EMPLOYMENT TRIBUNALS

Claimant: Mr M Willis

Respondents: 1 GWB Harthills LLP
2. Ms H Russell
3. Ms E Lord

Heard at: Leeds (by CVP) **On:** 1 November 2023

Before: Regional Employment Judge Robertson (sitting alone)

REPRESENTATION:

Claimant: In person
Respondents: Mr A Burns, King's Counsel

JUDGMENT

The claimant acted unreasonably in the way these proceedings were conducted by him and is ordered to pay the respondents' costs limited to the amount of counsel's fees reasonably and properly incurred from 1 August 2022 for preparation for and attendance at the remedy hearing in this case from 3 to 6 October 2022. Such costs will be the subject of detailed assessment by an Employment Judge under rule 78(11)(b) of the Employment Tribunals Rules of Procedure 2013 if not agreed.

REASONS

Introduction

1. The respondents in this case, GWB Harthills LLP, Ms Russell and Ms Lord, apply under rule 77 of the Employment Tribunals Rules of Procedure 2013 for a costs order against the claimant, Mr Willis.

2. The application follows a reserved remedy decision of an Employment Tribunal in the case, promulgated with full reasons on 21 December 2022

following a four day hearing from 3 to 6 October 2022 and three days of deliberations on 7 and 15 October and 15 December 2022. The Tribunal (Employment Judge Rogerson, Mr W Roberts and Mrs N Arshad-Mather, "the Rogerson Tribunal") unanimously decided to make no award of compensation to the claimant for injury to feelings, personal injury or special damages and the cost of personal care, in respect of acts of unlawful disability discrimination against him which the respondents had admitted, as recorded in an earlier consent judgment of the Employment Tribunal dated 6 January 2021. The claimant withdrew, but the Tribunal did not dismiss, his claim for compensation for pecuniary loss, in the form of past and future loss of profit share[1].

3. It is unusual for a Tribunal not to award compensation where unlawful discrimination under the Equality Act 2010 has been found (or admitted).

4. The respondents contend that a costs order should be made under rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013 on the ground that the claimant acted unreasonably in the way that the proceedings (or part) have been conducted. They do not contend that the claim (or any part of it) had no reasonable prospects of success under rule 76(1)(b).

5. The application relates to the costs incurred by the respondents from 6 January 2021, the date of the Tribunal's liability consent judgment. The respondents say that their costs exceed £380,000 and ask for them to be subject to detailed assessment (although they propose a cap of £277,000).

6. The full terms of the application, set out in the respondents' solicitors' letter of 16 January 2023, are as follows (emphasis in the letter):

"We act on behalf of the Respondents in the aforementioned claim.

We write further to the reserved judgment from the tribunal dated 16 December 2022, sent to the parties on 21 December 2022, in respect of claim number 1802068/2020 **(Claim 1)** as well as the costs judgment from the tribunal dated 16 December 2022 for Claim 1 and claim number 1803135/2021 **(Claim 2**)[2].

Application under Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

We now wish to make an application pursuant to Rule 76 of the aforementioned rules for the Respondents' costs in respect of defending Claim 1 remedy and defending the Claimant's Claim 1 costs application on the grounds that:

- The Claimant acted vexatiously, abusively, disruptively, and unreasonably in the way in which the proceedings have been conducted (Rule 76(1)(a)).

For ease, we now enclose a copy of the Respondents' schedule of costs totalling £381,442.27, together with our letter to the Claimant's representatives dated 23 December 2022 where we included detailed reasons for the Respondents' costs application for Claim 1

[1] Although the Tribunal did not say so, this, I believe, was to preserve his right to bring civil proceedings against the respondents for payment of profit share (see paragraph 2 of the Claim 1 consent judgment of 6 January 2021).
[2] I explain "Claims 1 and 2" below.

remedy against the Claimant and the Claimant's representative's response to us dated 12 January 2023.

We note that the tribunal awarded no compensation for Claim 1 and no costs to the Claimant in respect of his costs application in Claim 1.

Further to the paragraphs referred to in our letter to the Claimant's representatives on 23 December 2022[3], we also rely on the following reasoning in the costs judgment to support the Respondents' costs application for Claim 1 remedy:

> 26. … The decision to resist Claim 1 was upheld in part by the claimant's withdrawal of those complaints and their dismissal. The respondents conceded parts of Claim 1 on a pragmatic and sensible basis. **In light of Claim 2's findings the respondents might even have succeeded at trial had they not conceded**.
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> 42. … **It was not unreasonable conduct for the respondents' previous solicitors to defend the claim up to the date admissions were made.** Very early on in these proceedings the parties agreed to engage in judicial mediation which the respondents only abandoned when it became apparent that **the claimant's expectations of settlement were impossible to meet.**
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> 43. At this hearing we know how far apart the parties were because the claimant had **valued his claim at just short of £3 million in compensation plus legal costs.** Preparation for a judicial mediation usually only requires an exchange of schedules of loss/statements of expectations. **Unusually and unnecessarily the claimant made requests for the discovery of documents before the judicial mediation**. Only when it became clear to the respondents' solicitors that mediation was doomed to fail that they focussed instead on defending the claim and preparing for the liability hearing.
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> 44. Shortly afterwards the respondents instructed new solicitors who reassessed the prospects of success of the claim after they had reviewed the available evidence following disclosure. They were expected to hit the ground running and get up to speed in a short space of time in a complex case. **They approached the case pragmatically and decided that instead of contesting the whole claim the respondents would make limited admissions on parts of the claim**. The claimant agreed and accepted the limited admissions made on 24 November 2020 agreeing to withdraw other parts of his claim. **The reassessment process took just under 7 weeks, which was a reasonable period given the complexity of the case and the information disclosed in discovery**. We find the change of solicitors does explain the change of approach.
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> 46. Immediately after agreeing liability the respondents' solicitors engaged in trying to agree terms of settlement with the claimant by suggesting an independent CEDR accredited mediator was used to avoid as the "typical lawyer positional negotiation" which was not helping the parties to agree a settlement. **Surprisingly sensible approach of a third part intervenor was immediately rejected by the claimant's solicitors who continued to adopt the typical lawyer positional negotiation which was not working.**
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> 47. On 15 December 2020 the respondents did make a substantially improved offer to over £250,000. **On 17 December 2020 the offer described by the claimant as 'derisory' was rejected.** We know that at the remedy hearing the claimant valued his non-pecuniary losses at £80,000.
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> **48. Based on the evidence we saw the respondents and their solicitors' conduct of these proceedings throughout has been reasonable and proportionate. From the evidence we have seen the claimant's conduct was**

[3] See paragraph 7 below.

unreasonable and disproportionate and dismissive of any of the constructive attempts made in the interests of all the parties to bring early closure to these proceedings in January 2021 at a time when the claimant had decided that he wanted to leave the partnership.

We understand that the tribunal will have regard to the Claimant's ability to pay and may cap an award, should it be made, giving succinct reasons for its decision. The tribunal will be aware from the Claim 1 remedy hearing that the Claimant has substantial capital assets in the form of his share of his house worth around £1.8 million. The Respondents again take into account the Claimant's half share of a valuable house, less his loans and other debts which were discussed at the Claim 1 remedy hearing. In order to seek to avoid a contentious Detailed Assessment hearing, the Respondents are prepared to be pragmatic and agree that a costs order, should it be granted, should be capped at £290,000 of the Respondents' costs after Detailed Assessment on the indemnity basis.

This application for the Respondents' costs should be dealt with by the papers already provided to the tribunal, without a need for another hearing. In the alternative, if the Claimant objects to this application being decided on the papers, to reduce costs for both parties, we request that this costs application hearing be listed for one day to give the Claimant an opportunity to provide his evidence and for submissions to be made for half a day, with the remaining half day to be reserved for tribunal deliberations.

Please note that the Respondents' schedule of costs enclosed is relatively brief as we anticipate that an order will be made for our costs to be assessed by way of Detailed Assessment and a formal bill will be required. Consequently, the Respondents' enclosed schedule of costs does not include any estimated time for forthcoming work on Claim 1. We therefore reserve the right to make further amendments to the Respondents' schedule of costs should this be required."

7. Except for setting out (and highlighting) paragraphs of the Rogerson Tribunal's earlier costs decision which they said supported the application, the respondents' solicitors did not explain in the application what about the claimant's conduct of the proceedings had been unreasonable. However, they referred to their letter to the claimant of 23 December 2022 which included the following (emphasis again in the letter).

"One of the most serious findings of misconduct by a party to legal proceedings is that he attempted to mislead the court or tribunal. Again, the tribunal found that your client's deception was "extreme" and he was attempting to mislead the tribunal because he was not telling the truth. The tribunal agreed with us that this is particularly egregious as your client is a solicitor. This finding, together with the tribunal's Claim 2 judgment, amounts to a finding of perjury. We invite your client to concede that this was unreasonable conduct of proceedings. As a result of your client's lies, our clients have incurred significant time and expense in preparing for the remedy hearing. A costs application will inevitably add to the considerable time and resources already expended on this claim and so we ask that your client takes a reasonable approach to this litigation and makes a prompt concession in relation to his unreasonable conduct and his liability for the Respondents' costs for Claim 1 remedy and his deeply flawed costs application…..

