "unequivocally" the claim had merits. It is the claimant's case that this demonstrates the claims had a reasonable prospect of success.

    b. Second, it is said the claimant is a "man of straw" and is unable to meet any costs order that is made. As he is "a man of straw" it is said the pursuit of costs is "yet another act of unreasonable, if not scandalous and/or vexatious harassment…" It is said there is little prospect of any costs being secured against Dr Piepenbrock.

    c. Third, the claimant rejects all allegations that he has conducted the proceedings unreasonably.

    d. Fourth, the claimant points to alleged unreasonable conduct of the proceedings by the respondent, including the LSE's own failed strike out attempt which is said to be the "most significant and costly preliminary hearing."

    e. Fifth, the claimant points to a number of allegations which he says are of relevance. He alleges LSE chairman, Professor Alan Elias had "made self admissions of guilt" and had "apologised to Dr Piepenbrock for the negligence." He continues to rely on the report of Lord Chief Justice Woolf 2011.

    f. Sixth, the claimant rejects the respondent's criticism of the claimant's interaction with the media.

g. Seventh, the claimant rejects any assertion then his evidence was false or dishonest.

h. Eighth, the claimant points to the alleged inappropriate conduct by the respondent's legal team, and in particular states Mr Michell wrongly claimed that Dr Piepenbrock had arrived valued as claimant more than £10 million.

i. Ninth, the claimant points to a number of matters he said were false allegations, in particular, he states "Dr Piepenbrock never agreed with the LSE's false allegations that the website of the IISL was his personal website."

j. Tenth, the claimant rejects any assertion that he failed to engage with settlement offers. He alleges the respondent did not put him on notice that he may pay costs.

The law

24. Rule 76, insofar as it is applicable, states:

> **76 (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—**
>
> > **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
> > **(b) any claim or response had no reasonable prospect of success.**
> > **…**

25. Rule 84 expressly provides that the tribunal may have regard to a paying party's ability to pay.

> **84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.**

26. The tribunal is not obliged to restrict the order to one the paying party could pay in **Arrowsmith v Nottingham Trent University 2012 ICR 159** at **paragraph 37 Lord Justice Reimer said the following.**

> 37. …The fact that her ability to pay was so limited did not, however, require the ET to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.

27. In **Vaughan v London Borough of Lewisham UKEAT 0533/12** the EAT also reiterated the tribunal was not obliged to have regard to the ability to pay at all.

> **26. We come finally to the question of the Appellant's means. The Tribunal was not in fact obliged as a matter of law to have regard to her ability to pay at all: rule 41 (2) gave it a discretion.**

28. It may be desirable to consider means, and the tribunal should give reasons for why it has, or has not, taken means into account. The tribunal should set out its findings about ability to pay.[2]

29. The amount of a cost order is addressed by rule 78:

> **78. The amount of a costs order**
>
> **(1) A costs order may—**
>
> **(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;**
>
> **(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; …**
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> **(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.**

30. The word "may" confirms that making the order is discretionary. However, the tribunal shall consider exercising that discretion in certain circumstances. The circumstances are often referred to as the threshold test or the gateway.

31. The threshold test is met in a number of circumstances which include the following: if either a party, or a party's representative, acts unreasonably in bringing or conducting proceedings (rule 76(1)(a)); and if the claim had no reasonable prospect of success (rule 76(1)(b).

32. There are three broad stages to a tribunal's consideration of a costs application: first, whether the threshold for making a costs order has been established; second, whether it is appropriate, in all the circumstances, to make a costs order (i.e. the exercise of its discretion); and third, what amount of costs should be payable.[3]

33. Once the threshold test has been met, the tribunal must consider the exercise of its discretion. Discretion will result in a tribunal making a number of decisions which can include the following: should costs be awarded at all; if the answer is yes; should the costs be awarded for a period; should the costs be limited to a percentage; and should the costs

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[2] See Jilley v Birmingham and Solihull Mental Health NHS Trust UKEAT/0155/07.

[3] (see *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 at [25] and *Vaughan v LB Lewisham (No.2)* [2013] IRLR 713 at [25])

be capped. The order can be tailored to suit the circumstances. It will be necessary to consider if the cost are to be awarded on an indemnity basis, if it is contended indemnity costs are appropriate.

34. In exercising its discretion, the tribunal should have regard to all of the relevant circumstances. It is not possible to produce a definitive list of the matters the tribunal should take into account.

35. We should be cautious about the citation of authorities on costs, albeit broad principles can be distilled from the relevant authorities.

36. We should not adopt an over analytical approach to the exercise of a broad discretion. The vital point is to look at the whole picture and ask whether there has been unreasonable conduct in the bringing and conducting of the case. In so doing, we should consider what was unreasonable about the conduct and what effect it had. See **Yerrakalva v Barnsley MBC [2012]** ICR 420 Mummery, LJ said:

> **39. I begin with some words of caution, first about the citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion.**
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> **40. The actual words of Rule 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. Unfortunately, the leading judgment in *McPherson* delivered by me has created some confusion in the ET, EAT and in this court. I say "unfortunately" because it was never my intention to re-write the rule, or to add a gloss to it, either by disregarding questions of causation or by requiring the ET to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect." Perhaps I should have said less and simply kept to the actual words of the rule.**
>
> **41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in *Mc Pherson* was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.**

37. Costs are compensatory; they are never punitive.[4]

38. We must recognise the difficulties faced by litigants in person. The threshold test is the same whether parties are represented or not, but the tribunal should not judge a litigant in person by the same standards as it

[4] See, for example, Lodwick v Southwark London Borough Council 2004 ICR 884, CA.

would a professional representative.[5] Lay people may lack the objectivity assumed in a professional adviser, and that is a relevant consideration when exercising discretion.

39. The case law does identify specific matters which may be relevant to the exercise of discretion, and we should consider some of the matters previous tribunals have found relevant to the exercise of discretion.

