EMPLOYMENT TRIBUNALS

Claimant: **Dr U Prasad**

Respondent: **Epsom and St Helier University Hospital NHS Trust**

Heard at: **London South Hearing Centre (by CVP)**

On: **20 &21 November 2023**

Before: **Employment Judge McLaren**
Members: **Mr. C Mardner**
Ms. K Omer

Representation
Claimant: Did not attend
Respondent: Ms. Motraghi, KC.

JUDGMENT

The claimant is ordered to pay costs to the respondent in the total sum of £20,000 inclusive of VAT.

REASONS

Background

1. A tribunal panel heard this matter on 1-12 and 15-17 November 2021and its unanimous decision was that, other than the Equal Pay claim which the claimant withdrew during the hearing, all the claims failed.

2. The respondent made an application for costs and this hearing was listed to consider that application which was made both on the grounds of unreasonable conduct under rule 76(1)(a) and that the claims had no reasonable prospects of success under rule76 (1) (b).

3. In advance of the hearing, we were provided with a number of documents. These were a joint bundle of authorities, the respondent's costs schedule, the claimant's bundle of 382 pages, a skeleton argument by the

claimant of 57 pages, together with 85 pages of appendices, a GMC expert report of 70 pages, a costs hearing bundle of 594 pages and written submissions by the respondent of some 19 pages.

4. The respondent confirmed that it had not received any written statement from the claimant about her means to pay, or any evidence in support of this as set out in the Employment Tribunal orders made on 23 August 2023. We noted that the claimant had not sent any of these documents to the Employment Tribunal either.

Continuing in the absence of the claimant

5. Prior to today's hearing the claimant had made a number of applications requesting that the case be postponed. These had been addressed in a letter of 15 November and the claimant's request had been refused. The Employment Tribunal's response identified that the claimant had not provided any information about her pre-booked holiday, or the specialist medical advice which had been referred to.

6. By 10 AM the claimant had not attended the tribunal hearing. We delayed the start of the hearing until 10.45 but the claimant was still not present. The claimant had not sent any communication to the Employment Tribunal indicating that she was not attending. Two individuals who identified themselves as the claimant's supporters were in attendance. We are satisfied from this and the claimant's postponement applications that she was aware of the hearing date.

7. There is no record of the claimant's telephone number on the files relevant to this tribunal hearing. At our request the clerk asked one of the supporters if he was in communication with the claimant and whether he had had a number that we could use to contact her. He indicated that he was in touch with the claimant but was not happy to provide her telephone number to us.

8. In the absence of the claimant, we asked the respondent for its position on whether we should proceed in the claimant's absence or whether we should adjourn. The respondent made several submissions in support of its application that we proceed in the claimant's absence.

9. In summary the respondent identified that the claimant had not offered any reason for her non-attendance, and she had not engaged with the orders made at the last hearing. It was submitted that the letter of refusal of 15 November was comprehensive, there could be no confusion about what the claimant needed to provide if she wished to renew her application to postpone and it was clear the application had been turned down. In this case the claimant had already provided detailed written submissions and documents, therefore the disadvantage of continuing in her absence would be minimal. It was submitted that the disadvantage was one the claimant appeared to be prepared to accept because of her non-attendance and non renewal of any postponement application.

10. Dr Ward, who was noted as a supporter of the claimant, asked if he could raise a question. I discussed with him that he was not on the record as a representative of the claimant, and we did not have anything from the claimant giving him authority to speak for her. However, I invited him to ask his question. He wanted to know whether the tribunal had received any medical correspondence. When I clarified whether he meant any particular piece of correspondence he asked whether we had received a letter from a GP saying that the claimant was unfit. I was able to advise him that the GP's letter dated October had been considered as part of the response of 15 November and no further documents had been received after that date.

11. We adjourned to consider the position and having done so concluded it was appropriate to proceed in the claimant's absence. We are satisfied that the letter of 15 November advised the claimant that her application had not succeeded because she had not provided specialist medical advice and/or evidence of her holiday. There have been no further applications or communication with the Employment Tribunal since then. She had not notified us that she was not attending this hearing.