The tribunal has concluded that your client conducted Claim 1 on lies and created misleading documents that he knew to be untrue. He was found to have repeatedly lied and misled the Respondents, Aviva and the tribunal. Amongst many others, we refer to the following paragraphs of the remedy judgment::

"58. The claimant's case was materially dependent on advancing multiple assertions which were found to be untrue and on irrefutable evidence **which fundamentally contradicted the assertions he had made[4].**

….

66. Contrary to the claimant's account which was unsupported by the undisputed transcript we find the claimant had no intention of returning to work before the admitted discrimination. **He has given a deliberately false account at this hearing to bolster his claim for compensation.** On 29 November 2019, he had confirmed to the insurer that his cancer related absence to continue to the next review in February 2020.He was not 'highly offended' by the suggestion he should be deemed unfit and had agreed it was 'true' but presents a contrary position to support his claimed losses.

67. Having carefully considered the position we find the claimant was presenting a false account at this hearing to try to mislead the tribunal into make a finding of fact he knew was untrue (but for the Claim 1 discrimination, the claimant would have returned to work on or around January 2020"). If the claimant had been transparent with Mrs Lord and Miss Russell about what he was saying to his insurer, he would have had to admit he agreed he should be deemed unfit and could not retain his roles and responsibilities which should be reassigned to them in his absence. **The claimant was not being transparent with the Insurer or with the respondents or with the tribunal.**

68. After his call to Mr Munday on 29 November 2019, the claimant had no intention of participating in any meetings with the respondents or agreeing he should be deemed unfit. **Having decided it was not in his interests to participate or attend the meetings he decided he would not engage in any way to deliberately frustrate the process.**

71. The claimant's account to the GP was inconsistent with his earlier account to Mr Munday. He informed his GP he has already been expelled and that he had sought legal advice which suggests his solicitors were involved very early in the process although they did not engage in the process until 6 January 2020. Dr Evans was completely reliant on the claimant's account and attributed the upset the claimant was describing to the expulsion that she believed had already happened by the date of the consultation on 3 December 2020. **We found the claimant's account to Dr Evans was not reliable or accurate because the claimant knew he had not been expelled.** The inference we draw is that the claimant was deliberately inaccurately reporting events to Dr Evans to gain her sympathy and provide a reason to issue a fit note. Although the claimant was reporting a work-related event as the cause, he must have requested that Dr Evans recorded the reason was related to his cancer to support his continuing absence from 2 December 2019 to 20 January 2020. This is significant because work related mental health difficulties were not subsequently picked up as the cause from the fit note by the insurer or by the medical expert when the fit notes were being considered for different purposes.

107. … His suggestion that the respondents had not previously disclosed their concerns to him is untrue.

120. … The claimant's description of hurt feelings in relation to this detriment is completely reliant on his account of the expulsion being accepted by the Tribunal. **We found that account was untrue.**

144. …The claimant reported that nobody had raised concerns **which was untrue and inconsistent** with the legitimate concerns raised by the respondents before any of the admitted unlawful conduct.

[4] This was a reference to paragraph 58 of the costs decision, not the remedy decision..

150. … The claimant's account of past events in relation to the injury to feelings and personal injury and his reporting of his injuries was unreliable.

160. Two key assertions the claimant has made to support his compensation claim have been found to be untrue. The claimant would not have returned to work on or around January 2020 and the claimant did not genuinely believe he had been expelled by the letter dated 27 November 2019. **These were false assertions the claimant has made knowing them to be untrue in another attempt to mislead the tribunal to support his compensation claim. This was unreasonable conduct of these proceedings by the claimant.**

8. The respondents' solicitors also referenced paragraphs of the Rogerson Tribunal's costs decision:

"26. … [Omitted as referenced in the application – see paragraph 6 above].

37. … **The claimant made it impossible to settle** as he was threatening external processes and **was being disruptive as an LLP member** (see findings of fact in Claim 2 paragraphs 195-210)… **From January 2020 the claimant was claiming a staggering £2.5 million in compensation**. Although the respondents offered over £250,000 to settle the claim that offer was rejected as 'derisory'. In December 2020 the claimant's response was to repeat his multi-million offer to settle.

40. … **It is the claimant that has been found (before this hearing) to have conducted himself in an untruthful and misleading way.** There is no basis for the claimant to maintain his allegation that the respondents' have conducted litigation unreasonably. Immediately after agreeing liability the respondents' solicitors engaged in trying to agree terms of settlement with the claimant by suggesting an independent CEDR accredited mediator was used to avoid as the "typical lawyer positional negotiation" which was not helping the parties to agree a settlement. Surprisingly that sensible approach of a third part intervenor was immediately rejected by the claimant's solicitors who continued to adopt the typical lawyer positional negotiation which was not working.

46….[Omitted, as above].

48… [Omitted, as above].

53. Although the paragraphs of the reasons quoted above explains in detail why the tribunal had concluded the claimant was not a truthful witness, none of that detailed reasoning has been addressed in the submissions or the claimant's costs witness statement in which the tribunal is invited to reconsider its assessment. **The claimant has been found to have lied on multiple occasions in his evidence to attempt to mislead the tribunal. He was not a reliable historian**. The evidence showed how the claimant was engaging and interacting with others. He was proactively and forcefully making informed decisions on any disputed matters. **He was using arguments/counter arguments and information to persuade and influence the outcome in the way that was most advantageous to him.** When the respondents had raised genuine concerns that the claimant was engaging in insurance fraud the claimant was dismissive of those concerns. He was able to stand his ground and make decisions about the information he disclosed to others and the information **he concealed from others in the way that was most advantageous to his position**. **He was able to deflect blame onto others when it suited his purpose.** All these behaviours were sustained over a long period of time demonstrating the claimant had all the skills to think through and respond to situations as and when they arose to analyse and assess complex information before responding to it in the way that was most favourable to his position at that time. There was no evidence his cognitive

ability was impaired in the way the claimant now suggests trying to retrospectively explain/excuse the adverse findings of fact that have been made. While we can and do accept the past 5 years have been a very difficult time for the claimant in relation to his cancer and his mental ill-health, **we do not accept the implication made that anyone else in his situation would have behaved in the same way**. As we noted in our judgment the difference for the claimant was that "by bringing these allegations to a hearing the claimant had decided the complaints he has made should be open to that level of scrutiny and be decided by the tribunal on the evidence provided by both parties. **He also affirmed (should be corrected to on oath) that the evidence he gave to the Tribunal was the truth".**

54. There is an obligation for any witness giving evidence to a court or tribunal under oath or by way of affirmation to tell the truth, whether the evidence they give undermines or supports the case being brought. The claimant has not asserted that his ability to tell the truth was impaired by his disabilities of cancer or depression. The 86 5 4006099/128596024 claimant has not explained how any of the mental health symptoms he describes affected his ability to give a truthful answer to any of the questions he was asked at the hearing. Before assessing the credibility of the witness evidence, the tribunal had the opportunity of hearing and seeing evidence spanning a lengthy period starting with the time when the claimant was diagnosed with cancer in 2018 to his retirement in March 2021. **Our detailed findings of fact have shown that throughout this period the claimant was proactively making informed decisions in relation to the partnership, his insurance, and his finances. He was influencing the outcomes to ensure they were in his best interests. He used his assertiveness, his position of authority, argument, persuasion, information, intransigence, and blame as tools in his armoury to control outcomes. The claimant's inability to tell the truth was not excused or explained by the symptoms he describes of "brain fog, confusion, short term memory issues, insomnia".** The tribunal took very seriously its task of assessing credibility especially when dishonesty was alleged and great care in assessing the evidence before making its findings of fact. We took a step back to look at the total picture before reaching **the conclusion that the claimant had been dishonest and lied on multiple occasions to try to mislead the tribunal and obtain relief to which he was not entitled.** From our observations the claimant appeared to be functioning well throughout the proceedings and witnesses to not require any particular skill to answer question truthfully. We also note that when Mr Burns made his submissions drawing the tribunals attention to the inconsistencies in the claimant's account inviting the tribunal to find the claimant was dishonest. Mr Cordrey did not respond to that submission or suggest as he now does that the claimant had difficulty understanding the questions or in giving his answers. The tribunal did not observe and was not alerted to any difficulty. **The tribunal was offered no explanations in closing submissions to explain the inconsistencies in the claimant's evidence.**

58. The claimant's case was materially dependent on advancing multiple assertions which **were found to be untrue and on irrefutable evidence which fundamentally contradicted the assertions he had made.**

60. With those findings of fact in mind we considered the context, nature gravity and effect of the claimant's conduct to decide if it was unreasonable. The nature and extent and scale of **the claimant's deception was extreme because he was attempting to mislead the tribunal to obtain relief knowing he was not entitled to it because he was not telling the truth. We agreed that misleading a court or tribunal is one of the most serious findings of unreasonable conduct by a party and particularly egregious for a party who is a solicitor.**