40. As it may affect the ability to analyse appropriately and reach objective decisions, ill-health may be a factor.

41. When considering what a party should have reasonably known at a particular time, we should exercise caution. We have regard to the comments of Sir Hugh Griffiths in **ET Marler v Robertson 1974 ICR 72**.

> **Ordinary experience of life frequently teaches us that 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.**

42. We can consider how a party has pursued a matter. We can have regard to **Beynon v Scadden [1999] IRLR 700, EAT**. We would note the following from Justice Lindsay.

> **A party who, despite having had an apparently conclusive opposition to his case made plain to him, persists with the case down to the hearing in the "Micawberish" hope that something might turn up and yet who does not even take such steps open to him to see whether anything is likely to turn up, runs a risk, when nothing does turn up, that he will be regarded as having been at least unreasonable in the conduct of his litigation.**

43. In relation to rule 76(1)(b), a tribunal should look at what a party knew, or ought to have known, had it gone about the matter sensibly: **Cartiers Superfoods Ltd v Laws** [1978] IRLR 315, per Phillips J.

44. When considering whether a party should reasonably have realised there was conclusive opposition to that party's case, we should consider if there were clear statements setting out that opposition. Those statements may appear in the response or claim form, correspondence, and cost warning letters. Difficulty may be obvious on a simple reading of the documents reasonably available.

45. Where evidence turns out to be false, it may be appropriate to consider whether the evidence was advanced dishonestly, particularly if it concerns a central allegation.[6] However, a lie, even about an essential allegation, will not necessarily lead to an award of costs.[7]

46. It is necessary to consider the context and it may be necessary to consider the nature gravity and effect of dishonesty.[8] A deliberate lie is not

[5] See AQ Ltd V Holden 2012 IRLR 648.
[6] See for example Daleside Nursing Home Ltd v Matthew (UK EAT/0 519/08).
[7] See for example Arrowsmith v Nottingham Trent University 2011 EWCA Civ 797.
[8] See for example Arrowsmith v Nottingham Trent University 2011 EWCA Civ 797.

necessary for there to be a costs order. Proceedings may have had no reasonable prospect of success, even if a party has little insight.[9] A genuine lack of understanding of the strength of a case or a lack of insight into the reasonableness of any conduct of a case may be a relevant consideration when exercising discretion, even if the threshold is met.

47. It may be appropriate to consider a party's motive in bringing a claim. This is particularly relevant where there are allegations of vexatious behaviour.

48. The manner of proceedings should not be limited to questions of vexation. Cconduct that causes disruption or prolongs the claim may be relevant. This is part of the general consideration identified in **Yerrakalva**.

49. The hallmark of a vexatious proceeding is "that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process" . Per Lord Bingham in **AG v. Barker** [2000] 2 FCR 1, para 19.

50. The essential difference between vexatious and merely unreasonable conduct is that the party concerned need not be aware that his claim has no reasonable prospect of success in order for it to be misconceived. But if a party pursues a claim knowing it has no reasonable prospect of success, or depends on false evidence, or pursues the claim out of malice towards the other party, or for some other ulterior reason, his conduct may be found to be vexatious. **ET Marler Ltd v. Robertson** [1974] ICR 72. An example is **Keskar v Governors of All Saints Church of England School** [1991] ICR 493, EAT. Costs were awarded against a claimant in a discrimination case on the basis that he was "motivated by resentment and spite in bringing the proceedings" and that there was "virtually nothing to support his allegations of race discrimination." The ground on which the award was made was unreasonable conduct but it could equally be relevant to vexatious conduct. We observe not all unreasonable conduct will be vexatious, but it is likely that vexatious conduct will be unreasonable.

51. Rule 84 expressly provides that the tribunal may have regard to a paying party's ability to pay (see above).

52. It may be desirable to consider means, and the tribunal should give reasons for why it has, or has not, taken means into account. The tribunal should set out its findings about ability to pay.[10] We also note that future

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[9] See for example, Topic v Hollyland Pitta Bakery Ltd UKEAT/0523/11
[10] See *Jilley v Birmingham and Solihull Mental Health NHS Trust* UKEAT/0155/07.

prospects may be considered.[11] We can consider if the evidence on means is unreliable.[12] We do not read any authority as requiring the tribunal to find any or any real prospect of improved means, or as requiring a finding the evidence on means is unreliable, before a cost order can made. A cost order can be made even if the paying party may never be able to pay it.

53. If an offer to settle is made, the fact that such an offer has been made and refused may be a relevant factor, provided that the tribunal finds that the refusal was unreasonable (see **Kopel v Safeway Stores plc** [2003] IRLR 753, EAT).

54. If the claimant fails to heed a costs warning and to engage with it, a costs order (on the basis of unreasonable conduct) may be more likely: **Peat v Birmingham City Council** UKEAT/0503/11 (10 April 2012, unreported); a warning is not a prerequisite to an award of costs.

55. Costs may be awarded on an indemnity basis. **Three Rivers v Bank of England** [2006] EWHC 816 gives guidance as to when indemnity cost may be awarded. Tomlinson J said that the following circumstances took the case "*out of the norm*" and justified an order for indemnity costs:

> **a. The claimant advanced and aggressively pursued serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time, despite the lack of any foundation in the documentary evidence for the allegations, maintaining the allegations, without apology, to the end.**
> **b. The claimant actively sought publicity for its serious allegations both before and during the trial.**
> **c. The claimant, by its conduct, turned the case into an unprecedented factual enquiry by the pursuit of an unjustified case.**
> **d. The claimant pursued a claim which was, to put it charitably, thin, and in some respects, far-fetched.**
> **e. The claimant pursued a claim which was irreconcilable with the contemporaneous documents.**
> **f. The claimant commenced and pursued large-scale and expensive litigation in circumstances calculated to exert commercial pressure on the defendant, and during the course of the trial resorted to advancing a constantly hanging case in order to justify the allegations made, only then to suffer a resounding defeat.**

<u>The claimant's means</u>

56. We have received limited information about the claimant's means.

57. Paragraph 4 of the order 22 December 2022 stated -

> **4.On or before 16:00, 24 March 2023, the claimant must confirm whether he wishes the tribunal to take into account, when considering any costs application, his means to meet any order. If he wishes his means to be taken into account, he must file and serve a statement of means detailing any employment, any prospect of employment, any capital asset, any**

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[11] See for example *Chadburn v Doncaster and Bassetlaw Hospital NHS Foundation Trust* [2015] UKEAT /0295/14

[12] See for example *Shields v Automative Ltd v Greig* UKEAT/024/10.

income, and any other relevant matter to include any potential change to his economic circumstances including any potential inheritance. He should exhibit relevant documents.