12. We noted that the decision to which this costs application relates was made in 2021 and relates to claims lodged in 2018 and 2019. We also note the claimant has not provided information as to her means to pay, although she was ordered to do so or to elect not to do so by a specific date. We must conclude therefore that she has chosen not to rely on this.

13. Orders were made on 23 August identifying the documents we would consider today. The claimant has had all of these from at least that date and has made no written comments on them. She was ordered to confirm if she intended to raise means to pay and has not done so. If she had attended today, as she has not complied with the orders relating to means to pay, it is possible that the hearing would be limited to her hearing the respondent's submissions and adding, if she wished, any points to her very detailed skeleton also prepared on 23 August and her letter of 14 April. There is therefore less prejudice to the claimant in continuing than might be the case in other circumstances.

14. Looking at things in the round, and considering the overriding objective, we concluded that it was in the interests of justice that we should proceed.

15. Once we had made this decision the respondent then indicated that, while they had previously told the tribunal they did not have a telephone contact number for the claimant, that was not correct, and they had now found one. This was found on the claim form that related to a separate matter.

16. Having been made aware of this, we asked the clerk to search for other matters involving the claimant on the tribunal case management system and we were able to locate a telephone number that was shown on more than one document. The clerk was asked to telephone this number, which she did. On the first occasion she received a response that the line could not be connected. She

tried a further three times and got only white noise. We concluded that we had made reasonable attempts to contact the claimant. We confirmed our decision to proceed in her absence.

Further intervention by the claimant's supporter

17. At the end of the second day, Dr Ward posted the following comment in the chat box.

> Further to my statement yesterday which was followed up with a brief comment on the "chat box" I wish to point out that the stress that has been experienced by Dr Usha Prasad throughout these proceedings was evident at the hearing in November 2021 before Mr Hyams-Parish. I know that Dr Prasad and the journalist, Mr David Hencke, have asked for the audio-visual recordings which I am sure would confirm this. Her inability to recall events, emails, or to refer to documentation within the extensive bundle, whilst giving oral evidence is because of extreme distress. She was not merely tired, but suffered from mental fatigue, which leads to loss of concentration when "put on the spot" under cross-examination in public at a hearing. I consider it is my professional obligation to point this out and would suggest that the audio-visual record of the proceedings of November 2021 are made available to provide objective evidence of the points I have made. It goes without saying that any costs awarded against Dr Prasad would be very damaging to her current state of mind and health. Dr David Ward MD FRCP

18. It was explained to him that any previous comments had not been seen. He was invited to repost them but no further comments were visible to the employment tribunal by the time the hearing concluded. We confirmed to the respondent's representatives that we had not received any confirmation from the claimant that Dr Ward was representing her. We could not therefore take these comments as being made by the claimant or on her behalf directly. Nonetheless, in the interests of transparency we did advise Dr Ward that audiovisual recordings are not made of employment tribunal hearings. There is no such recording of the hearing in November 2021.

Claimants' application to strike out the costs claim under rule 37(1)

19. There is one matter we wish to address before dealing with the costs application. In her response to the respondent's application the claimant had requested that the costs application be struck out submitting that the tribunal had the power to do so at any time. She relied on rule 37.

20. This rule provides the tribunal with the power to strike out *"all or any part of the claim or response".* The respondent's application is neither a claim or response and I have no powers under this rule to strike out their application. It must be heard and resolved unless the respondent withdraws it.

21. The panel must therefore address that application by the respondent.

Grounds of the costs application

22. The initial application was made by letter of 7 March 2022 pursuant to rule 76 (1)(a) and (b). The following paragraphs from the November 2021 decision were relied upon.

158.The Tribunal accepted that the claimant felt genuinely aggrieved about the way she had been treated. There is no doubt that the claimant vehemently denied the allegations relating to her capability or conduct; she believed the issues were more about clinical judgment and she should not have been subject to a MHPS process.

