Case No: 1600397/2016

EMPLOYMENT TRIBUNALS

Claimant: Miss E Thompson

Respondent: Vale of Glamorgan Council

Heard at: Cardiff (by CVP) **On:** 12 & 13 October 2023

Before: Employment Judge C Sharp
Mrs M Walters
Mrs J Beard

Representation:
Claimant: Mrs C Thompson (Mother; lay representative)
Respondent: Ms B Criddle KC (Counsel)

Interpreters: Ms K Sharp (12 October 2023)
Mr S William (morning 13 October 2023)
Ms N Lloyd-Rees (present as stand-by if required)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's application for the panel to be recused is refused;

2. The Respondent's application for a Costs Order is successful as the Claimant's claims had no reasonable prospect of success and the conduct of the litigation by her/her representative was unreasonable;

3. The Tribunal will exercise its discretion to order that the Claimant pays costs incurred by the Respondent;

4. The costs to be paid by the Claimant will be assessed by detailed assessment undertaken by an Employment Judge assessing costs as if the proceedings were in the County Court.

REASONS

Recusal

1. At the outset of the hearing, Mrs Thompson on behalf of the Claimant renewed the repeated written applications she had made for all three members of the panel to recuse themselves from continuing to deal with these proceedings. In essence, it was an application asserting apparent bias. The Tribunal applied the test of whether a fair-minded informed observer would consider there to be a real possibility of bias. It also, in light of the serious allegations made against them, considered whether in any event they had actual bias and should recuse themselves.

2. Oral reasons for the Tribunal's refusal to recuse themselves were given. Mrs Thompson alleged that 3456 documents had been lost by the Cardiff Employment Tribunal ("the Cardiff ET") (including before the empanelment of this tribunal); the Tribunal explained that its members were not responsible for this and noted that the documents required for the liability hearing had been before it. Mrs Thompson alleged that the Judge had stolen and hidden evidence, aided and abetted by the non-legal members; the evidence relied upon was her understanding that packages of bundles were delivered to the Judge's personal office to be unwrapped and therefore it must be the Judge who stole documents. The Judge explained that this was not the practice in this Tribunal; Mrs Thompson persisted in alleging that the Judge had stolen documents. An informed observer would know that it was extremely unlikely that panel members were responsible for the carriage of documents or looking after evidence. There are proper processes for HMCTS staff to follow in this regard. The same goes for the panel members enabling the Judge to steal documents.

3. Mrs Thompson asserted that there was a special rule in Cardiff ET that people cannot complain about failures to make reasonable adjustments in hearings. The Tribunal noted that the provisions of the Equality Act 2010 did not strictly apply to judicial proceedings, but there was a right to a fair hearing (Article 6 ECHR). The facts of this case were that all of the reasonable adjustments directed by Regional Employment Judge Davies had been made. Judge Davies set out the reasonable adjustments and those had been complied with.

4. Mrs Thompson argued that the events at the end of the remitted liability hearing, the conduct of the panel and her belief that the Judge was a liar meant that the panel should be recused. The facts known to an informed observer were that when the Claimant sought some form of amplification to listen to the liability judgment (without any prior warning), the Judge asked the staff if the hearing loop was available and was told that it was not; passing that information on was not a lie by a Judge. The idea that the clerk, Judge and other staff should walk into other courts dealing with their own proceedings to take their equipment as asserted by Mrs Thompson was not an appropriate course of action. The appropriate action is to make the request to HMCTS, which was done.

5. In light of the unavailability of the loop (as it had not been pre-booked), the panel had a discussion with the parties when about to hand down the remitted

liability judgment. Mrs Thompson agreed to the written judgment being handed down in writing (with the agreed adjustments in terms of font and colour of paper) to be considered; she asked for 30 minutes to read it but the Tribunal gave longer than that. It also explained that as the Judgment would not be discussed further that day, the Claimant and her representative did not need to closely analyse it over the adjournment; the only matter to be discussed that day were the arrangements for today. The Tribunal did not consider any of this would cause the fair-minded observer to consider that there was a real possibility of bias.

6. There was an allegation that the Tribunal stared at the Claimant whilst she cried on the last day of the remitted liability hearing. This is incorrect. The Claimant was given breaks and treated with respect and courtesy. Mrs Thompson argued that the headsets used by a different interpreter (Mr William) were removed deliberately from the hearing room on the last day on the direction of the panel as retribution for alleged protected disclosures made by Mrs Thompson to the Lord Chief Justice and others about the Cardiff ET. Firstly, the Tribunal was wholly unaware of any such disclosures. Secondly, the equipment was that brought by Mr William, who was not booked for the last day of the remitted hearing (the Tribunal had previously explained the difficulties in finding interpreters due to a conference elsewhere and had another interpreter present that day). It was not removed at the direction of the Tribunal. The Tribunal did not consider any of this would cause the fair-minded observer to consider that there was a real possibility of bias.