63. … Having seen the without prejudice save as to costs correspondence it was **unlikely the claimant would have taken any costs warning letter seriously however well drafted and would most likely have complained that the respondents' solicitors were sending aggressive correspondence questioning his honesty and integrity.**

64. The claimant's evidence that the value of his house has not risen substantially for 20 years was implausible. The claimant had purchased his for £850,000 20 years ago and is suggesting a realistic value for the property if sold is £950,000 giving him a share of £475,000. The valuation he has provided shows the property has increased by £100,000 in 20 years. The claimant could not explain how that valuation could be correct and we do not accept it is realistic or reliable. We preferred Mr Burns more realistic estimate based on Zoopla valuation showing a value of £1.47 million - £2.2 million based on the House Price Index which does factor increases over time in a more realistic way. **This was another blatant attempt by the claimant to 'hoodwink' the tribunal about the true value of his half share of the capital asset to try to avoid a costs order. His conduct in attempting to rely on an estimate he knows is not truly representative of the value goes against the claimant and in favour of the making a costs order."**

9. Based on Mr Burns KC's opening submissions on their behalf, the respondents now say that the claimant acted unreasonably in conducting the proceedings as follows:

a. The respondents' decision to resist Claim 1 was upheld in part by the claimant's withdrawal of certain complaints and their dismissal. The respondents acted reasonably in defending the claims and then conceding parts of Claim 1 on a pragmatic and sensible basis.

b. The claimant valued his claim at just short of £3 million plus legal costs and refused the respondents' proposal of an independent mediation to resolve the dispute.

c. In December 2020 the respondents' offer of about £250,000 was rejected as 'derisory', yet at the remedy hearing the claimant valued his non-pecuniary losses at only £80,000.

d. The claimant's conduct was unreasonable and disproportionate and dismissive of any of the constructive attempts made in the interests of all the parties to bring early closure to these proceedings in January 2021 at a time when the claimant had decided that he wanted to leave the partnership.

e. The claimant's remedy claim was based on false assertions and evidence. The claimant gave a deliberately false account to the Rogerson Tribunal to bolster his claim for compensation. He claimed that he felt highly offended by the respondents' discriminatory comments knowing this to be false and when he had privately agreed they were true.

f. The claimant's claim and evidence that 'but for the Claim 1 discrimination, the claimant would have returned to work on or around January 2020' was a deliberately false account to try to mislead the Rogerson Tribunal into making a finding of fact he knew was untrue. The claimant knew that he was giving false evidence that he had been expelled from the LLP in another attempt to mislead the Rogerson Tribunal to support his compensation claim.

Hearing

10. I heard the application remotely by CVP on 1 December 2023. The claimant appeared in person, having previously been represented by solicitors and counsel, and provided written and oral submissions. The respondents were represented, as before, by Mr Andrew Burns KC, who also provided written and oral submissions. I am grateful to both of them. References to page numbers are to the agreed bundle of documents for this hearing.

11. The circumstances in which, with the agreement of the parties, I heard the application sitting alone in place of the Rogerson Tribunal appear fully in the Tribunal's recent correspondence with the parties and case management orders (97-115) and need no further explanation here.

Background history

12. The proceedings have a considerable history which I must summarise to provide context.

13. The claimant, Mr Willis, is a solicitor who was until his retirement from the partnership on 8 March 2021 a partner/designated member of the first respondent firm of solicitors, GWB Harthills LLP, with offices in South Yorkshire specialising in legal aid work. Immediately prior to the events in question, he was the firm's managing partner. The other partners/designated members were the second and third respondents, Ms Russell and Ms Lord[5].

14. There have been two sets of proceedings between the parties in the Employment Tribunal. This is Claim 1, case no 1802068/2020, presented to the Tribunal on 16 April 2020. Very broadly, Claim 1 relates to matters between October 2019 and April 2020. It was, when presented, a complaint of unlawful disability discrimination within sections 13, 15, 19, 20/21 and 45 of the Equality Act 2010, harassment within section 26 and victimisation under section 27. It concerned the respondents' alleged efforts to expel the claimant from the partnership, the removal of his management responsibilities, a report about him to the Solicitors' Regulatory Authority ("the SRA") and the withholding of profit share. In Claim 1, there have been three separate judgments of the Tribunal:

    a. A liability consent judgment of Employment Judge Maidment dated 6 January 2021 (10-11);

    b. A remedy judgment of the Rogerson Tribunal dated 21 December 2022, as mentioned at paragraph 1 above (14-59); and

    c. A costs judgment of the Rogerson Tribunal also dated 21 December 2022 (60-82). refusing the claimant's application for a costs order. This

[5] There was also a fixed-share partner, Mr Jones, but he was not a designated member and is not a party to the proceedings.

judgment also dealt with costs in Claim 2, in which the claimant was ordered to pay to the respondents' costs of Claim 2 to be assessed but capped at £210,000.

15. The claimant presented Claim 2, case no 1803135/2021, to the Tribunal on 7 June 2021. By then, he had retired from the partnership on 8 March 2021. It was also a complaint of unlawful disability discrimination, harassment and victimisation, broadly concerning the claimant's alleged continuing exclusion from the management and decision-making of the firm, the respondents' questioning of his integrity in respect of income protection payments, the withholding of his profit share and the circumstances of his retirement from the firm. In Claim 2, which related to the period from April 2020 to June 2021, there were two judgments of the Rogerson Tribunal:

    a. A liability judgment (rejecting at paragraph 3 all the claimant's extant claims of unlawful discrimination, victimisation and failure to make reasonable adjustments in that case, the claimant having withdrawn his other complaints which the Tribunal duly dismissed), dated 3 May 2022; and

    b. As mentioned above, a costs judgment dated 21 December 2022.

16. The only remaining matter in Claim 1 is this application for costs. Except for the assessment in the County Court of the costs awarded by the Tribunal, Claim 2 is concluded, and it is unnecessary at this point to say anything more about the Tribunal's decision in the claim[6].

17. The proceedings in Claims 1 and 2 arise out of a partnership dispute between the parties. The judgments of the Rogerson Tribunal provide detailed findings of fact about the history to which reference should be made. However, in brief, the events began in mid-2018 when the claimant was diagnosed with bowel cancer. He underwent lengthy and demanding medical treatment and surgery and was unable to undertake any fee-earning or management and other responsibilities for the firm.

18. The claimant had a policy of Permanent Health Insurance ("PHI") with the insurer, Aviva. As he was unfit to work, he claimed PHI income replacement benefits under the policy from November 2018. The parties agreed that he would not receive his partnership profit share, as he was claiming PHI benefits, and he ceased to take drawings from the firm.

19. In October 2019, the position changed. After consulting accountants and Aviva, the claimant asserted that the firm was not entitled to withhold his profit share, even though he was receiving PHI benefits. Ms Russell and Ms Lord fundamentally disagreed, and formed the view that in taking this stance, the claimant was implicating them in insurance fraud. They thought that he could not have both PHI benefits and profit share. The ensuing dispute led to

[6] I understand that the claimant has appealed against the Rogerson Tribunal's decisions in both Claim 1 and Claim 2.

Claims 1 and 2 and subsists to this day. The Rogerson Tribunal made detailed findings of fact about the dispute at paragraphs 95-137 of its Claim 2 liability judgment which it is unnecessary to repeat.

20. In late October 2019 Ms Russell and Ms Lord privately resolved to take steps to remove the claimant's management responsibilities from him. They exchanged confidential WhatsApp messages to this effect which spoke about the claimant in derogatory and regrettable terms and which the claimant saw for the first time during disclosure in October 2020 (see paragraphs 47 and 133 of the Rogerson Tribunal's remedy decision). Separately, they made a report to the SRA about the claimant reimbursing himself alleged work-related expenses when he was not working.

21. On 27 November 2019 Ms Russell and Ms Lord wrote to the claimant inviting him to a partners' meeting on 6 December 2019 at the Rotherham office to discuss whether he was physically and mentally unfit to carry on his duties and obligations as a member under the firm's LLP agreement. The claimant did not attend the meeting which was rearranged for 13 December 2019. Again the claimant did not attend and the meeting proceeded in his absence. He received copies of the minutes of both meetings later the same day. Ms Russell and Ms Lord resolved to remove the claimant from his various roles with the firm, including Managing Partner, and to inform the Registrar of Companies that he was no longer a person with significant control of the firm (see paragraphs 75-83 of the Claim 1 remedy decision).

22. The claimant was not expelled from the firm at the meetings on 6 and 13 December 2019. The Rogerson Tribunal commented adversely on the claimant's contention that he believed at the time that he had been expelled (paragraphs 84-85 of the Claim 1 remedy judgment), and I will return to this later in this decision.