159. The Tribunal considered a very large number of allegations by the claimant, many of which the Tribunal concluded were not very well thought through and, in some cases, were completely misconceived. The Tribunal doubted whether the claimant really believed some of the claims she was making. Examples included allegations relating to breaches of MHPS where the claimant could not identify the breaches; race discrimination allegations where the comparator was the same race; sex discrimination allegations where the comparator was the same sex. The tribunal concluded that the factual premise of many allegations was simply wrong.

160. The Tribunal also concluded that the whistleblowing allegations which flowed from concerns raised by the claimant to the respondent about health and safety were not very persuasive. The Tribunal accepted that as a consultant, the claimant was expected, like any other consultant or clinician, to raise concerns about health and safety; indeed it was their duty. The Tribunal heard that other consultants were raising concerns about such matters as levels of radiation and the state of x-ray machines, alongside the claimant. The Tribunal was not satisfied that the claimant was being targeted for raising these concerns. Neither was it satisfied that the underlying reason for the treatment of her was the fact that the claimant had brought previous Employment Tribunal claims or had raised complaints of mistreatment and discrimination.

161. Ms Motraghi described the claimant's approach as "scattergun". Whether or not that is right, there is no doubt that the claimant's evidence was difficult to understand in places, her witness statement did not provide sufficient, or any, evidence to support some of her claims. She also to failed identify or produce documents to support many of the claims she was making.

23. The respondent summarised their position that they were relying on two points, unreasonable conduct/no reasonable prospects of success. They relied upon allegations where the claimant relied on a comparator with the same protected characteristic as herself; allegations where the factual premise was wrong and accordingly there was no detriment; allegations where the claimant relied on there being a failure and was unable to identify any requirement in law, policy or HR best practice; allegations for which the claimant failed to particularise evidence; and allegations unsupported by any evidence. It also referred to the abandonment of the equal pay claim during the trial on day two.

Relevant Law

24. Costs in the employment tribunal are still the exception rather than the rule. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the tribunal's power to specified circumstances.

25. The grounds for making a costs order under rule 76(1) of the Tribunal Rules are:

- a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) ,or

- any claim or response had no reasonable prospect of success

26. Both of the above grounds are discretionary, i.e., the tribunal may make a costs order if the ground is made out but is not obliged to do so, although the tribunal is under a duty to consider making an order when they are made out. Even if the threshold tests for an order for costs are met, the tribunal still has discretion whether to make an order. That discretion should be exercised having regard to all the circumstances.

27. We agree with the respondent's characterisation that rule 76 requires the Tribunal to determine 3 essential questions:

a) Has the claimant's conduct met one of the threshold jurisdictional tests;

b) If so, does the Tribunal consider it appropriate to exercise its discretion to make an Order for costs;

c) If so, what should the terms of that Order be?

28. We were referred to 2 authorities on the question of whether to exercise our discretion. In the first, McPherson v BNP Paribas [2004]ICR 1398 (CA), we were directed to para 40 "*the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion"* In the second, Yerrakalva v Barnsley Metropolitan Council [2012] ICR 420 we were reminded that the Tribunal's task is not to "*dissect a case in detail and compartmentalise the relevant conduct under separate headings*".

29. The Court of Appeal has cautioned against "*adopting an over-analytical response to the exercise of a broad discretion"*. In assessing whether a party or representative has acted unreasonably, the vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct in bringing, defending or conducting the

case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

30. "No reasonable prospect of success" is determined objectively. The Tribunal must consider how matters appeared at the outset of proceedings and any relevant juncture in issue, not taking into account information which would not have been available to the party in question at the relevant point. We were referred to Radia v Jefferies International Ltd UKEAT/0007/18 21 February 2020

> "At the first stage, accordingly, it is sufficient if either Rule 76(1)(a) (through at least one sub- route) or Rule 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did."

31. If the Tribunal finds as a fact that the party did not consider there was genuine merit in their allegations, costs may be appropriate. When considering whether to make a costs order on this ground, the Employment Tribunal should consider what the claimant knew or ought to have known if he had considered the matter sensibly. Ahir v British Airways plc [2017] EWCA Civ 1392.