7. The criticisms about Cardiff ET made by Mrs Thompson were generic and not specific to any panel member. Similarly, Mrs Thompson's comments about those who are hearing impaired being able to have a fair trial in the Cardiff ET did not relate specifically to any member of this panel. The directions made by Regional Employment Judge S Davies regarding reasonable adjustments had been complied with, and by the point of handing down Judgment, which was when the Claimant sought further adjustments, the decision had already been made. From the unsuccessful attempts to use the loop today, it would have made no difference at all as the Claimant could not use the loop as she did not wear a hearing aid, and the decision was concluded by the time the parties attended for the handing down of the Judgment.

8. The allegation that this Tribunal would automatically prefer the submissions of a Kings Counsel was not accepted; there was no basis for such an allegation. Mrs Thompson argued that the Claimant now had no trust and confidence in the Tribunal as a result of her previous experience with it. If the Claimant was not happy with the liability Judgment, that was understandable in the view of the Tribunal, but it did not justify the recusal of the panel. The Tribunal concluded that a fair-minded reasonable informed observer would not conclude that there was a real possibility of bias.

9. Mrs Thompson made very serious allegations; potentially with a view to force the panel to recusal itself by causing actual bias to arise. Being accused of a crime without the most cogent evidence to support it could cause panel members to form a view about the Claimant or her representative. However, parties cannot pick their panel members; once empaneled, unless the members suffer from a bias or other good reason to recuse themselves, they are duty bound to be robust and continue to deal with proceedings. The panel discussed this point, and all confirmed that they each remained open-minded

and able to decide the costs application on the basis of the evidence before them and the submissions made by the parties.

Postponement

10. Mrs Thompson also renewed the application previously made for a postponement. There was no change of material circumstance to justify such an application, but the Tribunal heard the application anyway and refused it. Again, oral reasons were given but in essence the Claimant's application was largely based on irrelevant factors. The fact that her representative alleged that the Cardiff ET lost documents, that the Claimant objected to the remitted liability judgment, or that appeals were underway did not mean that the costs hearing should be postponed.

11. The Tribunal did not accept that there had been preferential treatment of the Respondent's representative when it came to the issue of reading from documents. Mrs Thompson had shown that she found it difficult to keep to the topic in question and to only address the Tribunal on relevant points that were accurate, despite reminders. It is appropriate to stop a representative using limited time and resources to read from an irrelevant document. The Respondent's representative in contrast read a small excerpt from a relevant document. That did not amount to preferential treatment.

12. The Respondent has been waiting for four years for the determination of this application. The Tribunal did not consider it in the interests of justice to further delay, particularly as the Claimant's arguments had been addressed more than once on the issue of the desired postponement.

13. At the outset of the second day, Mrs Thompson again sought to prevent the progression of the costs hearing. The Tribunal identified that the issue she sought to raise (about the Regional Employment Judge) was wholly irrelevant and refused to allow the application to be made. There was only the window of the morning session available with Mr William and his equipment, and the Tribunal wished to ensure that the Claimant's evidence was heard then while equipment acceptable to her was available.

The costs application

14. For a summary of the background to this judgment, the previous liability judgments should be read, particularly the most recent. These proceedings have been underway for approximately 7 years, and included a partially successful appeal to the Employment Appeal Tribunal, leading to the remittal of the failure to make reasonable adjustments claim (which if successful, would have led to a review of the previously unsuccessful unfair dismissal claim).

15. Following the promulgation of the two liability judgments on 30 January 2019 & 22 June 2023 dismissing the Claimant's claims, the Tribunal in today's proceedings considered the Respondent's application for costs made on 22 February 2019. It was not updated since the second liability judgment was promulgated.

16. The basis of that application was on two grounds:

a. that the Claimant's claims of unfair dismissal, direct disability discrimination, disability related harassment and failure to make reasonable adjustments had no reasonable prospect of success;

b. that the Claimant or her representative had acted unreasonably in the bringing of the proceedings and/or the way that the proceedings had been conducted.

17. The Respondent submitted that the conduct of proceedings were plainly unreasonable and was supported by a finding in the first liability judgment by the Williams Tribunal (paragraph 42) that the Claimant's representative's correspondence was "*unduly lengthy, oppressive, onerous and extravagantly worded*". The Respondent said that the same description could be applied to the correspondence sent within the litigation itself, which at the time of the application totaled 17 volumes. The Respondent said that the Claimant had failed to pursue the litigation in a proportionate way, making multiple unmeritorious applications (often making serious and unsubstantiated allegations of wrongdoing).

18. The Respondent set out 15 aspects of the alleged unreasonable conduct by the Claimant and/or her representative for the purposes of the costs application:

a. 80-page claim, which was repetitive, and failed to identify the claims clearly but made serious irrelevant allegations;

b. Originally bringing a claim against 5 Respondents, which was unnecessary;

c. Attempts to join others as respondents, including a union and external regulatory bodies, which were not pursued;

d. Failure to respond to the Respondent's attempts to clarify the claims in September 2016, forcing the Respondent to incur costs to produce a list of issues to clarify the claims;

e. The making of wholly unmeritorious applications in October 2016 asserting "*vicarious liability*" and unprofessional conduct against one former Respondent and asserting personal injury, as well as attempts to strike out the Respondent on the basis of no reasonable prospect of success;

