EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms Anna Prior	**v**	**(1) Greycoat Real Estate LLP** **(2) Mr Nicholas Millican**

Heard at: London Central
On: 28 and 29 November 2023
Chambers 30 November 2023

Before: Employment Judge G Hodgson
Mr M Reuby
Ms H Craik

Representation
For the Claimant: Mr D Tatton-Brown, KC
For the Respondent: Mr N Siddall, KC

JUDGMENT

1. **The claimant shall pay on a standard basis the entirety of the respondents' costs incurred in defending the claims.**

2. **The costs recoverable by the respondents shall be capped at a total of £225,000.**

3. **In applying that cap, the respondents may choose to allocate the capped costs incurred to either respondent one or respondent two. If further directions are needed on this point there is liberty to apply.**

4. **There will be a detailed assessment of cost which will proceed in the county court.**

REASONS

Introduction

1. A tribunal chaired by EJ Grewal, dismissed the claimant's complaints of direct sex discrimination, sexual harassment, pregnancy/maternity discrimination, and victimisation by a judgment dated 24 May 2023.

2. EJ Grewal has now retired. The respondent applied for costs by an application dated 7 June 2023. REJ Freer exercised his powers to appoint EJ Hodgson as chairman of the tribunal, in substitution for EJ Grewal. The original lay members continued.

3. Case management orders were issued by EJ Hodgson following a hearing on 6 July 2023. There was dispute as the proper approach the relevant part of the order reads as follows:

> **2.3 We have agreed that at the costs hearing, the tribunal will need to determine the following: whether the gateway for ordering costs is met; whether the tribunal should exercise any discretion to order costs; and if so, how should the tribunal exercise its discretion.**
>
> **2.4 If the discretion is exercised, the terms of the order will need to be decided which may include the following: the period the costs will be payable; whether the costs will be limited by issue or percentage; whether the cost should be assessed summarily at up to £20,000; or whether the cost should be referred for detailed assessment. I noted that the default position is any costs orders is on a standard basis.**
>
> **2.5 The respondent contended that there should be full disclosure of the claimant's means, to include the means of her husband, and there should be an order for the claimant's husband to provide disclosure. I considered such application to be premature and declined to determine it. The respondent may renew the application in due course.**
>
> **2.6 It was agreed that rule 84 Employment Tribunals Rules of Procedure 2013 provides that the tribunal may take into account means. That is a discretion; it is for the claimant to lead evidence on means, if she requests the tribunal to take her means into account. If the claimant does not put means in issue, the tribunal will be entitled to assume the claimant has means to pay any award.**
>
> **2.7 Mr Tatton Brown proposed that the hearing be in two parts. First to consider, in principle, whether a costs order should be made, and to make that costs order if limited to no more than £20,000. Second, to consider any argument concerning means and whether that should be taken into account.**
>
> **2.8 Mr Siddal submitted that the tribunal should not treat the gateway question as some form of preliminary issue, but should decide whether costs should be ordered. Consideration of means is part of that discretion and should not be heard separately.**
>
> **2.9 I found that splitting the two issues has the potential to lead to significant delay and additional costs. The claimant must decide if she**

> **wishes to alleged she does not have means to pay any award. If she wishes her means to be taken into account, she will be expected to provide full and frank disclosure, both by way of a witness statement and supporting documentation. Her means should be considered at the same time as the gateway question is considered. It is a factor which may be relevant to the making of any costs order. It may be relevant to whether to exercise discretion to award costs and may also be relevant to the question of the amount. I Therefore declined to split the two issues.**
>
> **2.10 I take the view it is for the claimant to provide proper disclosure. If the respondent is unhappy about the disclosure, including any disclosure in relation to access to any property owned by a husband, the respondent may make an application.**
>
> **2.11 We have agreed that the parties' submissions should be completed in one and a half days. The parties will be released at the end of day two. It is anticipated that a reserved judgment will be given.**
>
> **2.12 We agreed the directions at the hearing. They are set out in the orders below.**

4. The costs hearing came before the tribunal 28 November 2023. The claimant elected to give no evidence concerning means or any, further evidence concerning any other matter.

5. The respondent elected to rely on the original application as its skeleton argument. The claimant filed a skeleton argument in accordance with the directions.