32. There is no requirement to link any more causally to particular costs which are being incurred as a result of specific conduct that the employment tribunal identifies as being unreasonable (Salinas v Bear Stearns International Holdings Inc [2013] IRLR 713.) There is no causation test to be applied when considering whether to make an Order under rule 76, or if so, on what terms. We were referred to Yerrakalva at para 41 :

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being 5 claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

33. The Tribunal must not judge a litigant in person by the standards of a professional representative. The fact that a claimant is unrepresented is a factor the tribunal should take into consideration (Vaughan v London Borough of Newham [2013] IRLR 713).

34. There is no requirement for the paying party to have received a costs warning from the receiving party before making a costs order. If the cost warning had been issued, that may be a relevant factor in the exercise the tribunal's discretion.

35. The purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the party ordered to pay the costs. Rule 84 addresses the ability to pay. A tribunal is not obliged by rule 84 to have regard to ability to pay, it is merely permitted to do so. Where a tribunal has been asked to consider a party's means, it should state in its reasons whether it has in fact done so and, if it has, how this was done. If it does not consider this it should say why. If it does decide to consider the ability to pay, it should set out its findings on the matter what impact this had on its decision whether to award costs or on the amount of costs, and explain why. This is set out in Jilley v Birmingham and Solihull Mental Health NHS Trust (UKEAT/0584/06)

> Rule 41(2) gives to the Tribunal a discretion whether to take into account the paying party's ability to pay. If a Tribunal decides not to do so, it should say why. If it decides to take impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the Tribunal has dealt with the matter and why it has done so is generally essential.

36. We were referred to Doyle v North West London Hospitals NHS Trust [2012] All Er(D) (jun) UKEAT/0271/11 and reminded that the Employment Appeal Tribunal held that even if the claimant does not raise the issue of means, it should be raised by the tribunal, particularly before a very large order is made.

37. We were also referred to Shields Automotive Ltd v Greig (UKEATS/0024/10) and reminded that means can include equity in a home even if not readily realisable. We also directed to paragraph 46 of this case where the Employment Appeal Tribunal concluded that where evidence of means remains unclear or unreliable that may be a reason for not taking it into account.

Respondent's submissions

No reasonable prospect of success

38. As set out in the initial letter of application, the respondent contends that the claimant 's complaint had no reasonable prospect of success from the outset. This was a case where any litigant should have appreciated this, and the claimant could and should have done so as an intelligent professional. By the time she litigated her Second and Third Claims at the November 2021 hearing,

she already had significant experience as a litigant of Tribunal processes, including costs and the relevant legal tests.

39. The claimant had the benefit of professional advice via the Medical Protection Society and others, as well as access to legal advice at key junctures, including at the final hearing when she was represented by experienced Employment Counsel. We were referred to various case management hearings and we note that on each of these occasions the claimant had the benefit of a legal representative.

40. We were also taken to the relevant page in the bundle which was a costs warning issued to the claimant. It was submitted that the claimant had the consequences of her actions set out to her and that letter made the respondent's position clear.

41. It was submitted that the claimant unreasonably brought or pursued her whistleblowing complaints based on alleged protected disclosures which were not those put before the tribunal. On the harassments, it was submitted that there was at no point an explicit connection or even implicit link relevant to the "related to sex requirement" in the claims. Furthermore, in some cases the unwanted conduct had not in fact occurred, and in any event did not create a hostile environment. We were referred to many examples of these as set out below

a. Allegations where the Claimant relied on a comparator with the same relevant protected characteristic such as allegations 17(xvi), para 194, 344

b. Allegations where the factual premise was wrong and accordingly there was no detriment

i. Allegation 17(ii), para 173, 180, p373,

ii. Allegation 17(viii), para 183, pp341-342

iii. Allegation 17(xiii), para 189, p343

iv. Allegation 18(v), para 209, p348

v. Allegation 18(vi), para 210, p348

vi. Allegation 17(xiii), para 189, p343

vii. Allegation 18(xvii), para 196, p344

viii. Allegation 18 (xiii), para 213, p349

ix. Allegation 18 (xviii), para 217, p237

x. Allegation 18 (iv), para 213, p349

c. Allegations where the Claimant relied on there being a failure where the Claimant was unable to identify any requirement in law, policy or HR best practice.