58. The claimant has not filed a formal statement of means. He has not exhibited any relevant documents. The claimant did include reference to his means in a skeleton argument. At paragraph 23 he stated "Dr Piepenbrock has no employment, no prospect of employment (as acknowledged by the medical experts in the High Court), no capital asset, no income, no potential inheritance. There are therefore no further documents to provide." He relied in particular on the fact that he secured full fee remission from the High Court and Court of Appeal on fourteen separate occasions.

59. The respondent does not accept that the claimant has given full or frank disclosure. The respondent suggests that there are matters which should be explained. It points to a failure to fully explain the funding of Mr Piepenbrock's schooling at Eton, albeit the respondent acknowledges the claimant has referred to bursary scholarships and the kindness of strangers. The respondent states the claimant's funding of a flat in Hammersmith is unexplained. The respondent states there is no explanation as to how the claimant has moved to America, or how he currently maintains himself.

60. It follows that both the information we have, and the disclosure made are limited. Dr Piepenbrock adopts the position that there is nothing to disclose.

<u>Discussion</u>

61. There has been lengthy and contentious litigation. The matters relied on for justifying and for resisting costs overlap and are characterised by accusation and counter-accusation. Many of the matters relied on are relevant to the following: whether the bringing of, or the conduct of the claim has been unreasonable, vexatious, abusive or disruptive; and whether there was no reasonable prospect of success of all any of the claims. It is first necessary to consider the matters relied on by the respondent. Thereafter, having regard to those which we find are well-founded, we should consider whether the threshold for a costs order had been made out and if so, on what basis. Thereafter, we should consider whether we should exercise our discretion to award costs. Thereafter, we will consider the amount if necessary.

62. In reaching our decision, we have had full regard to all previous decisions, including the preliminary hearing undertaken by EJ Hodgson in March 2020 (we will refer to it as PHJ) and the liability decision dated 8 June 2022 (we will refer to it as the FMH); where it is most relevant, we will refer directly to those decisions.

63. We now consider the respondent's main contentions advanced in support of the application for costs.

64. As to the conduct of the proceedings, the findings in the PHJ are relevant. Unreasonable conduct of the proceedings was considered. EJ Hodgson found that, at that time, there was unreasonable conduct of the proceedings. Specifically, the content of the IISL website, which by the claimant's admission was under his control, was so extreme that it potentially undermined a fair hearing. It should be considered to be unreasonable conduct of the proceedings. In particular see paragraphs 82 – 90 PHJ. Those conclusions are endorsed by this tribunal.

65. The respondent alleges the claimant has "subverted due legal process as a means to harass, insult, damage and defame a number of the respondent's employees."

66. We accept the claimant sought to vilify Ms D see for example FMH 7.34. The tribunal noted that the claimant's propensity for malicious allegation is clearly illustrated by his behaviour towards Ms D.

67. We accept that the claimant sought to introduce irrelevant allegations of assault against Ms Hay. Those allegations were not raised when the claim was brought. In our FMH decision we rejected any assertion that they were not made contemporaneously because of his fear of retaliation. They were introduced after the Daily Mail article in 2018 and had no relevance to these proceedings (see, e.g., 7.32 FMH). This is an example of the claimant's approach to individuals who he believes have wronged him being malicious and actively destructive (see 7.24 FMH).

68. We accept the claimant made wholly new false allegations of sexual misconduct against Professor Estrin. These allegations were contained at paragraph 52 to 58 of the claimant's statement; they were not put to Prof Estrin in cross examination. We found them to be "malicious allegations designed to undermine the reputation of Prof Estrin" (see, e.g., para 7.33 FMH). These allegations were never made contemporaneously, and their inclusion was unmeritorious and abusive.

69. Dr Piepenbrock's defence to the costs application alleges he "never sought to vilify anyone." He appears to argue that autism prevents him from doing other than tell the truth. Whatever the effect of autism, we are satisfied that the claimant has deliberately sought to vilify individuals, particularly Ms D, but also others, including Ms Hay and Professor Estrin. His contention that he has never sought to vilify anyone is wholly without merit.

70. We accept the claimant has a continuing vendetta against Ms D, and others. That is amply illustrated throughout these proceedings, we considered it in detail in the FMH. The respondent points to the claimant's continuing campaign against Ms D and the observations made by judges in the EAT and the High Court. We have noted the decision of Williams J, QB-2021-003782, in particular, we have considered paragraphs 127 – 133. One of the matters Williams J considered was an application to set

aside the anonymity order. She concluded that it was necessary, in the interests of justice, for Ms D's anonymity to be preserved. In reaching that conclusion, she explored, at length, the claimant's continuing conduct towards Ms D. We do not need to quote from her judgment at length. At paragraph 130 she stated "there is a clear pattern of Dr Piepenbrock attempting to misuse litigation to vilify and oppress D and to further his agenda in relation to her." She noted his propensity to recycle allegations "irrespective of their age and the fact they have already been rejected in earlier proceedings."

71. We accept the claimant was dishonest in alleging at the hearing that he had brought a grievance against Ms D on 19 November 2012. He had not.

72. We accept that the claimant has misrepresented the findings of the High Court in 2018. We considered this in the FMH. Misrepresentation was observed by Williams J, as referred to above. We do not need to set out full particulars of this.

73. We accept the claimant gave misleading evidence concerning his dealings with Ashridge Business School (see, 7.30 and 7.31 FMH).