f. Correspondence in November 2016 alleging that external third parties were seeking to undermine the claim and suggesting that they should be witnesses;

g. The Claimant's production of 4 lever-arch bundles for the first preliminary hearing in December 2017, which were not in date order, contained incomplete documents and were annotated with the Claimant's comments. The bundles were allegedly of no value and not referred to in the course of the hearing;

h. At the first preliminary hearing, the Claimant withdrew applications to amend, add new Respondents and obtain witness orders, and accepted

the claim should only be against the current Respondent, but had previously written extensively to the contrary;

i. The "*further particulars*" produced by the Claimant were extremely difficult to understand and lengthy, yet failed to answer the questions posed, requiring more work to gain proper particulars and to amend the Response;

j. The Claimant did not provide a signed consent form for her medical records until February 2018, and did not co-operate when it was highlighted that the records from the personal injury solicitors were incomplete (allegedly blaming the Respondent). The Respondent said this caused it to incur the costs of a specific disclosure application;

k. The Claimant was found by the first Tribunal (paragraph 17) to have exaggerated her medical condition and her case contradicted itself between whether she was fit for work or struggling due to a personal injury, causing additional costs;

l. The Claimant allegedly failed to disclose any documents relating to the claims, and failed to co-operate in the production of a hearing bundle, other than asking for the inclusion of one particular document. The Claimant's representative then sent a "*barrage of correspondence*" to the Respondent claiming that documents had been omitted; the documents were then included but the Claimant refused to use the bundle and produced her own at the liability hearing. The Respondent said that the Claimant's bundle duplicated documents within the official hearing bundle. It said that this was entirely unreasonable conduct and caused additional costs;

m. The Claimant made 8 applications before the second preliminary hearing in October 2018, making serious allegations of professional misconduct, which required a substantial amount of work to rebut. The Claimant failed to pursue any of the applications, other than to ask again for the Response to be struck out on the basis of no reasonable prospect of success. This was refused;

n. The Claimant produced two witness statements, the first of which was lengthy, not in chronological order, and exceptionally difficult to follow;

o. The sheer scope of the Claimant's claims meant that the Respondent called more witnesses than would be reasonable or proportionate to the claims. The Respondent pointed out that the first Tribunal thought that more time had been allocated to the final hearing than could be justified (paragraph 7), and said that this incurred unnecessary costs that would not have been incurred if the Claimant had conducted litigation proportionately.

19. Turning to the second ground relied upon by the Respondent, it submitted that the claims pursued by the Claimant were "*doomed to fail*" as she had advanced no case as to the connection between her disability and the treatment of her when she complained (it relied upon paragraph 85 of the first liability judgment). The Respondent noted that the Claimant had not been put to any substantial disadvantage by any provision, criterion or practice ("PCP"), and that the

Claimant's case was inconsistent with such an argument as she argued that she was a good teacher who was the victim of a vendetta. The Respondent highlighted that the Claimant during the relevant time had told Dyslexia Action Cymru her dyslexia did not affect her teaching, and that the first liability judgment had held that there was no shred of credible evidence of any vendetta, corruption or conspiracy. It went on to point out that in paragraph 91 of the first liability judgment, the Tribunal had held that the procedure used to dismiss the Claimant was scrupulously honest and fair, and that the Claimant had unjustifiably criticised others (paragraph 95 first liability judgment).

20. The Respondent said that it had sent a costs warning letter to the Claimant on 21 November 2018 making the above points regarding merit, which had been ignored. It said as a result £183,742.42 of public money had been wasted dealing with "*wholly unmeritorious claims*". The Respondent provided a Schedule of costs with its costs application of February 2019. It sought £86,631 for the in-house solicitors costs (no VAT mentioned) and £94,486.36 (exclusive of VAT) for Counsel's fees. This totaled £181,117.36 as far as this Tribunal's mathematics indicated.

21. In the written submissions provided to the second Tribunal in June 2023, the Respondent said that the fact that there was a remittal did not have any relevance to the costs application. This was because the EAT ordered the remittal as the first Tribunal had provided insufficient reasons dealing with the failure to make reasonable adjustments claims and had not shown that they had been considered properly. The Respondent did mention that the EAT had observed that it was not confident that the Claimant would ultimately succeed. Further written submissions were provided for today's proceedings, but they largely echoed earlier submissions and were updated in light of recent evidence.

The Claimant's response

22. The response of the Claimant's representative, Mrs Thompson, before the oral hearing was not constructive. She sent voluminous correspondence focused on making allegations against the Judge, tribunal members, HMCTS staff and others, and making complaints about matters not relevant to this application. This correspondence appeared in the judgment of this Tribunal to be an attempt to stop the costs hearing from proceeding. These matters were ignored by the Tribunal in reaching its decision today.