i. Allegation 17(v), para 180, p341

ii. Allegation 17(vi), para 181, p341

iii. Allegation 17(viii), para 183, p341

iv. Allegation 18(viii) para 211, p349

d. Allegations which the Claimant failed to particularise in her evidence

i. Allegation 17(vii), para 182, p341

ii. Allegation 18(xx), para 218, p350

iii. Allegation 22(iii), para 230-231, p353

iv. Allegation 17(iv), para 179, p340

v. Allegation 18(x), para 213, p349

e. Allegations unsupported by any evidence

i. Allegation 17(xii), para 188, p343

ii. Allegation 17(xiv), para 190, p340.

iii. Allegation 17 (xviii), para 197, p345

iv. Allegation 18(xxiii), para 221, p351,

v. Allegation 22(i) and (ii), para 230-231, p303 in which the Tribunal remarked expressly that there was “absolutely no evidence from which the Tribunal could conclude a male colleague would not have been treated in exactly the same way.”

vi. Allegation 18(xxiv), para 222, p351

vii. Allegation 18(xx), para 225, p352

f. Allegations which the Claimant failed to particularise in evidence

i. Allegation 17(iv), para 179, p340

42. With reference to the Equal Pay claim it was submitted that this was never a complaint about the rate of pay but about hours. The respondent had to produce 700 pages of documents which were included in the trial bundle for an entirely spurious claim.

Unreasonable conduct

43. While the respondent's primary position is based on no reasonable prospects of success, it also contended that the claimant's conduct was unreasonable having regard to bringing and continuing her complaints. It was submitted that certainly by not later than disclosure, or at the stage of witness statement exchange, or the eve of the hearing it would have been clear that they had no reasonable prospects of success, but the claimant nonetheless chose to continue. The claimant's conduct in relation to disclosure and case preparation was also referred to in support of this application.

44. The effect of the claimant's conduct in bringing and pursuing these claims was to significantly increase both the respondent's and the employment tribunal's costs. It led to a very lengthy hearing and the calling of nine witnesses, one of whom was in very poor health.

Claimant's submissions

45. The claimant had previously sent in 57 pages of written submissions. This expanded upon the letter she had provided objecting to the costs application on 14 April 2022.

46. The letter of 14 April 2022 makes a number of points. It was submitted that the tribunal had not concluded the claimant lacked belief in her own claim. No effective cost warning had been given in this case. There had been no attempt to particularise the costs claimed. The respondent had themselves been unreasonable. The respondent had refused to consider judicial mediation.

47. The claimant reminded us that the tribunal should take into account the special difficulties facing litigants trying to validate prospects of success in their own claims. We were referred to an Employment Appeal Tribunal case. This was not included in the agreed bundle of authorities but we accept the proposition made. A costs order against a claimant in a discrimination case is likely to be very rare even exceptional. It was noted that the tribunal should have in mind the very real difficulties which a claimant in a discrimination claim faces as there is very rarely, if ever, evidence of discrimination and it may be that it is difficult for the claimant to know whether or not they have a real prospect of success until the explanation of the employee's conduct is heard, seen and tested.

48. This letter also raises issues under the European Convention on Human Rights. This is expanded upon in the submissions produced in August.

49. The majority of the second longer document addressed why whistleblowing is important in the health service for the confidence of the public in the medical profession. It also dealt with the claimant's ongoing concerns about the trust's failure to take action. The claimant continues to raise criticisms of the respondent's processes and failure to follow particular principles. These are not relevant to the issue of whether these are circumstances in which a costs order should be made. The document did, however, make a number of other points which we summarise below.