23. On 19 December 2019 Ms Russell and Ms Lord wrote to the claimant giving him notice of a partners' meeting on 31 December 2019 to discuss and vote upon his expulsion from the firm. The meeting did not proceed that day and was adjourned to 7 January 2020. The day before, however, 6 January 2020, the claimant's solicitors wrote to the respondents asserting that the claimant's treatment was discriminatory and that there was no power under the LLP agreement to expel him. The respondents did not proceed with the threatened expulsion and on 22 January 2020 retracted the notice to the Registrar of Companies about significant control. The claimant remained a partner and designated member. The respondents did not, however, restore the claimant to his managerial roles with the firm. They allocated profit share to his current account with the firm and accounted for tax on his behalf but did not permit any partner to take drawings because of the effect of the pandemic on the firm. They maintained throughout, in any event, that they were entitled to withhold from profit share the amount of the PHI benefits the claimant had received from Aviva.

24. In April 2020 the claimant presented Claim 1. This related to the events between October 2019 and January 2020. As already mentioned, it was,

when presented, a complaint of unlawful disability discrimination within sections 13, 15, 19, 20/21 and 45 of the Equality Act 2010, harassment within section 26 and victimisation under section 27. It concerned the respondents' efforts to expel the claimant from the partnership, the removal of his management responsibilities, the report about him to the Solicitors' Regulatory Authority ("the SRA") and the withholding of profit share.

25. Initially the respondents fully contested the claim, which after a case management hearing in June 2020 was listed for an eight day full merits hearing beginning on 6 January 2021. I understand the claimant's schedule of loss valued the claim, including past and future loss of profit share, at over £3 million.

26. With the parties' agreement, the Tribunal listed the case for a Judicial Mediation in September 2020 but the respondents withdrew from the process, asserting there was no prospect of settlement. However, following a change of solicitors, on 24 November 2020 the respondents made an open part-admission of the claim. The Rogerson Tribunal attributed this change of position to the involvement of new solicitors and described it as "sensible and pragmatic". Following discussions between the parties before the hearing, during which the claimant agreed to withdraw his other allegations in the case, the Tribunal (Employment Judge Maidment, sitting alone) issued the consent judgment of 6 January 2021 reflecting what the respondents had admitted in the letter of 24 November 2020, and made case management orders for a remedy hearing.

27. As it did not appear in the consent judgment, I note that the letter of 24 November 2020 (447-450) included the following wording:

"The respondents admit that the above-admitted acts of discrimination caused the loss claimed in the second paragraph 120.2 and paragraph 120.4 of the Particulars of Claim, namely:

a Injury to his health and feelings to be assessed
b Financial loss (if any) to be assessed
c Interest (if any)."

28. The 6 January 2021 consent judgment (10-11) was in the following terms:

"JUDGMENT

1. On the basis of admissions made by the respondents in their representative's letter of 24 November 2020 and by consent it is declared that:

a. The claimant's complaints of discrimination arising from disability (Section 15 of the Equality Act 2010) are well founded and succeed in respect of

i. The claimant's removal from his role as designated member and managing partner of the first respondent
ii. The taking of steps to expel him as a member of the first respondent
iii. Removing and reinstating the claimant as a person with significant control of the first respondent

iv. Removing the claimant from the first respondent's decision making and management processes
v. Withholding from him management and accounting information relating to the first respondent
vi. Excluding the claimant form a partners meeting in January 2020.

b. The claimant's complaints of indirect disability discrimination (Section 19 of the Equality Act 2010) are well founded and succeed in respect of the practice of holding partnership meetings at the first respondent's Rotherham office.

c. The claimant's complaints of a failure to make reasonable adjustments (Section 20 of the Equality Act 2010) are well founded and succeed in respect of a failure to allow the claimant to work from home, continue with his management roles and/or return to work on a phased basis.

d. The second and third respondents are liable for the aforementioned acts of unlawful discrimination as agents of the first respondent which is treated as having done their acts.

2. The claimant's remaining complaints are hereby dismissed upon his withdrawal of them. For the avoidance of doubt, no breach of contract claim was brought by the claimant in these proceedings and the claimant has stated a wish to reserve his right to bring such a complaint.

3. This matter shall proceed to be listed for a remedy hearing and to hear an application by the claimant for his costs in bringing these proceedings."

29. The Tribunal listed the remedy hearing for 2 June 2021. It did not proceed because of CVP connection issues. It is impossible to know now what might have happened had it proceeded at that time. Meanwhile, the claimant had retired from the firm on 8 March 2021. He presented Claim 2 on 7 June 2021. The parties agreed that Claim 1 remedy would be held over until liability had been decided in Claim 2.

30. The Claim 2 liability hearing before the Rogerson Tribunal proceeded in November 2021. The Tribunal issued its decision (with reasons extending to 89 pages) in April 2022. The outcome was disastrous for the claimant, whose claims were dismissed on their merits or following withdrawal by him.

31. Following this, in October 2022 the Rogerson Tribunal dealt with remedy in Claim 1 and the claimant's and respondents' applications for costs in Claims 1 and 2 respectively; the Tribunal promulgated its decisions in December 2022. In each case the outcome was just as unfavourable for the claimant. In Claim 1, he was awarded no remedy for the admitted acts of unlawful discrimination, and his application for costs was rejected. In Claim 2, the respondents' application for costs on the basis of his unreasonable conduct of the proceedings succeeded[7] and a costs order was made, with the amount to be decided by detailed assessment in the County Court but capped at £210,000.

False evidence to the Tribunal: paragraphs 9e and f above

32. In support of their application for a costs order, the respondents assert that the claimant's remedy claim was based on false assertions and evidence.

[7] The respondents also contended that the claim had no reasonable prospect of success within rule 76(1)(b), but the Tribunal did not find it necessary to decide the point.

They say that the claimant gave a deliberately false account to the Rogerson Tribunal "to bolster his claim for compensation". They say that he claimed he felt "highly offended" by the respondents' discriminatory comments knowing this to be false and something that he privately agreed was true.

33. The respondents say that the claimant's claim and evidence that 'but for the Claim 1 discrimination, the claimant would have returned to work on or around January 2020' was a deliberately false account to try to mislead the Rogerson Tribunal into making a finding of fact he knew was untrue. They contend that the claimant knew that he was giving false evidence that he had been expelled from the LLP in another attempt to mislead the Rogerson Tribunal to support his compensation claim.

34. The respondents do not invite me to make findings of fact that the evidence which the claimant gave to the Rogerson Tribunal was untrue or that he based his claim on assertions that he knew were false. Instead, they rely on the express findings of the Rogerson Tribunal in the Claim 1 remedy decision to such effect. At paragraphs 55 to 86 the Rogerson Tribunal made findings about the claimant's alleged wish to return to work before the admitted discrimination, and at paragraphs 102 – 120 are the findings about the attempts to expel him. The following paragraphs relied on by the respondents are particularly material (emphasis added):

"66. Contrary to the claimant's account which was unsupported by the undisputed transcript we find the claimant had no intention of returning to work before the admitted discrimination. He has given **a deliberately false account** at this hearing to bolster his claim for compensation. On 29 November 2019, he had confirmed to the insurer that his cancer related absence to continue to the next review in February 2020.He was not 'highly offended' by the suggestion he should be deemed unfit and had agreed it was 'true' but presents a contrary position to support his claimed losses.

67. Having carefully considered the position **we find the claimant was presenting a false account at this hearing to try to mislead the tribunal into make a finding of fact he knew was untrue** (but for the Claim 1 discrimination, the claimant would have returned to work on or around January 2020"). If the claimant had been transparent with Mrs Lord and Miss Russell about what he was saying to his insurer, he would have had to admit he agreed he should be deemed unfit and could not retain his roles and responsibilities which should be reassigned to them in his absence. **The claimant was not being transparent with the Insurer or with the respondents or with the tribunal.**
……..

120. … The claimant's description of hurt feelings in relation to this detriment is completely reliant on his account of the expulsion being accepted by the Tribunal. **We found that account was untrue.**
…..

160. Two key assertions the claimant has made to support his compensation claim have been found to be untrue. The claimant would not have returned to work on or around January 2020 and the claimant did not genuinely believe he had been expelled by the letter dated 27 November 2019. These were false assertions the claimant has made knowing them to be untrue in another attempt to mislead the tribunal to support his compensation claim. This was unreasonable conduct of these proceedings by the claimant."

35. These findings go beyond an assessment of credibility. They are findings that the claimant gave evidence that he knew was untrue: first, that he believed he had been expelled in November 2019; second, that he would have returned to work in January 2020 had it not been for the admitted discrimination. I will return to this in my conclusions on the application.

Settlement discussions: paragraphs 9a to d above

36. During the proceedings, there were discussions between the parties on a without prejudice save as to costs basis about the basis of the claim and defence and possible settlement. I have copies of the correspondence in the hearing bundle. The respondents contend that the claimant conducted the proceedings unreasonably by not engaging with settlement proposals.

37. Specifically, the respondents assert that their decision to resist Claim 1 was upheld in part by the claimant's withdrawal of certain complaints and their dismissal. They say that they acted reasonably in defending the claims and then conceding parts of Claim 1 on a pragmatic and sensible basis.