23. However, the Claimant's representative did provide limited information about the means of the Claimant, but without a witness statement to support it. The Tribunal directed that this evidence would be considered and the Claimant would be expected to attend to give oral evidence. During the course of submissions regarding recusal and postponement, it became apparent that the Claimant may have written a witness statement, but it had not reached either the Tribunal or the Respondent. Directions were made to ensure that the Claimant brought additional copies of the statement and any other evidence she said was missing from the costs bundle to the costs hearing. At the start of the second day, the Claimant provided a witness statement dated 12 October 2023 (so could not have been in any bundle sent to the Tribunal and Respondent as alleged) and additional evidence. The Tribunal considered the evidence as so far as it was relevant. Much of it was not.

24. Oral submissions were made. Ms Criddle orally highlighted elements of her argument and submitted that the oral evidence heard from the Claimant regarding her means showed that the picture painted in the witness statement and the Schedule which the Claimant swore was true to the best of her knowledge and belief was not accurate. Ms Criddle argued that in reality the Claimant had substantial means and was financially comfortable, and able to satisfy the legal costs claimed and be able to rent a home if necessary. Regrettably, the oral submissions of Mrs Thompson did not assist the Tribunal greatly. She did not, despite reminders, deal with the key points for most of her address, instead choosing to assert that the Claimant should have won the liability hearing and had been discriminated against, and the Employment Appeal Tribunal did think she had a good case (amongst other irrelevant or inaccurate statements).

The hearing

25. The same adjustments made at the second liability hearing in June 2023 were made for the costs hearing (see paragraph 6 second liability judgment), with the addition of a direction that either the Welsh interpreter must provide headphones to amplify the hearing for the Claimant or a loop must be provided by HMCTS. It was listed to two days to ensure sufficient time and to ensure that regular breaks were provided for the benefit of the Claimant's representative.

26. On the first day, 12 October 2023, the additional equipment ordered in the above paragraph was not satisfactory to the Claimant. The loop was also available (having been booked just in case), but was of no assistance as the Claimant did not wear a hearing aid. HMCTS staff worked hard to understand the difficulty, as they had observed the Claimant testing the equipment prior to the hearing and confirming that she could hear. The interpreter who attended that day confirmed that she had brought the standard equipment, and knew the equipment used by Mr William was similar. It appeared that standard interpreter headsets do not provide a formal amplification function. It was not until the hearing commenced that the Claimant announced that she could not hear sufficiently. HMCTS tried to use other equipment available, such as a roving personal amplifier and tested TOURTALK TT 200-T. None of this equipment appeared to be suitable.

27. While the Tribunal and the parties discussed potential solutions, the Tribunal bore in mind that the history of these proceedings showed that the Claimant had taken a full part in proceedings throughout without amplification or use of headphones at all times. It was not until 22 June 2023 that there was an issue, and no new medical evidence was provided in support. The Claimant had shown throughout, and while under the observation of the Tribunal on 12 October 2023, that she was able to follow proceedings without amplification. She was observed reacting appropriately to what the Judge and others said, giving her mother instructions and able to ask for clarification of a particular word in English. She did not on 12 October 2023 ask the Welsh interpreter to interpret the proceedings for her, despite being able to hear them through the headset provided.

28. Ultimately, it was confirmed that Mr William's services had been obtained for the morning of the second day. By this point, the Claimant had confirmed that she would be content with the assistance of Mr William and his equipment so there was no reason why her oral evidence could not be given then. While the

Tribunal acknowledged that the situation was not ideal, the representatives were able to deal with recusal and postponement on the first day. As the Tribunal pointed out, the Claimant should have been well aware of what issues were to be raised to give instructions to her representative, and its duty was to make reasonable adjustments. Given the reasonable adjustments provided and the evidence that the Claimant did not want the hearing to proceed, the Tribunal was satisfied that it was fair to deal with the recusal and postponement applications without Mr William. The Tribunal though ensured that it observed the Claimant in case there were signs that she was struggling to follow the proceedings. There were none.

29. On the second day, the Claimant was fully assisted by Mr William and his equipment. This was when she gave oral evidence and the costs application was heard. The Tribunal also wishes to record that while Mrs Thompson became unwell at the end of the hearing, this was after her submissions on behalf of the Claimant. Mrs Thompson was expressly asked if she was happy to continue before she made her submissions as the break had been extended to allow her more time; she confirmed that she was happy to proceed to make her submissions.

30. At the hearing, the Tribunal had the benefit of a bundle provided at its direction by the Respondent totaling 988 pages, including the evidence provided as to the Claimant's means, and heard from the Claimant orally on this issue. It also bore in mind its own judgment from June 2023 and received late evidence from the Claimant on the second day.

31. The Tribunal more than once reminded the parties of the three-stage approach that should be adopted for costs applications (see law section below). It also reminded the parties that it would not conduct a detailed assessment if a costs order was made, but it would decide whether to order such an assessment if it reached that point (and if so, what directions would be given to the judge sitting alone conducting the detailed assessment as if they were in the County Court). It was also explained that summary assessment was an option, limited to £20,000, though neither party sought such an order.

Law

32. The Tribunal must deal with costs applications in three stages:

    a) Has the threshold for the making of a costs order been met? This is likely to require findings of fact about the paying party's conduct.

    b) If so, should the Tribunal exercise its discretion to award costs?

    c) If it chooses to make a costs order, how much and in what form?