74. We accept the claimant was dishonest in relation to his medical history. We considered this particularly at 7.25 – 7.28, FMH.

75. We accept the respondent's submissions that the claimant accused a number of the respondent's witnesses of malice and of perjuring themselves. We accept some of those allegations were contrary to the findings of the High Court in 2018. We do not need to set out the full detail; Davies J, in 2018, did not find Ms D's grievance to be either false or malicious (see 7.54 FMH).

76. The claimant seeks to distance himself from his involvement with the IISL website. He appears to say that he is not the owner. We noted in the liability hearing the claimant sought to resile from his admission that the website was under his control (see 4.39 FMH). In paragraph 19 of the defence to the costs application the claimant asserts he "never agreed with the LSE's false allegation that the website of the IISL was his personal website." We accept the respondent's characterisation of this assertion as "evasive and disingenuous." The website was under his control. The nature and effect of the IISL website was considered at length in both the PHJ and the FMH (see, e.g., 5.208 – 5.217 FMH); we also noted the effect on the litigation of the claimant's use of the website, and observed the likely inhibiting effect on the willingness of potential witnesses to give evidence (see, e.g. 5.221 FMH). The continuing vilification of Ms D was explored, see, e.g., 7.34 – 7.35 FMH.

77. The respondent relies on the alleged unreasonable valuation of the claim, and settlement discussions.

78. We accept that the claimant has put a high valuation on this claim. We do not find this, in itself, is of particular assistance. It is common for claims to be pleaded in the most optimistic, and frequently, unrealistic terms.

79. We accept the respondent offered, on 20 April 2018, to settle both the High Court and employment tribunal claims for a total of £100,000. That offer was expressed to be "without prejudice save as to costs." The letter referred to the weakness of the claims. The offer was rejected by a brief letter of 23 April 2018. At that time the claimant was represented. We have no reason to believe the claimant did not receive appropriate or relevant advice. There was a further offer to settle the employment tribunal claim on 12 July 2021. The letter was "without prejudice save as to cost." That letter included up to £5,000 for advice on the settlement. It expressed concern for the claimant's health and well-being. The offer was rejected on 14 September 2021. In rejecting that offer, Mr Piepenbrock, on behalf of the claimant referred to "the current multi-million pound employment tribunal lawsuit against the LSC and the new seven figure lawsuit in the High Court against the LSC." This is one of many letters which refers to Ms D as a "stalker." By way of rejection, the letter focused on the inadequacy of the offer to pay legal fees.

80. We note paragraph 27 of the defence to the costs application which refers to the failure to provide a "cost warning." We accept that the potential for costs was addressed in the PHJ (see, e.g., para 90 PHJ). Further, given the offer to settle in 2018 was expressed to be "without prejudice save as to costs" and the claimant was represented at the time, the claimant should have fully understood the potential for costs to be ordered.

81. The respondent asserts the claimant "was dishonest in his dealings with the respondent from about December 2012." It refers to the claimant providing a false narrative. We did not find the claimant to be a reliable or credible witness. We concluded that his behaviour had been "manipulative and dishonest." We considered this particularly at 7.24 – 7.38 FMH, albeit there are other parts of the FMH decision which are similarly relevant. There are grounds for finding that aspects of the claimant's behaviour have been dishonest, both in his relationship with the respondent, and in his presentation to the tribunal.

82. We must consider whether the threshold for ordering costs is met. As we have observed, the litigation in this matter has been lengthy, involved, exceptionally contentious, and characterised by accusation and counter-accusation. We must take account of all the facts. However, when deciding the threshold question, it is appropriate for us to stand back and understand the relevance of the detailed accusations in the context of the claim, and the approach to this claim, as a whole.

83. It is instructive to consider, broadly, the nature of the claims, and the key contentions which form the foundation of the claims, as pursued.

84. The claimant brought claims of unfair dismissal, victimisation, and discrimination arising from disability.

85. The claims all stem from an incident alleged to have occurred in November 2012, when the claimant alleges he was sexually harassed by Ms D. Key to that allegation is that she made unwanted sexual advances which he rebuffed. He contends he acted appropriately at the time and at all times thereafter. He alleges that she behaved inappropriately by making malicious complaints. Thereafter, it was contended that the respondent behaved inappropriately in numerous respects. Dr Piepenbrock alleged the combination of the initial complaint and the reaction of the respondent led to him becoming depressed and anxious and unable to continue working. He then alleged the respondent behaved inappropriately in numerous respects and ultimately terminated his contract in circumstances where it should not have done so. It is the claimant's contention that he behaved appropriately in relation to Ms D and his employer throughout.

86. We set out a summary of the claim and the key issues at paragraphs 1.2 – 1.9 FMH. We do not need to set it out here.

87. We first consider whether it can be said that all or any of the claims had no reasonable prospect of success. The claimant contends that the PHJ rejected any allegation that the claims had no reasonable prospect of success, and that such rejection is a complete answer to the allegation that the claim had no reasonable prospect of success. We reject the claimant’s argument. When considering the reasonable prospect of success prior to a full merits hearing, it is necessary to take the claimant's case at its height. There are limited exceptions. If a contention is sufficiently undermined by contemporaneous documentation, it may be appropriate not to take the claimant's case at its height, but this is limited, and mini-trials should be avoided. No exception applied here.

88. When considering whether any claim had a reasonable prospect of success, after the claim has been determined, it is necessary to have regard to all findings of fact and to consider what should have been known to the claimant had he gone about matters reasonably.

89. When the preliminary hearing took place, it was appropriate to assume that the claimant would be able to establish the facts as pleaded. It was assumed that he would establish that Ms D had made sexual advances, which he had refused. Thereafter, she had made inappropriate allegations and that in dealing with those, he had acted honestly and reasonably at all times. At the FMH we found that Ms D did not make sexual advances. It has been found that the claimant's behaviour was neither honest nor appropriate in numerous respects.