50. The claimant set out how she believed Articles 2, 6,8 and 10 of the European Convention of Human Rights have been infringed by the costs application. The claimant submitted that the Employment Tribunal as a public authority has a procedural duty to investigate infringements under Article 2 which arise as a result of the protected disclosures that she made. She submitted that her Article 6 right to a fair trial had been infringed because this creates a duty to ensure that whistleblowers do not suffer a detriment in making protected disclosures and must have a right of access to relevant judicial processes. A costs order undermines this principle.

51. Her Article 8 rights had been infringed because she had been placed under considerable pressure to cease the protected disclosures throughout the proceedings of several years and it had affected her personal health and well-being. The claimant further submitted that her right under Article 10 to freedom of expression had also been infringed as this should protect the right of the whistleblower and yet she continued to suffer harm as a result of making protected disclosures.

52. The claimant also made submissions on the specific grounds of the respondent's application under the rules. Her response to the application being on the grounds of no real prospect of success was to submit that that was not true as the Employment Tribunal had agreed with some parts of the claimant's case in its judgement. She also submitted that if there were no prospects of success the respondent should have asked for a costs order or made an application to strike out. They had not done so.

53. As far as what was said to be her unreasonable conduct, she submitted that it was not appropriate to categorise mistakes in law made by the claimant during the proceedings as unreasonable, given the context that she was a litigant in person. The categories mentioned by the respondent were pernickety and did not comprise sufficient grounds for a costs order.

Amount of costs sought.

54. The respondent confirmed that the total costs incurred in defending the claims were over £150,000 plus VAT. The respondent was, however, asking the

tribunal to exercise its discretion to make an order of costs the tribunal summary assessment limit of £20,000.

55. The respondent is a public body and therefore costs were met from the public purse. In limiting their application for costs to £20,000 the respondent submitted that it was acting within the overriding objective and reasonably. They were not asking for a proportion of these costs, but for the full £20,000 the tribunal can award. This was a very small amount of the respondent's costs and it was appropriate in the circumstances that the full amount to be awarded.

Means to pay

56. At the preliminary hearing on 23 August 2023 the claimant was ordered to write to the respondent before 29 September to confirm whether she would wish the tribunal to have regard to her ability to pay, should a costs order be made. She was required to provide the respondent with relevant documents. The case management order set out that if the claimant did not provide the confirmation and/or the documentation by particular dates the tribunal could decide it would not have regard to her ability to pay if a costs order were made.

57. The claimant had not provided any such evidence. The respondent had provided some. This included details of the salary scale for a consultant and information about the value of a property that the claimant owns and its likely increase in value since she purchased it.

Conclusion

58. We have considered first whether the claimant's conduct has met one or both of the threshold jurisdictional tests. In considering the findings of fact made by the tribunal we agree with the respondent's characterisation of the position. As clearly set out in that decision, there were allegations where the claimant relied on a comparator with the same protected characteristic as herself; allegations where the factual premise was wrong and accordingly there was no detriment; allegations where the claimant relied on there being a failure and was unable to identify any requirement in law, policy or HR best practice; allegations for which the claimant failed to particularise evidence; and allegations unsupported by any evidence.

59. We conclude that some parts of the claim had no reasonable prospects of success and that that was clear on an objective basis from the moment that they were set out and certainly they should have been come clear to the claimant during discovery and exchange of witness statements. This is not a case where a claimant could not make an appropriate judgement on a discrimination claim until the respondent's explanation could be seen and tested. For example, the chances of succeeding in an equal pay claim based on different hours and not different pay, a sex discrimination claim based on a female comparator, and detriment claims for which the protected disclosure was never produced did not

depend upon hearing evidence in the employment tribunal. They could never succeed.

60. We note again the comment made at paragraph 159 of the Employment Tribunal's judgment that the tribunal doubted whether the claimant really believed some of the claims she was making. The judgment gave examples of these including race discrimination allegations when the comparator is the same race, and sex discrimination allegations where the comparator was the same sex. The tribunal concluded that the factual premise of many allegations were simply wrong. We are therefore satisfied that in continuing to bring this litigation the claimant was also acting unreasonably.