38. The respondents say that the claimant valued his claim at just short of £3 million plus legal costs and refused the respondents' proposal of an independent mediation to resolve the dispute. They say that in December 2020 their offer of about £250,000 was rejected as 'derisory', yet at the remedy hearing the claimant valued his non-pecuniary losses at only £80,000.

39. The respondents assert that the claimant's conduct was unreasonable and disproportionate and dismissive of any of the constructive attempts made in the interests of all the parties to bring early closure to these proceedings in January 2021 at a time when the claimant had decided that he wanted to leave the partnership.

40. Before I describe the conduct of the settlement discussions, I make two preliminary observations.

41. First, the respondents' application for costs relates exclusively to Claim 1, and to the period from 6 January 2021. However, as will emerge, the discussions about settlement, at least until late in the proceedings, ranged wider than Claim 1, and the respondents refer to earlier settlement discussions in support of their assertion that had the claimant properly and reasonably engaged with their settlement proposals at that time, the proceedings need not have continued after January 2021.

42. Second, I have seen the findings of the Rogerson Tribunal at paragraphs 30 to 49 of its December 2022 costs decision. They made findings about the reasonableness of the parties' conduct of the proceedings in the context of the claimant's application for Claim 1 costs asserting the respondents had acted unreasonably within rule 76(1)(a). They found, at paragraph 48, that:

"**the respondents and their solicitors' conduct of these proceedings throughout has been reasonable and proportionate. From the evidence we have seen the claimant's**

conduct was unreasonable and disproportionate and dismissive of any of the constructive attempts made in the interests of all the parties to bring early closure to these proceedings in January 2021 at a time when the claimant had decided that he wanted to leave the partnership."

43. I give due respect to these findings. However, I am hearing a different application which asserts that the claimant acted unreasonably in his conduct of the proceedings, which was not an application before the Rogerson Tribunal. I am not bound by the Rogerson Tribunal's findings. I will make my own findings and reach my own conclusions on the respondents' application, including whether the claimant acted unreasonably within rule 76(1)(a) and if so, whether I should exercise my discretion to make a costs order.

44. At all times the parties were represented by solicitors and counsel and all correspondence was between representatives.

45. On 6 January 2020, accompanying their initial open letter about his treatment, the claimant's solicitors wrote to the respondents on a without prejudice and subject to contract basis (298-300)[8]. They asserted the claimant's distress at his treatment whilst undergoing treatment for cancer and his concern at the loss of his career with the firm he had built up over 35 years. They said that the claimant, with the right support and reasonable adjustments, had hoped to work until retirement at age 65. They asserted that the treatment had caused personal injury and had irreparably damaged the relationship of trust and confidence between the parties. They proposed settlement terms including the claimant leaving the firm on a date to be agreed, payment of accrued profit share of £436,000 and repayment of capital of £75,000, £44,000 compensation for injury to feelings and a compensation payment for loss of his role of "at least £2.5 million", based on future loss of profit share until retirement at age 65. I do not know if the respondents replied to these proposals. I have no relevant correspondence in the bundle.

46. On 26 August 2020 (302-305), ahead of the listed Judicial Mediation in Claim 1, and after the claimant had served his formal Schedule of Loss, the respondents' then solicitors challenged the claimant's valuation of his claim, which they asserted amounted after grossing-up to over £3million. They proposed that the claimant should retire from the firm and receive a payment equivalent to the profit share he would have received had he worked throughout the period of his absence, less the PHI benefits he had received, and repayment of his capital of £75,000, amounting to an estimated figure of £210,000. The claimant made no formal response, but the respondents withdrew from the Judicial Mediation, asserting that the parties were too far apart for there to be any realistic hope of settlement.

47. I interpose that it was to be a constant refrain in the settlement discussions that the respondents required PHI benefits received by the claimant to be deducted from any profit share paid to him, and I will return to this.

[8] Although the letter was marked "without prejudice" rather than "without prejudice save as to costs" basis, neither party has objected to my seeing it.

48. On 22 October 2020 the respondents' new solicitors put forward settlement terms (306-308). These were in settlement of Claim 1, and fell into two parts: first, a payment of £40,000 for injury to feelings; second, the claimant would remain a member of the firm; he would continue to receive his profit share as a member of the firm and the parties would enter into mediation with a CEDR accredited mediator about reasonable adjustments, the roles and responsibilities of the designated members, updating the terms of the LLP agreement and the treatment of the PHI benefits the claimant had received.

49. On 3 November 2020 the claimant's solicitors (312-3) rejected the offer as "derisory". They asserted (in very strong terms, including, by way of example, the words "professionally humiliated") the harm that the respondents had caused the claimant and contended that it was inappropriate to make an offer on the basis that he would remain a member of the firm. They reiterated the proposals in the letter of 6 January 2020 and invited the respondents to reconsider their offer based on his ceasing to be a partner.

50. On 4 November 2020 the respondents' solicitors (314-5) suggested that discussions about the claimant ceasing to be a member of the firm should take place through mediation and proposed a stay of the proceedings to enable CEDR mediation to take place on all matters between the parties. There were then discussions between representatives about the preparation of financial information to assist in the process, including a proposal of a without prejudice meeting of the parties and representatives if the claimant would not agree to mediation (316-320).

51. On 13 November 2020 the respondents' solicitors proposed (321-2) a payment of £40,000 for injury to feelings and payment of the claimant's legal costs for Claim 1 and arrangements for him to receive his full profit share to retirement. The claimant's solicitors responded on 18 November 2020 (323-4) in terms that the claimant would have been prepared to enter into mediation if the offer had been made earlier, but he had now incurred costs in preparing for the final hearing that was only two months away and there was no purpose in settlement discussions when the parties were too far apart.

52. Finally on 15 December 2020 the respondents' solicitors proposed (329-333) payment to the claimant of unpaid profit share (after the deduction of PHI payments received by him) totalling over £150,000 (supported by detailed calculations) plus the return of capital of £78,750 and £40,000 for non-pecuniary losses. This was subject to the claimant agreeing to the firm taking out two loans (one of which was a Coronavirus Business Interruption Loan) to fund the lump sum payments. The respondent's solicitors also tentatively suggested an alternative based on the claimant retiring but receiving sums equivalent to the profit share he would have received as if he had not retired, to age 65, but as far as I am aware, nothing more was heard of this.

53. On 17 December 2020 the claimant's solicitors again rejected the proposals as "derisory"(334-5). They asserted that they were not prepared to put forward

any counterproposals as the parties were too far apart. They disputed the contention that PHI payments should be deducted from profit share.

54. This ended, without agreement, the first stage of settlement discussions. By now, the respondents had made, on 14 November 2020, their open part-concession of Claim 1 and on 6 January 2021 the Tribunal issued the consequent consent judgment. At this point, therefore, the respondents had admitted some of the claimant's allegations in Claim 1 and the claimant had withdrawn the rest of his allegations in the claim.

55. Following the consent judgment of 6 January 2021, the claimant's solicitors wrote to the respondents' solicitors again on 28 January 2021 (339-341). They contended that the claimant's position as a member of the firm was becoming increasingly untenable. They stated that the claimant had received confirmation from Aviva that his PHI claim had been properly made and that he had been transparent about the circumstances. They also stated that a detailed psychiatric report on the claimant confirmed that on the balance of probabilities, the respondents' attempt to expel him and their discriminatory and unlawful actions had caused his current mental health state. They proposed a settlement package involving an agreed termination date before the end of February 2021; a payment of £482,325 as the balance of the claimant's profit share net of tax; repayment of the claimant's capital of £75,000 plus interest of £7,500; a compensation payment of £1.75 million gross (to include an injury to feelings award); and payment of legal fees.

56. The respondents' solicitors replied on 9 February 2021 (342-3). They stated that the profit share could not be agreed. Their position remained that PHI payments must be deducted. They confirmed that the respondents were unable to fund the payment of a lump sum from a Coronavirus Business Interruption Loan. Finally, on 19 February 2021, the respondent's solicitors advised (345) that as the parties were too far apart, there was no purpose in further negotiations. As far as I am aware there were no further negotiations until June 2022, by when the position in the proceedings was very different. In April 2022 the Rogerson Tribunal had promulgated its decision dismissing Claim 2, and in May 2022 the claimant had appealed that decision

57. On 1 June 2022 (346-351) the claimant's solicitors initiated further settlement discussions by suggesting the parties' counsel meet informally to see whether there was a possibility of settlement. In a lengthy letter, they set out the claimant's position in relation to the various heads of loss. These included:

    a. Past profit share, which they valued at approximately £623,923.

    b. Future profit share, valued at £918,345 and involving an assessment of the chance that the claimant would have remained a designated member until retirement. They asserted that counsel had agreed as part of the process leading to the consent judgment in January 2021 that profit share, past and future, would form part of the Claim 1 remedy calculation.

c. Injury to feelings, valued at £35,000.

d. Aggravated damages of £10,000, referring to the disparaging comments made by the respondents about the claimant. including describing him as "the one with cancer", "withered old man", "scrote" and the like..

e. Personal injury damages of £22,000 and care costs of £90,000.