90. We first consider the claim for unfair dismissal. It is common for employers to dismiss workers who have been absent for a long period of time. Such absences are often caused by ill-health, including depression.

It is well established that such dismissals can be fair. It is necessary to follow a fair procedure. Reasonable adjustments must be considered. Where dismissal is because of absence, section 15 Equality Act 2010 is frequently engaged, as the dismissal may be unfavourable treatment, and the respondent may need to show the treatment was a proportionate means of achieving a legitimate aim.

91. We considered the unfair dismissal claim at 7.74 – 7.102, FMH. Where dismissal is conceded, the reason for dismissal must be proven by the respondent; the question of fairness is neutral. The respondent relied on some other substantial reason, or in the alternative capability or conduct. The claimant did not accept the respondent's reason, but instead alleged some form of inappropriate or ulterior motive, particularly he alleged orchestration by Ms Hay (see 7.80 FMH). He also asserted that Professors Estrin, Bevan, and Barzelay were responsible for the dismissal (see 7.81 FMH). The claimant rejected the respondent's basic position, which revolved around his being dismissed, first because of his absence, second because there was no prospect of his returning, and third because the fixed term contract, which had been extended had expired. We considered Mr Seehra's reasons (see 7.90 FMH). Whilst the claimant disputed these reasons, at no time did he have any grounds to do so. There was no objective basis to doubt the respondent’s reason. Challenging that reason had, objectively, no prospect of success. The claimant, with reasonable reflection, should have understood at the time he brought the claim that there was no reasonable prospect of a asserting a different reason.

92. Unrealistically disputing the respondent's reason does not mean that the unfair dismissal claim would fail. It is still necessary to have regard to the fairness of the decision.

93. However, in considering whether there was any prospect of success, it is relevant to have regard to those matters advanced by the claimant in support of the argument that the dismissal was unfair. The arguments advanced by the claimant were wholly unrealistic and inconsistent with the facts that should have been understood and known to the claimant. Moreover, much of his argument relied on an assertion that he behaved reasonably and appropriately, when it was clear that he had not.

94. During his period of absence, there are elements of dishonesty and manipulation concerning the work he undertook and the position he applied for at Ashridge.

95. The claimant identified no alternative position to which he could have been employed. The argument that his contract concerned research was misconceived (see 7.95, FMH). The claimant's suggestion that he could return to work ignores his own conduct (see 7.96). His general assertion that either he should have been considered for further employment, or that he would have continued in employment, is undermined by his view of the LSE as an unethical institution (see 7.97 FMH).

96. The claimant, at no time, had any realistic prospect of arguing that the respondent should have maintained his position indefinitely (see in particular 7.97 – 7.102).

97. It is appropriate to stand back and consider the matter in the round. The respondent sought to engage with the claimant and facilitate his return. The claimant resisted all attempts to assist him and made it plain that he would not return, unless completely unrealistic demands were met. In bringing the claim of unfair dismissal the claimant ignored the reality of the relationship, and sought, dishonestly, to misrepresent it.

98. It is in that context that it is necessary to ask whether there was any prospect of the unfair dismissal claim succeeding. We find there was no reasonable prospects of the unfair dismissal claim succeeding. Further the manner in which it was pursued, including by making wholly unsupported allegations as to the reason for dismissal seriously prolonged the consideration and amounted to unreasonable conduct of the proceedings.

99. Did the section 15 Equality Act 2010 claim have a reasonable prospect of success?

100. We have no doubt that elements of this claim had a prospect of success (see 7.110 FMH). The claimant is disabled. He was absent from work. There was a reasonable prospect of establishing that his absence was because of depression and anxiety, at least at times or in part. One allegation of unfavourable treatment, being dismissal, may have been because of the absence. It follows that there was some prospect of establishing some elements of the discrimination arising from disability claim.

101. The prospect of success turns on whether those alleged acts of unfavourable treatment which occurred because of something arising in consequence of disability could be justified. Were the relevant acts a proportionate means of achieving a legitimate aim?

102. There were difficulties with this claim, which the claimant should have been aware of, which seriously undermined it. We say this at 7.12 and 7.13 FMH.

> **7.12 There is a difficulty with this case. Mr Seehra proceeded on a fundamental misunderstanding caused by the claimant's deliberate omission of relevant facts. The claimant could have, and should have, told the respondent that he was capable of working. That must have been the position because he started working for Ashridge Business School. The nondisclosure of information was deliberate and unjustified. It is arguable that the language of section 15 requires both subjective and objective consideration of the reason for taking a decision. Subjectively, the claimant's absence was believed to be a matter arising in consequence of disability. If a subjective test is applied, the causational link is made out. Objectively, the claimant['s] continuing absence was not because of**

something arising in consequence of disability. The depression had sufficiently resolve[d] to allow him to return to work. If an objective test is applied, it is arguable that the causational link is not made out in this case.

7.13 Mr Seehra's subjective belief, that the claimant's absence arose because of disability, was objectively wrong. It is arguable that his reason was not the absence itself, but his reliance on a dishonest representation. We do not need to finally decide this, and it is not a matter which has been specifically argued before us.

103. The claimant did not accept the legitimacy of the respondent's aims (see 7.116). That assertion never had any reasonable prospect of success. The claimant failed to identify, at any time, a less discriminatory way of achieving the aims (see 7.116 FMH). His argument that there would be no cost to the respondent, and he need not engage with the need to teach, had no prospect of success (see 7.117). The arguments on proportionality were fundamentally weak (see 7.118 – 7.120).

104. As to the reality of the claimant's argument that the LSE should continue employing him, we explored that in detail at 7.130 – 7.134, FMH. We accept that there is a theoretical argument that the respondent could have continued to employ the claimant, and therefore it may be argued that the justification defence could fail. However, for the reasons we gave in our FMH decision, as outlined above, we find that objectively that argument is fanciful. As it was fanciful to argue that the dismissal was not justified, we find there was no reasonable prospect of the discrimination arising from disability claim succeeding, and at least so far as it related to the dismissal. We do not need to consider the other allegations of unfavourable treatment. It is not proportionate to do so. Each of the arguments was weak and ultimately failed. The weakness of each argument is recorded in our FMH decision.