6. The parties filed an agreed bundle of documents and a number of authorities. Further documents were supplied as discussed at the hearing.

The law

7. The relevant law was largely agreed by the parties. We set out below the main points of law relevant to this application. Where necessary, we will consider further points of law in our conclusions.

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

> **76 (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—**
>
> > **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
> > **(b) any claim or response had no reasonable prospect of success.**
>
> **(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.**

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

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

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

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

12. There are three broad stages to a tribunal's consideration of a costs application. First, has the threshold for making a costs order been met; second, is it appropriate, in all the circumstances, to make a costs order (i.e., the exercise of discretion); and third, what amount of costs should be payable.[1]

13. Once the threshold test has been met, the tribunal must consider the exercise of its discretion. Discretion will result in a tribunal making a number of decisions which can include the following: should costs be awarded at all; should the costs be awarded for a period; should the costs be limited to a percentage; and should the costs be capped. The order can be tailored to suit the circumstances.

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

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

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

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

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

<u>The threshold</u>

16. In identifying whether the threshold for ordering costs is met in any case, it is necessary to consider the appropriate approach.

17. In relation to rule 76(1)(b), a tribunal should look at what a party knew, or ought to have known, had it gone about the matter sensibly: **Cartiers Superfoods Ltd v Laws** [1978] IRLR 315, per Phillips J. This point was reiterated in **Radia v Jefferies International Ltd** [2020] IRLR 431. HHJ Auerbach stated at par 65, in the context of considering whether a claimant should have known at the outset a claim had no reasonable prosect of success:

> **65. … [The tribunal] should first, at stage 1, consider whether that was, objectively, the position, when the claim was begun. If so, then at stage 2 the Tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering these questions, the Tribunal must be careful not to be influenced by the hindsight of taking account of things that were**

> **not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation.**

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

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

19. When considering whether a party should reasonably have realised there was conclusive opposition to that party's case, we may consider if there were clear statements setting out that opposition. Those statements may appear in the pleadings, the correspondence, and any costs warning letters.[2] We would add that the difficulty may be obvious on a simple reading of the documents reasonably available, this is particularly important for respondents.

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

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

21. The threshold may be met if a party acts vexatiously in bringing a claim or in the conduct of the claim. In **ET Marler v Robertson** [1974] ICR 72 at 76 Sir Hugh Griffiths stated:

> **If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee …**

22. The hallmark of a vexatious proceeding Per Lord Bingham in AG v. Barker [2000] 2 FCR 1, para 19 is –

> **… that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant and that it involves an abuse of the process of the court, meaning by that a use of the court process for a**

[2] A party is not obliged to give a costs warning.

> **purpose or in a way which is significantly different from the ordinary and proper use of the court process…**

23. The essential difference between vexatious and unreasonable conduct is that the party concerned need not be aware that his claim has no reasonable prospect of success in order for it to be misconceived. But if a party pursues a claim knowing it has no reasonable prospect of success, or depends on false evidence, or pursues the claim out of malice towards the other party, or for some other ulterior reason, his conduct may be found to be vexatious or unreasonable.[3] We observe not all unreasonable conduct will be vexatious, but it is likely that vexatious conduct will be unreasonable.

24. As noted above, we should be cautious about the citation of authorities. The case law does identify specific matters which may be relevant to the exercise of our discretion, particularly when considering if there has been unreasonable conduct in bringing or pursuing the claims or the proceedings.

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

26. Where evidence turns out to be false, it may be appropriate to consider whether the evidence was advanced dishonestly, particularly if it concerns a central allegation.[4] However, a lie, even about an essential allegation, will not necessarily lead to an award of costs.[5]

27. It may be appropriate to consider a party's reason for bringing a claim. This may be particularly relevant where there are allegations of vexatious behaviour (see above).

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

29. The tribunal should consider each claim. It cannot be assumed that if one claim had no reasonable prospect of success or was brought or pursued unreasonably that the same can be said of a different claim brought at the same time. [6]

<u>The ability to pay</u>

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

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[3] An example is *Keskar v Governors of All Saints Church of England School* [1991] ICR 493, EAT. Costs were awarded against a claimant in a discrimination case on the basis that he was "motivated by resentment and spite in bringing the proceedings" and that there was "virtually nothing to support his allegations of race discrimination."