33. Today's hearing can only address Stages 1 & 2 due to size of the costs award sought. Detailed assessment is carried out by a designated judge sitting alone applying the principles that apply in the County Court. However, it is agreed that this Tribunal is the forum to decide the mode of assessment and the principles to be adopted at that assessment by the costs judge to address Stage 3.

34. Rule 76 of the Employment Tribunal Rules of Procedure state:

"(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;

(b) any claim or response had no reasonable prospect of success;…"

35. The common meaning of the word "*unreasonable*" apply to this application; the test is not whether the impact of the conduct on the Respondent was unreasonable. However, the Tribunal should take into account the "*nature, gravity and effect"* of a party's unreasonable conduct (**McPherson -v- BNP Paribas** 2004 ICR 1398, CA). If the Tribunal finds unreasonable behaviour during the conduct of the proceedings by the Claimant (or by bringing the proceedings), it does not mean that the Tribunal must make a costs order against her.

36. **Davidson -v- John Calder (Publishers) Ltd and another** [1985] IRLR 9 reminded the Tribunal that when considering conduct, it is the conduct in the course of the proceedings alone which has to be considered, not conduct in relation to the dismissal itself or pre-dating the proceedings.

37. The Tribunal when considering whether to make an order under Rule 76(1)(b) (no reasonable prospect of success) bore in mind the guidance offered in **Radia -v- Jefferies International Ltd** (2020) IRLR 431 - where there is an overlap between unreasonable bringing of or conducting the claim under Rule 76(1)(a) and no reasonable prospect of success under Rule 76 (1)(b), the key issues for consideration by the tribunal are in either case likely to be the same: did the complaints in fact have no reasonable prospect of success, did the complainant in fact know or appreciate that, and finally, ought they, reasonably, to have known or appreciated that? *Radia* notes that tribunals should focus on what the parties knew about their cases at the time, not what the tribunal knows after hearing the evidence.

38. Turning to the issue regarding whether the claims (in whole or in part) had "*no reasonable prospect of success"*, merely losing a claim or a central allegation does not necessarily mean costs should be awarded (**HCA International Ltd -v- May-Bheemul** UKEAT/0477/10/ZT). When considering if a party should have realised that the claim had no reasonable prospect of success, the Tribunal can consider what that party knew or ought to have known if they had "*gone about the matter sensibly*" (**Cartiers Superfoods Ltd -v- Laws** [1978] IRLR 315) (though this authority is based on an older different version of the Tribunal rules, it simply further confirms that the Tribunal should consider what a party knew or ought to have known as set out in *Radia*). However, caution in making such an assessment is wise as what is obvious with hindsight may not be so clear during the "*dust of battle*" (**Marler -v- Robertson** [1974] ICR 72).

39. The Tribunal has a discretion and should consider all relevant factors. Costs orders in the Employment Tribunal are the exception, rather than the rule (***Yerrakalva -v- Barnsley Metropolitan Borough Council 2012*** ICR 420, CA). Rule 76 uses the word "*may*" when talking about circumstances which may lead

to the making of such an order. It is a relevant factor to consider whether any application for strike out or a deposit order was made by the receiving party (**AQ Ltd -v- Holden** [2012] IRLR 648).

40. The purpose of costs orders is to compensate the receiving party; punishment of the paying party is not a relevant factor (***Lodwick -v- Southwark London Borough Council*** 2004 ICR 884 CA). This means consideration of the loss caused to the receiving party as a result of the identified basis of any costs order is required. The case of *Yerrakalva* demonstrates that costs should be limited to those "*reasonably and necessarily incurred*".

41. The ability to pay of the paying party can be a relevant factor in deciding how to exercise the Tribunal's discretion (and also when considering how much should be paid). However, this is a factor to be balanced against the need to compensate the receiving party if they have been unreasonably put to expense (***Howman -v- Queen Elizabeth Hospital Kings Lynn*** EAT 0509/12). The Tribunal is not required to consider ability to pay, but it may choose to do so. Any assessment of the Claimant's ability to pay must be based on evidence before the Tribunal. ***Vaughan -v- London Borough of Lewisham and others*** 2013 IRLR 713 EAT saw the appeal tribunal make the point that a costs order can be made on the basis that there is a realistic prospect that the Claimant might be able to afford to pay costs in the future.

42. Another potentially relevant factor can be whether the paying party was legally advised (*AQ Ltd*). While Mrs Thompson does not appear to be legally qualified, she has made the point more than once that she has previously appeared in employment tribunals as a professional representative.

Findings

Stage 1 - Did the Claimant bring claims with no reasonable prospect of success? Did the Claimant act unreasonably in the bringing or continuing of proceedings?

43. As *Radia* confirms, the key issues for consideration by this Tribunal when dealing with Stage 1 overlap between the two limbs relied on by the Respondent. Whether the Claimant was unreasonable in bringing or continuing the claims is closely connected to the issue as to whether the claims had no reasonable prospect of success and whether the Claimant knew or ought to have known that. The limbs in this case cannot be sensibly separated in the Tribunal's view, and so were considered together.