105. Commonly, victimisation claims are founded on an alleged protected act. Generally, protected acts occur when an employee does something in relation to the Equality Act 2010. Examples include making an allegation of discrimination and requesting reasonable adjustments.

106. There is no suggestion that the claimant does not understand the need to tell the truth when bringing a claim. The need to give an honest account is obvious. It may be possible to advance a case which appears strong because it is based on facts which are untrue. Section 27(3) Equality Act 2010 provides that the giving of false evidence or information, or making a false allegation, will not be a protected act if the information is given or made in bad faith.

107. In our FMH reasons we explored the inadequate way the victimisation claimant had been pleaded (see, e.g., 7.50 FMH). The claimant relied on various communications said to constitute protected acts, but failed to adequately set out the information, evidence, or allegation relied on. Setting out that information is the claimant's responsibility. It should be set out in the pleaded case. Relying on numerous documents, whilst simultaneously failing to give proper detail in relation to any, is an

inappropriate way of approaching proceedings and arguably unreasonable conduct of the proceedings as it undermines a fair hearing, increases expense, and prolongs the hearing. The claimant relied on 24 separate emails as protected acts 1 – 24, and at least 39 other emails as protected act 25 (See 7.39 FMH). Relying on dozens of alleged protected acts whilst failing to identify how they are said to be protected is oppressive; it is unreasonable conduct to the proceedings, and it is evidence of vexation.

108. In the FMH reasons, we considered in what manner the various documents were said to be protected acts. We do not need to consider each of the documents in detail again. By far the most important allegation relied on was the allegation that the Ms D had made inappropriate sexual advances and the claimant had behaved appropriately.

109. The first alleged protected act relied on significantly postdates the events of November 2012. We noted the escalation at paragraph 7.47 FMH. We stated this -

> **7.47 When considering the correspondence, it was clear to the tribunal that Professor Marnette-Piepenbrock's email of 24 July 2013 marked an escalation in terms of the language used, the nature of the allegations, the individuals included, and the degree of hostility. That hostility did not lessen at any time. The email of 24 July 2013 contained several key themes. It alleged that in finding Ms D's grievance unproven, the respondent clearly demonstrated the claimant had "spurned the inappropriate and unwanted advances of a sadly unstable former LSE student." It refers to the claimant's "courageous ethical actions to stop her harassment." It stated that her complaint was an act of retaliation and was "vengeful and malicious defamation of character… based on false information." It alleged there were eyewitnesses, but what they were alleged to have witnessed was unclear. It alleged that the investigation had determined the claimant's "innocence," and that he had been initially presumed "guilty" leading to him being punished "publicly prior to the investigation." In that context it states, "This harassment, bullying and unlawful discrimination, resulted in Ted being very unwell and currently on sick leave."**

110. We note how the claimant's correspondence developed. It placed him as the innocent party; it alleged he had been judged guilty and punished publicly by the respondent by its investigation. He sought vindication of his position, and confirmation from the respondent that Ms D had acted maliciously and vexatiously.

111. As to the allegation that Ms D was malicious, that cannot survive either the finding of the High Court (see 7.54 FMH) nor our own findings. The claimant's assertion that he was, in some manner, a wronged and innocent individual is not supported by the facts. His behaviour towards Ms D in America was improper, as found by the High Court in 2018, and as supported by our findings. We summarised the position at 7.57, FMH:

> **7.57 We find it is not possible to separate the allegation that he was presumed guilty and publicly punished from the claimant's allegation that**

> **he was innocent and Ms D's actions were malicious. The claimant does not make a distinction. The email of 24 July 2013, is premised on the assertion or allegation that Ms D made a malicious allegation of harassment against an innocent man. It is in that context that the reference to presumption of guilt and public punishment must be understood. We take the view that there is, essentially, a single allegation which has multiple assertions attached. That allegation is one of innocence and it is false. It is underpinned by the allegation that Ms D's actions were malicious. They were not. Reading the totality of the correspondence makes it clear that the principal reason why the claimant says Ms D['s] allegation was malicious is because he represents himself as the innocent victim of her sexual advances, which he spurned. That fundamental allegation underpins the entirety the relevant correspondence, and it is untrue. We must consider whether it was made in bad faith, and to do this we will consider whether it was dishonestly made.**

112. We considered whether the claimant's mental health was such that he did not understand the difference between right and wrong. We say this at 7.58 FMH.

> **It has been no part of the claimant's case before us that any personality trait, whether viewed as a narcissistic trait, or more generally as an ASD development issue prevents the claimant understanding the difference between right and wrong.**

113. We then considered in detail, having regard to the relevant guidance in **Ivey**, whether the claimant's evidence was dishonest (see 7.58 FMH).

114. At 7.59, FMH, we state:

> **7.59 We found that had Ms D behaved in the manner now alleged by the claimant the claimant would have raised her conduct at a much earlier stage, and in much more detail. We have reached the conclusion, on the balance of probability, that the claimant's allegation of spurned sexual advances is dishonest. That dishonesty taints the entirety of his alleged disclosure of information, and his assertion of innocence. That dishonesty leads us to find the assertion that he was an innocent victim was made in bad faith.**

115. We concluded that the essence of the complaints consisted of false allegation made in bad faith, we could not find the email of 24 July 2013 to be a protected act. This dishonesty infected the remainder of the protected acts. Those alleged acts leading up to the email of 24 July 2013 were founded on the same basic allegation (see 7.71 FMH). We found there to be no protected acts.

116. The claims of victimisation were based on no ground other than the assertion the claimant had undertaken protected acts. The claimant's allegations that Ms D made sexual advances, and thereafter filed a malicious grievance, were based on dishonest evidence. Viewed objectively his claim of victimisation had no reasonable prospect of success. Given that the claimant was basing it on a dishonest account, the claimant should have known that the claim had no reasonable prospect of success.