[4] See for example *Daleside Nursing Home Ltd v Matthew* (UK EAT/0 519/08).

[5] See for example *Arrowsmith v Nottingham Trent University* 2011 EWCA Civ 797.

[6] See ,e.g., *Opalkova v Acquire Care Ltd* EAT-2020-345

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

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

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

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

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

33. It may be desirable to consider means, and the tribunal should give reasons for why it has, or has not, taken means into account. The tribunal should set out its findings about ability to pay.[7]

Amount

34. Costs are always compensatory; they are never punitive.[8]

35. The Court of Appeal in **Kuwait v Allegation-Tarkait** [2021] ICR 718 confirmed the tribunal may make a order for costs that reflects a claimant's ability to pay and may place a cap on the level of costs that can be recovered (see paragraphs 25 -26).

> **25. That does not involve a tribunal impermissibly usurping the function of the detailed assessor in a case where costs exceed £20,000. There is no power under rule 78(1)(b) to assess costs in a specific amount. But a power to cap costs is not precluded because that is not what a cap on costs does. A cap sets a ceiling on the amount to be awarded by reference to what a tribunal considers reasonable for the losing party to pay, but does not determine a specific amount to be paid. That is for the assessor to do in a different and separate exercise that requires detailed scrutiny of the actual costs incurred by reference to a range of factors set out in the Civil Procedure Rules, which are well known but do not include ability to pay. Moreover, this approach has the advantage that, having dealt with the substantive issues in the case, the costs order under rule 78(1)(b) is made by the tribunal itself, which, having lived with the case is likely to be in the best position to assess what is reasonable in the circumstances.**

[7] See *Jilley v Birmingham and Solihull Mental Health NHS Trust* UKEAT/0155/07.
[8] See, for example, *Lodwick v Southwark London Borough Council* 2004 ICR 884, CA.

> **26. Nor do I accept Mr Duggan's contention that the costs assessor's jurisdiction is ousted or usurped where a ceiling or cap on the specified part of the costs is imposed. A cap establishes the outer limit within which costs are to be assessed, but ultimately the amount to be awarded is determined by the assessor subject to that limit. While the limit acts as a constraint set by the tribunal, it does not determine the actual amount payable. The assessor has the function of and remains empowered to determine "the amount to be paid".**

Withdrawing allegations

36. Where allegations are withdrawn, **McPherson v BNP Paribas** [2004] IRLR 558 the CA observed at [28] that it "… would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed." This confirms that dropping an allegation may tell us nothing about whether the claimant should have realised at the outset an allegation had no reasonable prosect. Withdrawing a claim is not, in itself, evidence. Equally, we observe, withdrawing a claim is no defence to an allegation that a claimant should have known there was no reasonable prospect of success.

The claims

37. The Grewal tribunal recorded the claims to be decided under the heading "list of issues" as follows:

> **Direct sex discrimination**
> **2.1 Whether the following acts occurred and, if they did, whether they amounted to direct sex discrimination:**
>
> **(1) In late 2018 Mr Millican requested the Claimant to liaise with CH (a junior female employee) with regards to her relationship with Mr Millican, her health, career and intentions and instructed the claimant to persuade her to resign;**
>
> **(2) In late 2018 Mr Millican instructed the Claimant to call a fertility clinic, pretending that she was pregnant, to ask about the procedure to terminate a pregnancy while he listened on speakerphone;**
>
> **(3) On 11 November 2019 Mr Millican attempted to kiss the Claimant, putting his hands on her knee and telling her that he had always wondered whether something could have happened between them (these were alleged to be three discrete allegations);**
>
> **(4) In September 2020 Ewen MacPherson suggested that the Claimant may wish to take a sabbatical after her maternity leave as the firm was looking at ways to save costs;**
>
> **(5) On a call to the Claimant on 19 January 2021 Mr Bunnis said "trust all is well in the garden";**
>
> **(6) During calls to the Claimant in August 2021 while she was on maternity leave Mr Millican –**
> **(a) informed the Claimant that she would be joining the Residential team;**
> **(b) Informed the Claimant that her 4% stake in the Respondent's Office activities would cease;**

(c) offered the Claimant a 5% stake in the Residential team;
(d) presented the Claimant with the two options for her return to work (as specified in paragraph 36 of the Amended Grounds of Complaint) and/or refused to accept her offer to work across both Office and Residential as workloads required;
(e) told the Claimant that as a mother she would not manage to be in the Office team as the role would be too tough given her family commitments.