58. The respondents' solicitors replied on 8 June 2022 (352-357). They asserted that the parties were too far apart for settlement discussions between counsel to be productive, although they agreed that counsel should discuss what issues remained as part of Claim 1 remedy. They set out the respondents' position about the claimant's heads of claim:

a. They asserted that no profit share should be awarded, as the Rogerson Tribunal had decided in Claim 2 that the withholding of profit share had not been discriminatory, and no loss of profit share arose from the admissions in Claim 1 which would concern non-pecuniary loss only.

b. They disputed that the claimant had an arguable breach of contract claim for profit share, arguing that whilst the Rogerson Tribunal had found in Claim 2 no implied term of the LLP agreement that permitted withholding of profit share, the claimant had agreed in 2018 that for as long as he received PHI benefits, he should not also receive profit share.

c. They noted that the claimant had reduced his claim for injury to feelings from £45,000 to £35,000 and invited him to reconsider his position.

d. They challenged the claimant's claims for personal injury and care costs, whilst not putting forward any counteroffer.

59. In their letter of 15 June 2022 (364-5) the claimant's solicitors valued his Claim 1 non-pecuniary losses at around £157,000 plus interest. (They also said that his claim for costs in Claim 1 was £194,575.) They reiterated that the claimant was entitled to profit share until retirement although they conceded that any claim for future profit share must await the outcome of his Claim 2 appeal.

60. On 28 June 2022 (367-372) the respondents' solicitors offered a payment of profit share of £195,761 (the figure was after deduction of PHI payments from what would otherwise have been profit share of £405,683), £20,000 for general damages, and offset of these payments against 80% of their Claim 2 costs (£222,156.84), abandoning their claim for the modest balance in their favour.

61. Correspondence between solicitors about possible settlement continued. The claimant rejected the respondents' offer on 8 July 2022 (373-377), proposing a global settlement (including profit share) of £478,836 after tax and the withdrawal of the respondents' application for Claim 2 costs.

62. On 13 July 2022 (378-380) the respondents rejected the claimant's proposal but offered £15,000 for injury to feelings, £20,000 for personal injury and £7,500 for care costs, resulting in a total offer of £42,5000 for Claim 1, and now excluding any claim the claimant might make for breach of contract for profit share (in respect of which a separate offer was made, which I do not need to describe) and costs applications. This was the first time that either party had proposed a settlement confined to Claim 1 remedy. The offer was stated to be time-critical and open for acceptance until 21 July 2022, due to the need to lodge counsel's brief for the remedy hearing. On 20 July 2022 (384), the claimant's solicitors rejected the offers for Claim 1 and profit share.

63. On 23 August 2022 (385) the claimant's solicitors proposed settlement of Claim 1 for £56,121.05, the higher figure being referable to the figure for care costs. The respondents' solicitors rejected this, their position now being that the figure of £42,500 would not be increased but the settlement must reflect legal costs incurred since the time for its acceptance had passed. Finally (384-398), the position was reached between solicitors in early September 2022 where the settlement figure of £42,5000 was agreed but the respondents required this to be reduced by £22,000 for their legal costs, meaning a net payment of £20,000. The claimant rejected this, and there matters rested without settlement. The Claim 1 remedy hearing duly proceeded in October 2022.

64. I will consider whether the claimant acted unreasonably in these settlement discussions when I come to my deliberations below.

Relevant law

65. The parties are largely agreed on the relevant law. I will summarise it briefly.

66. Rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013 provides for the Tribunal to make a costs order on the ground that a party 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.

67. In this case the respondents say that the claimant acted unreasonably in his conduct of the remedy proceedings in the ways set out at paragraph 9 above, and It is common ground that the Tribunal must apply a two-stage process: first, it must decide if the claimant's conduct reached the threshold of unreasonable conduct under rule 76(1)(a); second, if so, whether to exercise its discretion to make a costs order against the claimant, and if so, in what amount (**Vaughan v London Borough of Lewisham 2013 IRLR 713,** at paragraph 5).

68. The task of the Tribunal in exercising its discretion is to look at the whole picture of what happened in the case and decide whether there has been unreasonable conduct by the claimant in conducting the case and if so, to identify the conduct, what was unreasonable about it, and what effect it had.

However, there is no requirement for a precise correlation between the conduct and the costs incurred (**Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420,** following **McPherson v BNP Paribas (London Branch) 2004 ICR 1398).**

69. In the Employment Tribunals, costs orders are the exception rather than the rule (**Yerrakalva; Gee v Shell UK Limited 2003 IRLR 82**).

70. There is no point of general principle that if a party has lied, even about a central contention in the case, that will inevitably result in an award of costs against that party. The Tribunal must always examine the context and look at the nature, gravity and effect of the lie in determining the unreasonableness if the alleged conduct (**Arrowsmith v Nottingham Trent University 2012 ICR 159).** Whilst a party who pursues a claim which he knows is dishonest can expect a Tribunal to find unreasonableness where a party is shown to have been dishonest in respect of their claim (**Nicolson Highlandwear v Nicolson 2010 IRLR 858**), the conclusion is fact-sensitive and does not involve the application of some legal principle (**Daleside Nursing Home v Mathew UKEAT/10519/08).**

71. In **Daleside**, the Employment Appeal Tribunal overturned as perverse a Tribunal's refusal to make a costs order where the claimant's lie was at the heart of her claim, but emphasised, as the Court of Appeal observed in **Arrowsmith**, that the decision was based on the facts of the particular case and established no principle of law.

72. Where a costs order is sought based on dishonesty, the party must be given a proper opportunity to address the contention of bad faith (**Treska v Master and Fellows of University College Oxford UKEAT/0298/16**). However, the circumstances in **Treska** were very different to this case; the claimant had had no warning, and no opportunity to make representations, about the Tribunal's finding of bad faith. In this case, the respondents made the basis of their application clear from the outset, founding it on the Rogerson Tribunal's findings that he gave false and untrue evidence.

73. Unreasonable refusal to enter into settlement negotiations or to accept a settlement offer may amount to unreasonable conduct, especially where the party persists in unsustainable allegations (**Kopel v Safeway Stores PLC 2003 IRLR 753)**.

74. The purpose of a costs order is compensatory, not punitive. Whilst the Tribunal is not obliged to take into account a party's means in deciding whether to make a costs order (**Vaughan**), it should not make an award which the party has no means of paying and should consider capping the award (**Herry v Dudley Metropolitan Borough Council 2017 ICR 610).**

Submissions for the respondents

75. Mr Burns KC says that the respondents rely on the claimant's unreasonable refusal to settle from mid-2020 onwards.

76. He contends that the respondents pointed out fundamental flaws in the claimant's remedy claim in their early without prejudice save as to costs letter of 26 August 2020 (302-305) and made an initial attempt to settle in much better terms than the claimant achieved by proceeding to a hearing.

77. He says that in the letter of 22 October 2020 the respondents offered a settlement of £40,000 for Claim 1 non-pecuniary losses on the basis that the claimant remained a member of the LLP entitled to a continuing profit share (306-308). The respondents had therefore made offers on the alternative bases that he left or remained a member of the firm. The claimant rejected this latest offer as 'derisory' (312-313) in his letter of 3 November 2020. Mr Burns says that the claimant ought to have engaged with these attempts to settle, and his failure to do so was unreasonable.

78. Then, he says, the respondents proposed CEDR mediation (314-315) and a roundtable settlement meeting (321-322). Neither ADR route was accepted by the claimant.

79. Finally, on 15 December 2020 the respondents proposed to pay unpaid profit share (less PHI payments already received) totalling over £150,000 plus capital of £78,750 and £40,000 for non-pecuniary losses (329-333).This offer (over £250,000 and designed to settle Claim 1 and the yet-to-be -issued Claim 2) was rejected on 17 December 2020 also as 'derisory' (334-335).

80. Although the claimant initially refused to make a counter-offer, he did make an offer to settle on 28 January 2021 (339-341) for £482,325 of profit share, £82,500 capital, £1.75 million compensation and £115,000 of legal costs (with the respondents paying all the claimant's tax on all payments). His valuation of Claim 1, Mr Burns says, was ludicrous and unreasonable. Mr Burns accepts, however, that the respondents' position was that PHI payments must be deducted from profit share, a position that the claimant never accepted. He acknowledges that neither side's position about this was correct, as it transpired.

81. Interposing at this point, I have already said that an intractable issue between the parties was whether the claimant was entitled to receive both profit share and PHI benefits. The claimant's position was that he was, the respondents' that he was not and any payment of profit share should be reduced by the PHI benefits he had received. I have also already said that the Rogerson Tribunal fond that there was no implied term of the LLP agreement that the respondents could withhold profit share, and that view is reflected in correspondence from Aviva's solicitors, Mills & Reeve, to the effect that the claimant was entitled to profit share and should repay to Aviva PHI payments made to him to which he was not entitled (350-347). This suggests that overpayment of PHI benefits was a matter between the claimant and Aviva, and the respondents should pay profit share to him without deduction.