117. If an individual is unable to distinguish right from wrong or truth from dishonesty, it may be possible to say there was no reasonable prospect of success, but the individual did not appreciate the weakness of the case. There is nothing to suggest the claimant did not appreciate and understand the distinction between truth and dishonesty.

118. As all of the potential protected acts were fundamentally undermined by the claimant's dishonest approach, we find there was no reasonable prospect of establishing any protected act, and therefore no reasonable prospect, in this case, of establishing a claim of victimisation.

119. It follows that the threshold test is met, as each of the claims had no reasonable prospect of success.

120. We have considered whether the claimant has been vexatious. We can deal with this briefly. These proceedings have been used to pursue a personal vendetta against Ms D. In pursuing that vendetta, the claimant has acted dishonestly. He has distorted the truth and at times actively misled. In his evidence before us he has embellished the alleged event. He has acted in ways which are malicious and inappropriate, for example in relation to Ms Hay and Professor Estrin. In pursuing this claim, and others, the claimant has ignored, and sought to misrepresent, findings of the High Court, as we have observed and as observed by Williams J. We have no doubt that the claimant will continue to pursue, in whatever manner he can, his vendetta against Ms D, and he will continue to make malicious allegations against others whom he believes have wronged him. We have no doubt that his conduct in bringing and pursuing these proceedings is vexatious.

121. Has there been unreasonable conduct of the proceedings? We find that there has been unreasonable conduct of these proceedings.

122. The proceedings themselves are founded on untruthful allegations.

123. There is a failure to set out, adequately or at all, key aspects of the claim, in particular relation to the protected acts. That is unreasonable conduct. In the courts, such failure of pleadings may lead to claims being struck out, albeit such failings are more commonly tolerated by employment tribunals. Nevertheless, it is unreasonable conduct of the proceedings, as the respondent is denied the opportunity to prepare adequality or proportionally, and any fair hearing is fundamentally undermined.

124. There are numerous examples of unreasonable conduct of the proceedings. The allegations against Professor Estrin, made for the first time in his statement was unreasonable conduct.

125. Bringing an allegation against Ms Hay because Dr Piepenbrock blamed her for the Daily Mail article is unreasonable conduct of these proceedings.

126. The claimant's vilification of Ms D and others on the IISL website is unreasonable conduct of these proceedings, in particular, by undermining the prospect of a fair hearing and discouraging witnesses from giving evidence.

127. The claimant has given dishonest evidence. That is unreasonable conduct of these proceedings.

128. Misrepresenting the findings of the High Court is unreasonable conduct of these proceedings.

129. There are various other allegations which we do not need to consider in detail. It is alleged the claimant has made numerous applications which were unnecessary and has failed to cooperate. It is also alleged that his conduct towards the respondent's representatives is inappropriate. We do not need to consider those; we have no doubt that his conduct has unnecessarily prolonged the length of the hearing. We have no doubt that such conduct has contributed to the length and complexity.

130. We next consider where we should exercise our discretion to make an award of costs. The main argument put against this is the claimant is a "man of straw." He argues that he is impecunious.

131. We first consider whether we should exercise our discretion to award cost at all. The starting point is rule 84 Employment Tribunals Rules of Procedure 2013 which states that we may take into account means. We do not read the rule, or the case law, as raising a presumption that there will be no exercise of discretion to award costs where an individual establishes impecuniosity, even in circumstances where impecuniosity may persist indefinitely without any or any realistic prospect of changing. Nevertheless, there is some suggestion that reasons should be given as to why discretion should be exercised when a person is impecunious.

132. We find that costs should be awarded; in reaching that decision, to the extent we need to give further reasons, we do so now.

133. Costs are always compensatory; they are not a punishment. There may be a reason to limit or refrain from ordering costs. All the circumstances should be considered. The fact the threshold is met may not be sufficient reason to order costs. It is appropriate to consider why the threshold for costs has been met. Equally, impecuniosity may not be conclusive. Taking into account means is discretionary. There is no obligation to do so.

134. The respondent incurred costs because the claimant vexatiously, conducted the claim unreasonably, and pursued a claim with no reasonable prospect of success.

135. In any case there may be factors which would make it appropriate to decline to make any order for costs, even when the threshold is met.

Those factors may well reflect on the claimant's culpability or provide mitigation. Culpability is a matter that is relevant. Dr Piepenbrock's actions were culpable and there is no mitigation. We exercise our discretion to order costs.

136. The fact that enforcement may be impossible is not, in itself, a good reason to decline to exercise our discretion.

137. We observe that there are further relevant factors in this case. First, the disclosure given by the claimant in relation to his means is inadequate. He has failed to comply with the order to provide supporting documentation. The information provided is vague and incomplete. Whilst we accept that there may be a presumption of impecuniosity where a claimant is able to demonstrate a financial position consistent with remission of fees, that does not absolve the claimant of responsibility to make proper disclosure. There are doubts about the claimant's financial position. The respondent has recently raised questions about his funding of the flat in Hammersmith, and his ability to move to America. Moreover, he has not explained what income he currently has. It follows that the claimant's disclosure concerning his means is inadequate. Moreover, it is the claimant's case that prior to the material difficulties, he had a significant earning capacity. There is some evidence of the claimant undertaking paid employment, as set out in our finding of fact (FMH), about which he has given inadequate disclosure. We do not rule out the possibility that the claimant may work in the future. The claimant asserts that he has no inheritance prospects but gives no detail.

138. In all the circumstances, we consider it appropriate to exercise our discretion to award costs.

139. We must consider what award to make. We need to consider the following: should the award be on an indemnity basis; for what period should costs be awarded; should the respondent be entitled to receive any percentage of the costs incurred; and should the costs be capped.

140. The question of indemnity costs was raised in the respondent's skeleton argument. We find that the application for costs does not need to refer to indemnity costs. However, if indemnity costs are sought, the claimant should have an opportunity to respond. Had the claimant attended the hearing, he would have had that opportunity. As he did not attend, we sought further submissions.