44. The Claimant can only be taken to have known what she knew, or ought to have known, and cannot be expected to have predicted the findings of the Tribunal. The Tribunal must also consider the nature, gravity and effect of conduct when deciding if it was unreasonable.

45. No further evidence was before the Tribunal for the costs application about what the Claimant did or did not know. The submissions from the Claimant did not assist on this point.

46. Stepping back, the Tribunal concluded that for many allegations, the Claimant ought to have known that she had no evidence to support her case very early on, if not from the outset. Not only did the Williams Tribunal note in paragraph 85 of its judgment that the Claimant had advanced no case as to the connection

between her disability and the treatment of her when she complained ("*The evidence in this case did not even begin to establish any case of direct disability discrimination or harassment. No treatment of the Claimant by the Respondent was because of her disability*"), the same point arose in this Tribunal as set out in paragraphs 47-60 of its liability judgment of June 2023. The Claimant argued that there was corruption or a conspiracy against her, something that the Williams Tribunal decisively rejected in paragraph 71 of its Judgment and for which it said there was no evidence.

47. As the shifting burden of proof required the Claimant to show facts in support of her discrimination claims, the Claimant ought to have been aware she needed to adduce evidence that could show a breach of the Equality Act 2010 had occurred; she failed to advance such a case before either the Williams tribunal or this one. Indeed, as Ms Criddle submitted the Claimant ran a contradictory factual case that she was not underperforming, but was instead the victim of a conspiracy but also that for the discrimination claims she was underperforming for reasons linked to her disability. In reality, the Claimant never accepted that she was underperforming from the evidence before the Tribunal, which meant that she struggled to argue the opposite for the reasonable adjustment claims.

48. The Tribunal concluded that the Claimant had no reasonable prospect of success for any of the discrimination claims. The unfair dismissal claim was also without merit due to the Claimant's wholly unsubstantiated argument that there was a conspiracy against her. The Williams Tribunal was unequivocal that the procedure used was fair and honest, and the evidence relied upon for that conclusion was known to the Claimant at the time of events. This claim also had no reasonable prospect of success in the view of the Tribunal, given the Claimant's arguments and lack of evidence, and this ought to have been known by the Claimant and her professional representative.

49. The Tribunal turned to the second limb relied upon by the Respondent. Having reviewed the evidence put before it by the Respondent, the Tribunal was satisfied that the Claimant or her representative had conducted litigation in a wholly disproportionate and unreasonable manner. It accepted as accurate the allegations set out above in paragraph 5 upon a review of the evidence supplied within the costs bundle; indeed, the Claimant nor her representative never engaged with the detail of the 15 points set out.

50. The Claimant's representative in her correspondence was attempting to conduct litigation through the writing of lengthy, unfocussed and aggressive letters. This was not in accordance with the over-riding objective. It was the Respondent who clarified the claims. Mrs Thompson blamed the Respondent for the need for litigation and the way in which she chose to conduct it; those allegations in the view of the Tribunal were baseless; the correspondence between the parties speaks for itself and it is hardly surprising if professional representatives repeated accused of misconduct would refuse to talk to Mrs Thompson on the telephone. Examples of how Mrs Thompson chose to conduct the litigation are given below.

51. The Claimant's representative did repeatedly seek a strike out of the defence, arguing as early as September 2016 that there was no defence when the Respondent had provided a substantial Response. This application was repeated many times (and withdrawn on occasions), and included

inappropriate threats against third parties, such as the Education Workforce Council, or attempts to involve others wholly unconnected to the events in question (for example, the chief executive of Estyn). As Mrs Thompson told this tribunal that she was an experienced employment tribunal representative, she or the Claimant ought to have known that allegations and applications require cogent reasoning and evidence; these were largely absent from the correspondence before the Tribunal.

52. The Claimant's representative had a pattern of behaviour of making extraordinary allegations against a wide variety of people (including in the Williams Tribunal against the Claimant's own trade union representative), for which there appeared to be little or no evidence in support. This included the allegations against professional representatives in 2018 of serious misconduct when there was no basis for such allegations, which was the case here (more is set out below on this issue). In addition, it was evident that the Claimant's representative persistently refused to comply with case management directions (disclosure, use of joint bundles) and caused additional costs as a result.

53. The Tribunal noted that the Claimant's representative's correspondence often included disrespectful and inappropriate language, such as referring to the then Respondents as a "*disgrace*" (page 167 costs bundle) and involved in *"a cruel and sadistic 4-year plot*" (page 199 costs bundle), and suggested that one witness was a "*psychopath*" (page 210 costs bundle). Ms Criddle pointed out in her submissions that matters reached such a level that the then Regional Employment Judge (Judge Clarke) wrote to the parties on 25 October 2016 and asked Mrs Thompson to reflect on the terms used in her correspondence. He highlighted the over-riding objective and noted several terms within her letters were not of assistance (page 231 costs bundle). Judge Clarke set out in the clearest possible terms what conduct was expected of the Claimant's representative:

"*Finally, I invite Ms Thompson to moderate the terms of her correspondence. It does not assist the over-riding objective for the actions of individuals to be described regularly as 'sadistic' or 'barbaric' or for a capability procedure to be described as a 'weapon of mass destruction'. I also invite her to resist the temptation to write to the tribunal with further submissions about why the claimant has been poorly treated. It is only necessary for a party to write to the tribunal if they are responding to a request from the tribunal, applying for an order or judicial direction or replying to such an application made by an opponent*."