82. Mr Burns submits that it was unreasonable for the claimant to refuse to compromise Claim 1 for a generous £250,000 payment and instead insist on

a fanciful settlement of over £2.4 million. That sum was totally unrealistic and based on a dishonest assessment of the claim by the claimant. That unreasonable behaviour perpetuated a claim that should have settled in 2020 and resulted in all the costs that are claimed in the respondents' schedule of costs (beginning 6 January 2021).

83. Mr Burns submits that the claimant's unreasonable stance during this period would of itself justify an order for costs.

84. Mr Burns says that the claimant compounded his unreasonable conduct in his response to the respondents' further reasonable attempts to settle in mid-2022. In an attempt to save the substantial hearing costs of the Claim 1 remedy hearing in October 2022, the respondents offered a settlement on 28 June 2022 of £215,716 for Claim 1, to be largely offset against 80% of the respondents' Claim 2 legal costs (367-372). That generous offer would have saved the need for substantial additional costs incurred by both parties in late 2022. It was rejected on 8 July 2022 (373-377) with the claimant proposing a settlement of £478,836 after tax and the respondents withdrawing their (successful) application for Claim 2 costs.

85. The respondents made further offers in July 2022 which were rejected by the claimant, who thereafter offered to settle the non-financial heads of Claim 1 only (for £55,121 (378-380)) which was of no utility as the remedy hearing would still have to go ahead. There was further discussion about a partial settlement but no progress before the October 2022 hearing.

86. Mr Burns submits that the late disclosure of the recording of the claimant's telephone conversation with Mr Munday of Aviva revealed that the claimant was lying about his intention to return to work. Mr Burns directs me to paragraph 67 of the Rogerson Tribunal's Claim 1 remedy judgment, which he describes as "extraordinary". He observes that the claimant's case that he believed he had been expelled in November and December 2019 was directly contradicted by the contemporaneous documents: from those documents, as the Rogerson Tribunal found, he cannot have believed that. His claim for compensation was based on what the Rogerson Tribunal found were lies.

Submissions for the claimant

87. The claimant's written submissions are very lengthy, extending to almost 50 pages. I do not criticise him for that, but I intend no disrespect by summarising only his main points, here and in my conclusions.

88. The claimant reminds me that following **Yerrakalva**, I should look at the whole picture in deciding whether his conduct was unreasonable and if so, what was unreasonable about it and what effect it had.

89. The claimant contends that the respondents were found in the consent judgment of 6 January 2021 to have taken unlawful steps to get rid of him. These included attempts to expel him from the firm, removing him as a person with significant control, excluding him from meetings and financial information,

not allowing him to return to work on a phased basis and holding partners' meetings in the office instead of at his home. He says that Ms Lord said in evidence that from November 2019, there was no way back for him. Because the November 2019 letter copied the language of clause 20 of the LLP meeting regarding expulsion, he thought that he had been expelled. He had also believed that counsel had agreed in January 2021 that Claim 1 remedy would include the amount of the loss of profit share, not whether he was entitled to claim it at all.

90. The claimant contended that the Rogerson Tribunal had misunderstood the position regarding his health in later 2019/early 2020. The fit note for his absence had been for recovery from cancer; the mental health issues had not then been diagnosed. His consultant was never going to decide about his recovery until an appointment 31 January 2020. He had always believed he would be able to return to work and that was his motivation. There was nothing sinister in what he told Mr Munday on 29 November 2019; he was in a post-operative condition at that point but was intending to return to work but he believed after getting the letter that the respondents wanted rid of him.

91. As to settlement, he understood that the discussions in 2020 were not part of the claim for costs which began from January 2021. But he submitted that the respondents did not participate in settlement discussions in 2020. They withdrew from judicial mediation. He did not accept the respondents were entitled to blame their former lawyers; the fact was that they did not engage with him.

92. The claimant submitted that his solicitors were trying to reach a global settlement, that was why the settlement figures were so large. The profit share figure was over £700,000 but the respondents were offering profit share only if PHI was deducted from it which was not acceptable to Aviva (434-435 and 458-460).There was no provision in the LLP agreement allowing a reduction on profit share. (I have commented on this aspect at paragraph 81 above.)

93. The claimant accepted there were settlement offers in summer 2022 but there were offers to and fro and the lawyers were at loggerheads. He disputed that he had been unreasonable, what had taken place was part of a normal negotiation process.

Deliberations and conclusions

94. I begin with some preliminary observations. First, the respondents' application for a costs order is based only on the claimant's unreasonable conduct of the proceedings under rule 76(1)(a). The respondents do not contend that the claimant's case (or any part of it) had no reasonable prospect of success under rule 76(1)(b).

95. Second, although in his written and oral submissions the claimant repeatedly invited me to do so, I cannot go behind the Rogerson Tribunal's findings about

the truthfulness of the claimant's case and his evidence at the remedy hearing. The Rogerson Tribunal rejected the claimant's evidence that he believed he had been expelled at the meetings in December 2019, and the claimant's explanation for that belief which he has given in this hearing (paragraph 89 above) is immaterial. I will not consider whether the Rogerson Tribunal may have misunderstood the evidence about the claimant's health (paragraph 90 above). Nor is it material to my deliberations that the SRA or Aviva reached a different view about the claimant's conduct regarding PHI benefits. I will decide whether the claimant's conduct of the proceedings was unreasonable in the ways contended for by the respondents, and that consideration is based on the Rogerson Tribunal's findings. But as I have already said, whilst I pay due regard to them, I am not bound by the Rogerson Tribunal's findings about the reasonableness of the claimant's conduct in terms of this application for costs.

96. Third, in assessing whether the claimant acted unreasonably in his conduct of the proceedings, and especially regarding settlement, it is important, in my judgment, to assess the reasonableness of his conduct at the various points in the proceedings when settlement discussions took place, without the benefit of hindsight. When assessing this, I will look at the overall context, including the approach of the respondents and the overall and wider dispute between the parties.

97. I begin, then, with the question whether the claimant's conduct of the proceedings reached the threshold of unreasonableness in rule 76(1)(a).

98. I start with the settlement discussions. There were three phases of settlement discussions: (1) August to December 2020; (2) January/February 2021, and (3) June to September 2022.

99. Mr Burns says that the claimant acted unreasonably in this first phase of settlement discussions. He says that the respondents alerted the claimant to fundamental flaws in his remedy claim as early as 26 August 2020. They made settlement proposals on the alternative bases that he left or remained a member of the firm. They proposed mediation (314-315) and a roundtable settlement meeting. Finally, on 15 December 2020 they proposed to pay unpaid profit share (less PHI payments already received) totalling over £150,000 plus capital of £78,750 and £40,000 for non-pecuniary losses. This offer (over £250,000 and designed to settle all matters) was rejected on 17 December 2020 as 'derisory'.

100. Mr Burns says that the claimant acted unreasonably in failing to engage with these settlement proposals and in putting forward an unreasonable valuation of the claim. He submits that it was unreasonable for the claimant to refuse to compromise Claim 1 for a "generous" £250,000 payment and instead insist on a "fanciful" settlement of over £2.4 million. That sum was totally unrealistic and based on a dishonest assessment of the claim by the claimant. That unreasonable behaviour perpetuated a claim that should have settled in 2020 and resulted in the costs claimed in the respondents' schedule of costs (beginning 6 January 2021).

101. In my judgment there is some force in what Mr Burns says. Whilst I acknowledge that the claimant was seeking a global settlement whereby he would leave the firm, the value of £2.5million which he placed on his claim for future loss of profits arising from his discriminatory treatment was unrealistic. There was little evidence in what followed of any realistic wish to settle. The respondents' proposals were rejected as "derisory". The claimant refused to participate in mediation.

102. But on the other hand, the respondents themselves withdrew from judicial mediation in August 2020 on the ground there was too much between the parties. Experience says that even where there appears to be much between the parties, mediation may find a way through. In my judgment, the respondents cannot properly criticise the claimant for declining to participate in mediation when they had themselves done the same thing. The claimant was seeking a global settlement based on him leaving the firm. Even if the figure the claimant put upon it was unrealistically high, this was nonetheless potentially a claim of high value made up of several components and involving contentious issues of causation. The respondents did not put forward any offer in respect of the claimant's claim for future loss of profit share; further, the respondents offered payment of accrued profit share only on the basis that PHI benefits should be deducted from the amount due, which the claimant reasonably assessed would be unacceptable to Aviva. Mr Burns's criticism of the claimant for rejecting a "generous" offer of £250,000 in December 2020 when, by the time of the remedy hearing, the non-pecuniary loss was only £80,000 is, I find, unfair. The proposal in December 2020 was a global offer including profit share, repayment of capital and injury to feelings, and the two figures cannot fairly be compared as Mr Burns seeks to do.

103. Taking matters overall, I do not find that the claimant acted unreasonably in the settlement discussions during 2020.

104. Turning then to the position in early 2021, the respondents had part-conceded the claimant's claim, leading to the consent judgment of 6 January 2021. I infer that the respondents made their admissions because they believed (or were advised) that they were likely to be unsuccessful at trial; a finding of unlawful discrimination might have adverse professional consequences for Ms Russell and Ms Lord and would not be conceded lightly.