141. Both parties gave further submissions. The respondent reiterated its reliance on **Three Rivers v Bank of England** [2006] EWHC 816 as set out in the original skeleton argument. The respondent did not wish to limit its costs by way of A cap. Instead, it sought payment on account and asserted the reference to applying the CPR rules on detailed assessment, as contained in rule 78, was sufficient to allow for this. It contended that an interim order for £300,000 should be made.

142. The claimant stated there should be no order for indemnity costs because there should be no order for costs. It follows that there should be no cap. The claimant submitted he had no way of knowing what costs have been reasonably incurred.

143. We are satisfied that there should be indemnity costs in this case. We have regard to the case of Three Rivers. This case is decided in the context of costs awarded in the court. In the courts, costs generally follow the event. It is apparent that many factors may be taken into consideration which include whether the claim had any reasonable prospect of success, whether there was vexation, whether there was unreasonable conduct of the proceedings, and whether such unreasonable conduct caused delay and extra expense. This case is not an 'ordinary' case. The case was founded on dishonest accusations. It objectively had no reasonable prospect of success. We found subjectively the claimant should have understood the claim had no prospect of success. The claim has been pursued vexatiously. We are satisfied that costs should be awarded on an indemnity basis.

144. The claimant alleges that he was not warned that costs may be sought. We do not consider this argument sustainable. The claimant received two letters that were without prejudice as to costs. The potential for paying costs was set out in the PJH. The claimant has had opportunity to obtain legal advice. It is not necessary for a respondent to issue a costs warning letter. It is appropriate for the respondent to exercise restraint in using such letters. Frequently, frank letters, alleging a claimant has no prospect of success, or alleging a claimant is acting unreasonably or vexatiously, cause significant distress. Commonly claimants allege that they undermine a fair hearing. This can lead to further satellite litigation. If it is possible to say that a claimant could not reasonably have understood the weakness of his or her case without a specific letter from the respondent, perhaps the relevance would be greater. That is not the case here.

145. We found this case has been pursued vexatiously. The claimant's conduct of the claim has been unreasonable. Each of the claims had no reasonable prospect of success. The claims have been advanced on a factual basis which is dishonest. In the circumstances, we find the claimant should pay all the costs properly incurred in defending the claim.

146. We have noted the claimant has criticised the respondent's actions. We have considered whether any conduct of the respondent is such that there should be a percentage reduction of the costs. In particular, the claimant criticises the respondent for seeking to strike out his claims. That criticism is unfounded. There were proper and appropriate grounds for seeking to strike out his claims, namely his unreasonable conduct of the proceedings and the true merits of the claims. Ultimately, they were not struck out because of the potential for there to still be a fair hearing, despite the potential for fair hearing being called into question by the claimant's conduct.

147. In the circumstances, we decline to make any percentage deduction.

148. Finally, we need to consider whether there will be cap on the costs that may be recovered. We observe that the cap would be applied after any detailed assessment. It follows that the sum found to have been reasonably incurred may only be recovered to the extent it does not exceed the cap.

149. We sought the parties' further submissions on this point. We invited the respondent to consider whether it would seek a cap on the costs.

150. If the respondent sought to cap the costs, it may be appropriate for the tribunal to consider, pursuant to rule 37 Employment Tribunals Rules of Procedure 2013, whether there would be any prospect of a detailed assessment reducing the costs to below the level of the cap. If so, it follows that judgment could be given for the capped sum, as the defence to the detailed assessment would have no prospect of success. However, the respondent has elected not to seek a cap on the costs and instead it requests a full detailed assessment of the full costs. In the absence of a request from the respondent, we see no proper reason to cap the costs in this case, and the case will proceed to a detailed assessment. It is likely that the detailed assessment will take some time and we consider the County Court is in a better position to deal with a lengthy detailed assessment and we order the detailed assessment will take place in the County Court.

151. Finally, we must deal with the respondent's request for a payment on account of £300,000. The respondent relies on CPR 44.2(8) which states -

> **(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.**

152. Insofar as it is applicable, rule 78 Employment Tribunals Rules of Procedure 2013 states -

> **78(1) A costs order may—…**
> **(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; …**

153. It is the respondent's contention that reference to "applying the same principles" is sufficient to incorporate CPR 44.2(8).

154. Rule 78 does not, directly, incorporate CPR, or any rule under the CPR. It refers to the principles. The tribunal finds the application of those principles must be achieved through the rules of the tribunal.

155. CPR 44.2 deals with the court's discretion as to costs. The general rule is that the unsuccessful party will pay the successful party's costs (CPR44.2(2)(a)). This is not reflected in the tribunal rules. CPR 44.2(8) states where the court orders a party to pay costs subject to a detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is a good reason not to do so.

156. It follows the CPR 44.2 applies at the points when the court is deciding whether to make a costs order and is considering the amount of the costs and when the costs are to be paid. It is at the point the court makes the costs order and provides for a detailed assessment that it must consider whether to make an order for payment on account. However, the tribunal is unaware of any principle in CPR which would permit the judge undertaking the detailed assessment to make an interim order for costs, and no provision is relied on by the respondent. We observe it would be strange if rule 78 incorporated CPR 44.2(8) but did not incorporate 44.2(2).

157. We find that that the power under CPR to make an interim costs order, is distinct from the provisions relating to detailed assessments and is therefore not caught by rule 78. There is no power to order an interim payment.

158. As noted, it may be possible to apply to strike out any defence to a detailed assessment, and thereby potentially give judgment for the full capped sum. The defence to the detailed assessment could be struck out if there were no prospect of the detailed assessment reducing the sum payable to below the capped amount. However, this respondent has elected not to seek a cap on the costs.

159. If we were wrong, and it is open to the tribunal to order an interim payment, you would accept that £300,000 would be a reasonable sum to order by way of interim payment.

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Employment Judge Hodgson

Dated: 27 September 2023

Sent to the parties on:

..27/09/2023

For the Tribunal Office