(7) On 30 November 2021 the Respondents sent the Claimant a draft LLP agreement which meant that she had no stake in the LLP, that she was a "passive member" and would have reduced voting rights;

(8) The Respondents divested the Claimant of her career in the ways summarised in paragraph 47 of the Amended Grounds of Complaint (other than in respect of her non-inclusion in the ManCo which the Claimant no longer pursued as an allegation of discrimination). The comparators relied upon by the Claimant were a hypothetical male comparator, John Henry Forde and Andrew Gartshore. All the complaints above, except 2.1(4) and(5), are made against both Respondents.

Pregnancy/maternity discrimination

2.2 In the alternative, whether in respect of the matters set out at paragraph 2.1(4)- (8) the Respondents treated the Claimant unfavourably because of pregnancy or because she was exercising or had sought to exercise a right to maternity leave.

Harassment
2.3 In respect of the matters set out at paragraph 2.1(3) above, whether that was conduct of a sexual nature and had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Victimisation

2.4 Whether the Respondents subjected the Claimant to a detriment by removing her access to her email on 21 February 2022 and/or restricting her mobile phone access because they thought that the Claimant might do a protected act, namely bring a claim or make an allegation of discrimination.

Jurisdiction

2.5 Whether the Tribunal has jurisdiction to consider complaints against the Frist Respondent about any acts or failures to act that occurred before 29 November 2021 and against the Second Respondent about any acts or failures to act that occurred before 6 January 2022.

38. At the cost hearing we noted that some allegations lacked clarity. In particular, 2.1(8) referred to the claimant being divested of her career, and there was a general reference to paragraph 47 of the amended grounds of complaint. The matters in dispute under paragraph 47 were narrowed at the liability hearing. Paragraph 47 of the amended grounds of complaint covered a number of matters which were dealt with elsewhere. It was agreed that the only point remaining was the "true up payment." It appears the nature of this allegation developed during the liability hearing, and it has been difficult to reconcile it with the draft schedule of loss. Ultimately, as decided by the Grewal tribunal, it referred to failure to pay

net drawings of £22,500 for the period from 1 October 2021 to 31 December 2021.

39. During submissions at the costs hearing, the tribunal sought further clarification as to what was meant by "the respondents divested the claimant of her career." It was agreed that this allegation envisaged that the claimant had been removed from her partnership against her will, thus depriving her of her earnings. It is that assertion of being "divested," coupled with 2.1 (7), which refers to a the draft LLP agreement designating her as a "passive member" which formed the basis on which the claimant sought loss of earnings. It was the claimant's case, at all material times, that it was the respondents' actions which caused the effective removal of her partnership rights and that constituted her loss of career which led to the alleged financial loss.

40. During submissions it was also clarified that the claim for financial loss was significant. This was further clarified by service of the schedule of loss dated 18 July 2022. The schedule, prepared by the claimant solicitors, was disclosed by way of additional documentation following close of submissions at the costs hearing.

41. The claimant recorded her annual salary as £150,000 per year. She alleged loss of "partnership pay" from March 2020 to September 2021 of £90,000; partnership pay 23 December 2021 – 22 February 2023 of £174,538; partnership share from 23 December 21 – 22 February 2023 of £1,908,000; a "true up payment (to be confirmed); the claimant's co-investment and return (to be confirmed but in excess of £170,000); future loss to March 2025 of £300,000; future loss of partnership pay to March 2025 of £300,000; a 4% partnership share to March 2025 (to be confirmed); injury to feelings up to £75,000; and aggravated damages £5,000.

42. It follows that the claimant's total claim, as pleaded in her provisional schedule of loss was in the region of £2,700,000. However, it was envisaged that further sums would be claimed, the quantum of which was uncertain. We observe that the "4% partnership share" for the 13 month period was put at £1,908,000. The further period envisaged was two years, and it may be that a similar sum was envisaged. This would take the total claim to potentially nearer £5 million. It is clear that a substantial sum was sought as a result of the claimant being "divested" of her career.