105. The claimant made a settlement offer on 28 January 2021 for £482,325 of accrued profit share, £82,500 capital, £1.75 million (a somewhat reduced figure) compensation and £115,000 of legal costs (with the respondents paying the claimant's tax on all payments). I note that the offer was global and not confined to Claim 1, and Mr Burns accepts that the respondents' position remained that PHI payments must be deducted from profit share, a position that the claimant never accepted. Mr Burns acknowledges that neither side's position about this was correct, as it transpired.

106. Although I would not adopt his description of it as “ludicrous”, I agree with Mr Burns that the figure of £1.75million “compensation” was unrealistic. But I note that there was one offer from the claimant and one response from the respondents at this point, with no common ground. The respondents then withdrew from negotiations. There were no further settlement discussions until June 2022, after claim 2 had been decided. I do not find any unreasonable conduct by the claimant at this point.

107. Finally, I come to the position in summer 2022. Mr Burns says that the claimant compounded his unreasonable conduct in his response to the respondents’ further reasonable attempts to settle.

108. In my judgment, however, the parties entered into serious settlement efforts at this point. By this stage, the claimant was no longer pursuing any claim for future loss of profits. The position was reached where the parties agreed that their efforts would focus on Claim 1 remedy only. The parties came perilously close to settlement; indeed, they eventually agreed the figure of £42,500 for non -pecuniary losses, but the settlement foundered on the respondents’ requirement that their costs incurred since the expiry of their time-limited offer should be deducted from that figure. I understand why the respondents adopted that position, but I am unable to conclude that the claimant’s rejection of that final position was unreasonable.

109. For these reasons, I find that the claimant did not act unreasonably for the purposes of rule 76(1)(a) in his engagement with the issue of settlement of these proceedings. I am aware that I have reached a different conclusion about the claimant’s conduct of the proceedings to that expressed by the Rogerson Tribunal at paragraph 48 of the costs decision, quoted at paragraph 8 above, but the issue of whether the claimant had acted unreasonably was not before the Rogerson Tribunal at that point. It is an issue that I have had to decide, and I have reached a finding accordingly.

110. I move on then to the respondents’ contention that the claimant acted unreasonably in pursuing a remedy claim that was based on false assertions and evidence.

111. By way of reminder, Mr Burns says that the claimant gave a deliberately false account to the Rogerson Tribunal to bolster his claim for compensation. He claimed he felt highly offended by the respondents’ discriminatory comments, which related to his ability to work, knowing this to be false because he had privately agreed (in the conversation with Mr Munday) that the comments were true.

112. Mr Burns submits that the late disclosure of the recording of the claimant’s telephone conversation with Mr Munday of Aviva revealed that the claimant was lying about his intention to return to work. Mr Burns directs me to paragraph 67 of the Rogerson Tribunal’s Claim 1 remedy judgment, which he describes as “extraordinary”. The claimant’s claim and evidence that ‘but for the Claim 1 discrimination, the claimant would have returned to work on or around January 2020’ was a deliberately false account to try to mislead the

Rogerson Tribunal into making a finding of fact he knew was untrue. Paragraph 67 was in the following terms:

> "67. Having carefully considered the position **we find the claimant was presenting a false account at this hearing to try to mislead the tribunal into make a finding of fact he knew was untrue** (but for the Claim 1 discrimination, the claimant would have returned to work on or around January 2020"). If the claimant had been transparent with Mrs Lord and Miss Russell about what he was saying to his insurer, he would have had to admit he agreed he should be deemed unfit and could not retain his roles and responsibilities which should be reassigned to them in his absence. **The claimant was not being transparent with the Insurer or with the respondents or with the tribunal.**"

113. Mr Burns says that the claimant's case that he believed he had been expelled in November and December 2019 was directly contradicted by the contemporaneous documents: from those documents, as the Rogerson Tribunal found, he cannot have believed that. Mr Burns says that the claimant knew that he was giving false evidence that he had been expelled from the LLP in another attempt to mislead the Rogerson Tribunal to support his compensation claim.

114. As I have mentioned, the claimant in his submissions said that the Rogerson Tribunal had misunderstood the evidence about his medical position and intention to return to work. He contended that he had believed he had been expelled because the wording used by the respondents in their letter of 24 November 2019 was that of clause 20 of the LLP agreement which dealt with expulsion.

115. As I have already said, I cannot go behind the Rogerson Tribunal's findings. I understand that the claimant disagrees with the Rogerson Tribunal's conclusions, but the Rogerson Tribunal was the arbiter of fact and reached its conclusions after hearing the evidence. They found that the claimant cannot genuinely have believed that he had been expelled in November or December 2019. They found that the claimant had not suffered injury to feelings or psychiatric injury when he was admitting to Aviva that he was unable to work. These were important components of the claimant's remedy claim and the Rogerson Tribunal found that the claimant lied in his evidence about them. Based on those conclusions, I find that the claimant acted unreasonably within rule 76(1)(b) in giving evidence at the remedy hearing in this case that was deliberately untrue about important components of his remedy claim.

116. I move on then to the second issue, which is whether I should exercise my discretion to make a costs order based on the claimant's unreasonable conduct of the proceedings as I have found it to have been and if so, in what amount or for what period. I have a broad discretion what to do, and I have considered the nature and extent of the unreasonable behaviour, what effect it had (recognising that there is no need for a precise correlation) and the overall context.

117. The relevant factors, in my judgment, are these: (1) the Employment Tribunal is largely a costs-free jurisdiction; (2) the respondents had submitted

to judgment in respect of acts of admitted unlawful disability discrimination against the claimant; (3) the claimant was entitled to pursue a claim for consequent remedy; (4) the remedy claim was not in any sense unarguable: the respondents had attempted to remove the claimant from the firm and there was expert evidence in support of the psychiatric injury he contended he had suffered. The Rogerson Tribunal found that the claimant had embellished his evidence by lying as to the effect the treatment had upon him and his intentions regarding returning to work.

118. Having regard to all these factors, and that there is no requirement for a precise correlation between the unreasonable conduct and the costs incurred, I have decided that I should make a costs order but that it should be confined to counsel's fees incurred by the respondents for the remedy hearing before the Rogerson Tribunal. The Rogerson Tribunal's key findings were about the claimant's untrue evidence at the remedy hearing, and I find that a proper and proportionate costs sanction should be in the form of counsel's fees incurred for and at that hearing.

119. I know from the copy fee notes in the hearing file that counsel's fees from 1 August 2022 were £32,500. These fees were for preparation for and attendance at the hearing and in principle, subject to any arguments about proportionality, those are the fees which fall within the costs order I have made. VAT should be deducted as the respondents can recover that.

120. The claimant's ability to pay is not an issue. I need say little about it. The claimant, I am told, has not yet been paid his accrued profit share, which I infer from correspondence may amount to over £400,000. He will be liable to repay to Aviva the PHI benefits he received, and in addition, there is an existing costs order in respect of Claim 2, limited to £210,000. The claimant also has an unpaid liability for his own legal costs. These are substantial liabilities which may extinguish unpaid profit share. However, although there is an unresolved dispute between the parties about the value of the claimant's property, there is sufficient equity in the property on any showing to allow the claimant to utilise the equity to raise funds to pay the limited amount of the costs I have ordered.

121. There is one final matter. The application for a costs order included the respondents' costs of resisting the claimant's earlier Claim I costs application. Mr Burns has not pursued this part of the application during this hearing and made no submissions about it. He has not explained if, and in that event why, he says the claimant acted unreasonably in pursuing his application for Claim 1 costs. I conclude from this that this aspect of the application is not pursued, but it may assist the parties if I say that I would not have been prepared to make a costs order against the claimant in this respect. I would not have regarded the claimant as having acted unreasonably In seeking costs for pursuing a claim which the respondents part-conceded, and I have not found that the claimant acted unreasonably in his engagement with settlement.

122. The costs order is therefore limited to counsel's fees for preparation for and attendance at the Claim I remedy hearing in October 2022.

Outcome

123. I make a costs order, accordingly, limited to the amount of counsel's fees reasonably and properly incurred from 1 August 2022 in preparation for and attendance at the Claim 1 remedy hearing. As the amount of those fees exceeds the limit in rule 78(1)(a) of £20,000 for summary assessment in the Employment Tribunal, it will be necessary for there to be a detailed assessment under rule 78(1)(b). The Rogerson Tribunal made a costs order in Claim 2 for detailed assessment in the County Court. I have considered whether I should make the same order so that the costs can, if possible, be assessed together, but I have concluded that the detailed assessment should be by an Employment Judge. That process will be quicker and will avoid expense and should be straightforward, having regard to the limited costs order I have made. I invite the parties, however, to agree the amount of counsel's fees and advise the Tribunal within 21 days of when the Tribunal sends this decision to them, in which event I will issue judgment for that amount. Alternatively, a detailed assessment will be needed.

Regional Employment Judge Robertson
13 December 2023

Judgment sent to the parties on:

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For the Tribunal:

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