54. Regrettably, Mrs Thompson ignored this invitation (and later ones making similar points about not sending lengthy letters about the case) and persisted in writing lengthy, diffuse, and inappropriate correspondence to the Respondent and Tribunal, substantially increasing the costs of the Respondent. Instead, Mrs Thompson raised allegations against the Respondent's professional representatives on 12 February 2018 (page 317 costs bundle), claiming that they misled the Tribunal. There was no evidence supporting such allegations (or any of the later ones of equal seriousness), and the Claimant's representative did not pursue such matters before the Tribunal. The inevitable conclusion is that this was because the Claimant or her representative knew, or ought to have known, that there was no basis for such allegations.

55. Mrs Thompson also continued to refer to the Respondent and witnesses in inappropriate terms (for example, describing one as "*vexatious, malicious and perverse*" page 365 costs bundle; stating that a witness was engaged in "*collective thuggery*" page 376 costs bundle; describing the instruction of Counsel by the Respondent as "*crudely offensive*" and complaining it was perverting the course of justice - page 410 costs bundle). In stark contrast, the correspondence from the Respondent's representatives was professional, constructive and wholly in compliance with the over-riding objective. This includes the correspondence about disclosure and the hearing bundles (for example, page 469-470 costs bundle).

56. The Tribunal considered the nature, gravity and effect of such unreasonable conduct, which was from the outset of the proceedings with the lengthy and confusing statement of case containing emotional declarations of wrongdoing through to the lengthy, unfocussed and aggressive correspondence and applications not pursued, through to the hearing before the Williams Tribunal which plainly from the judgment itself was extended due to the conduct of the litigation by Mrs Thompson. It concluded that it was not only in breach of the over-riding objective, causing substantial costs to be incurred for no good purpose, but was wholly disproportionate and unprofessional. The Respondent was put to enormous expense for no good reason. The Tribunal concluded that the conduct of the litigation from the start was unreasonable.

Stage 2 - How should the Tribunal exercise its discretion?

57. The Tribunal was asked to consider a number of factors when exercising its discretion, but many raised by the Claimant were irrelevant. The Tribunal observed that Mrs Thompson simply could not focus on what would assist the Tribunal, and persisted in making statements such as the Claimant had been denied reasonable adjustments (not found by this Tribunal), that the Appeal Tribunal should have simply decided the whole case in the Claimant's favour, or that the Equality Act 2010 should not allow disabled claimants to be subjected to a costs order (ignoring the Rules of Procedure of the Employment Tribunal). The Tribunal considered carefully whether this was a factor to be weighed in the balance, albeit Mrs Thompson herself was plainly unable to identify that she could be part of the problem and why the Claimant found herself in this position. The Tribunal considered that it should not be put in the balance as neither party raised it, and the Claimant had been present during the liability hearings and in the recent hearings, had presumably seen the letter from Judge Clarke of 25 October 2016 and the attempts by the various tribunals to keep Mrs Thompson on track – if the Claimant did not agree with the way that Mrs Thompson had chosen to behave, it was open to her to dispense with her services. The Claimant did not.

58. Mrs Thompson argued that parties had a right to be represented by fearless, independent advocates; the Tribunal agreed. However, this right is not unfettered. Advocates are required to assist the Tribunal with succinct, logical, and clear arguments that are relevant and based on the law; they are required to deal with the other side with courtesy, respect and to only seek what is relevant and proportionate. Advocates should not advance serious allegations against professionals without a cogent evidential basis, or repeatedly make applications that they then do not pursue after causing the other party to incur costs in dealing with them. In short, fearless and independent advocates are required to behave professionally. The Tribunal did not consider this argument

helped the Claimant. Indeed, the conclusion it had drawn was that Mrs Thompson's conduct was unreasonable, which was why it now had the discretion to make the costs order.

59. The Respondent's position was straightforward. If the Claimant was found to have brought claims with no reasonable prospect of success or acting unreasonably in the conduct of the litigation, and given her financial position, why should the public purse bear the very significant costs? Ms Criddle further pointed out that the Respondent's representatives sent a costs warning letter on 21 November 2018 (page 648 case bundle).

60. The Claimant's means was the relevant factor on which the Claimant sought to rely which the parties spent most time and effort addressing. The Tribunal reviewed the means of the Claimant. The original alleged witness statement was in reality 11 pages signed by the Claimant's representative, complaining about the liability judgment and the decision to proceed with the costs hearing. It also alleged that the Respondent's bundle contained documents unlawfully stolen from the Claimant's home; a point rebutted by the Respondent's representative to the satisfaction of the Tribunal in later correspondence. The only relevant part within this document was an allegation that the Claimant does not have the means to pay such costs as sought by the Respondent.