61. Her conduct did, as respondent outlined, result in a very lengthy hearing that a considerable number of witnesses. It also led to an excessively voluminous bundle. It therefore meant that greater cost was incurred both for the respondent and for the employment tribunal whose resources were given to a lengthy and complex hearing.

62. We conclude that the jurisdictional tests under both rule 76(a) and (b) are met. We have gone on, therefore, to consider whether we should exercise our discretion. We have taken a number of points into consideration.

Knowledge of the law/lack of representation

63. Bringing claims where the factual premises are incorrect, or where the claimant is unable to identify the part of a policy she states is being breached are not mistakes of law which an inexperienced individual representing themselves might make. These are matters of fact which would have been within the claimant's own knowledge and did not require legal expertise to analyse.

64. While the claimant refers to herself as a litigant in person and there is no legal representative formally on the record, she is, however, a professional with significant litigation experience. She was also supported by legal advice at every hearing stage.

65. By the time she brought these claims she had already lost a sex discrimination claim and been ordered to pay costs. She would have been well aware that it was not enough to make a mere assertion of difference in treatment and a particular protected characteristic to succeed in a discrimination claim.

No deposit order/ costs warning/ mediation

66. We also note that, while there was no deposit order sought by the respondent, that is not a bar to a costs order being made. We have taken it into account. Mediation applies where there is a desire to settle the claim. Not entering into mediation cannot be a bar to a subsequent costs order.

67. Contrary to the claimant's submission, we also note that the respondent did put the claimant on a costs warning. Its terms were clear. While there is no requirement that this step occur as a condition of a costs order being made, its absence can be taken into account. On these facts we find that the respondent did fairly and properly identify to the claimant the potential consequences of her continuing to litigate. As noted above she had already had a costs order made against her in previous litigation and the claimant would have understood, perhaps better than many claimants, the reality of what could happen if she did not heed the costs warning.

ECHR

68. The claimant seeks to rely on various articles of the European Convention on Human Rights. On the facts before us we have found that the claimant brought claims that had no reasonable prospect of success and pursued them unreasonably. The costs regime does not apply unless these jurisdictional tests are met. We do not find that the existence of the costs regime or its application in the circumstances amounts to any such infringement.

69. While we acknowledge that costs are the exception and not the rule in the employment tribunal, we conclude that this case does fall within those exceptional circumstances. We are satisfied that in the circumstances of an experienced litigant with legal assistance who understood the risk of costs, that we should exercise discretion in these circumstances to award costs to the respondent. We next consider our position on the claimant's means to pay.

Means to pay

70. We are conscious that the respondent in asking for £20,000 is asking for a sum that it says is considerably less that it has incurred. It is nonetheless, a large sum. The claimant was asked by the respondent in correspondence prior to the postponed hearing in August and via an employment tribunal order following the August hearing to identify if she wished to rely upon her means to pay as part of resisting the cost application. She has provided no information whatsoever and has not responded to any of these enquiries.

71. While the respondent has provided some general information, we cannot rely on this to identify the claimant's ability to pay any award. It does not, for example, deal with how often she has worked, exactly what rate of pay she gets (agency workers may get a higher rate), the state of the property that she owns any rent that she pays or other outgoings.

72. In the absence of information from the claimant about her outgoings, and specifically about her means, we find we are unable to take this into account. This is an instance where we conclude that evidence on means is so unclear we cannot take into account and on that basis we do not do so.

The amount of the order

73. Turning finally to the amount that should be ordered. As we are being asked for a summary assessment no detailed assessment of costs is required. We also remind ourselves that there is no causation test so that particular costs being incurred do not need to be identified as being a result of specific conduct.

74. We accept that the respondent has incurred considerably more than the £20,000 it is seeking. We note that costs are compensatory not punitive. We take into account that this is a public body. We take into account that it is seeking to recover only a fraction of the costs incurred and for all those reasons we are awarding the requested £20,000.

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Employment Judge **McLaren**
Date: **3 January 2024**

JUDGMENT & REASONS SENT TO THE PARTIES ON
Date: **18 January 2024**
.....

.....
FOR EMPLOYMENT TRIBUNALS