61. The attachments to the document were of more assistance. The Claimant produced a spreadsheet of her income and expenses and limited evidence in support (and swore that it was true in her oral evidence). Some figures were wholly absent, such as the amount in a NatWest bank account (the Claimant confirmed orally was worth about £4,000), and it appeared that the Claimant was part owner of a property for which she was paying a mortgage, but little information or explanation was provided. The value of the property was unknown, though there was a reference in one document to a valuation in 2005 of £185,000 (page 944 costs bundle).

62. It appeared from the spreadsheet that the Claimant's gross income was £2250 per month (net £1780.36), that there was a property interest and some savings in the region of £2524, and a low value car (which the Claimant accepted she had valued herself, but the Tribunal thought a £1000 valuation for a car of that age was likely to be reasonable). The Claimant's account of her spending was confusing, using a mixture of dollars and sterling and annual/quarterly/monthly figures. It broadly appeared that she spent a significant proportion of her monthly wages if the evidence she relied upon was correct. The spreadsheet and supporting evidence provided by the Claimant, unsupported by a witness statement supported by a statement of truth was unsatisfactory in that it did not adequately set out the position and was not a full declaration of the Claimant's financial position. It was a partial account.

63. The Tribunal was provided with a witness statement on 13 October 2023 by the Claimant. Of most assistance was the oral cross-examination, conducted in Welsh. Under cross examination, it became clear that the Claimant's spreadsheet and witness statement was not accurate. The Tribunal would have been misled had it relied solely on what the Claimant said within those documents. The Claimant under cross-examination admitted that contrary to the picture she sought to draw, she was not solely responsible for the costs of running the property of which she owned 50% and for some items she did not pay half the cost; in addition, her brother lived in the property and contributed

financially (being in full time work). She confirmed that there was a mortgage of at most £256.86 (and page 944 of the costs bundle showed that the Claimant could draw at will on a facility under the mortgage the sum of approximately £89,000). The Claimant did not provide any valuation of the property, other than the reference to the mortgage paperwork to £185,000, which the Claimant said dated from 2005. As Ms Criddle submitted, the Tribunal concluded that the Claimant is financially comfortable and able to draw on substantial sums of money to pay the Respondent's costs.

64. The Claimant was also forced to accept under cross-examination that she was still registered as a teacher and able to return to the profession, though the Tribunal considered there to be great force in the Claimant's point that having been dismissed for capability and been out of teaching for many years, it was likely to be very difficult for her to secure a role; however, it was not an impossibility.

65. The Tribunal did not accept the suggestion by the Claimant that the property was worth less than the 2005 valuation. It was open to the Claimant to provide a proper valuation and she did not; the Tribunal considered that it was much more likely that the property was worth considerably more than £185,000 given the passage of 18 years and the mortgage could easily be cleared with the Claimant's available savings elsewhere. The Tribunal did not accept the Claimant's figures in her spreadsheet as wholly accurate, and concluded that she was more likely than not to be spending less of her monthly income than asserted. However, the property alone was likely to be sufficient to pay much of the amount sought by the Respondent, and the cash assets in excess of £6,500 and the Claimant's income were more likely than not to be able to assist with any shortfall. The Tribunal considered that it was also open to the Claimant to increase her income using her teaching qualification, but this might take time to achieve.

66. The Tribunal stepped back and considered whether the Claimant's means were a reason why the costs order should not be made; it concluded that the evidence showed that there was a realistic prospect of payment in full. The Tribunal further concluded that, given the findings above under Stage 1, it would exercise its discretion and considered it appropriate to grant the costs order sought for 100% of the costs incurred by the Respondent from the start of the proceedings up to the date of the application in 2019 (and the costs of any detailed assessment). The argument that disabled claimants should not face costs orders was unsustainable; costs orders are rare and only made in limited circumstances. However, the gravity of what has happened in this case and the resources expended by the Respondent in trying to deal with meritless claims brought in an unreasonable manner could be overlooked. The Claimant was given a warning on 21 November 2018 and chose to take the risk of persisting.

<u>The nature of the assessment to be undertaken and on what basis</u>

67. The method of assessment will be detailed assessment. The Tribunal considered that to limit recovery to summary assessment would not be just. It is evident that the Respondent's costs far exceed £20,000, and this would have been reasonably foreseeable to the Claimant (or her representative) from the outset. The Respondent is entitled to be properly compensated for the costs incurred as a result of the Claimant's unreasonable conduct of

proceedings/bringing claims with no reasonable prospect of success; summary assessment would not achieve that goal. There is no good reason why the public purse should bear the majority of the Respondent's costs, as opposed to the Claimant.

68. The detailed assessment will be conducted on the basis of standard assessment of costs. No application for indemnity costs has been made. Following promulgation of this Judgment, the proceedings will be assigned to an Employment Judge sitting alone who will make further directions to enable a detailed assessment to be undertaken in line with the judgment of this Tribunal. The parties are encouraged to co-operate and consider whether they are able to agree the amount to be paid by the Claimant to the Respondent, and avoid the costs of a detailed assessment.

Employment Judge C Sharp
Dated: 13 October 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....16 October 2023.....

.....
FOR EMPLOYMENT TRIBUNALS