43. It is implicit that the claimant's case proceeded on the basis that she was able, and willing, to continue working in the partnership. The losses are advanced on the basis that it was her intention to continue her work for the partnership and it was the respondents' actions that , removed her effective participation in the partnership and "divested the claimant of her career."

44. The majority of the remaining claims, with the exception of some of the financial claims referred to in 2.1(6) refer to alleged detrimental treatment which, itself, does not appear to give rise to loss of earnings or partnership profits.

45. The claimant advanced specific acts of detrimental treatment, whether direct discrimination, harassment or victimisation. The main allegations concerned the inappropriate behaviour of Mr Millican, his inappropriate exercising of power, and the claimant's alleged objection to his behaviour. The allegations against Mr Millican, together with those allegations against Mr MacPherson, Mr Eunice appear to have also been advances generally as evidence from which discrimination could be inferred more widely.

The application

46. The respondent's application for costs sought the following order:

> **(a) Pursuant to rules 76 and 78 of the Employment Tribunals (Constitution and Rules of Procedure etc) Regulations 2013 ("the rules") the Claimant do pay the Respondents' costs of the defence of her claims or a contribution to the same;**
> **(b) The Respondents seek sums significantly in excess of the Employment Tribunal's summary jurisdiction: £708,916.65 (see attached schedule which is to the date of this application – a finalised version shall be included in the costs hearing bundle). Thus the Respondents seek a detailed assessment to be conducted before the County Court pursuant to rule 78(1)(b).**

47. At the commencement of the hearing the respondent clarified that it was not pursuing a claim for breach of order.

The submissions

48. Both parties submissions identified broad themes, as well as detailed points. The submissions are extensive, and we should summarise the main points relied on by both sides.

The respondent submissions

49. The respondent made an number of general submissions.

50. At all times the claimant was advised by competent lawyers.

51. The claimant brought her claims knowing that they had no reasonable prospect of success.

52. In the alternative the claimant brought claims which she ought to have known lacked merit.

53. The pursuit of the claims was an abuse of process and thereby vexatious.

54. The manner in which the claims were pursued was unreasonable to include the following allegations: the claim was dishonestly advanced; and the claimant should have reviewed the merits of the claim but failed to do so.

55. In support of the contention that there was no reasonable prospect of success, the respondent states is not necessary to seek a deposit order or issue a costs warning. In any event the response sets out the contention that the claims have no prospect of success, brought for inappropriate motives, and costs will be sought.

56. The respondent relies on the liability judgement in support of its contention that the claims lacked any reasonable prospect of success, and the claimant ought to have known.

57. In general, it is said the claimant's approach, which underpinned the claim, was dishonest

<u>The claimant submissions</u>

58. The claimant denies that any claim had no reasonable prospect success, or that she ought to have known this the outset. She advances the following general contentions:
    a. no claim was misconceived;
    b. no claim was inherently implausible;
    c. no claim was comprehensively undermined by incontrovertible contemporaneous documentation, such that it could be said to be hopeless.

59. The claim is said to be a typical examples of a discrimination claim. It is asserted that discrimination cases are difficult to establish as there is rarely overt evidence. Claimants may not know whether there is a real prospect of success until the explanation for the employer's conduct, which is subject to the complaint is set out, heard, and tested.

60. Cost orders, in the absence of misconduct, are rare or exceptional.

61. It is alleged that the respondents' allegation that the claimant knew at the outset that her claims had no reasonable prospect of success was inherently implausible. It said is this belief of the respondents is "an egregious example of hindsight bias."

62. It is submitted that the respondent's expenditure on costs, including witness familiarisation training, is inconsistent with an allegation that the claimant knew the claim should fail.

63. The tribunal's rejection of evidence does not mean the following: the parties could know what decision would be reached by the employment tribunal; a finding on the balance of probability does not establish the truth of the fact; rejection of evidence does not equate with dishonest

advancement of the claim; and to consider the prospects on the basis of the final judgment is to adopt entirely the wrong perspective."

64. The submissions then deal with the treatment of specific allegations in the filing of the tribunal. The allegations of unreasonable conduct in bringing or proceeding with the claims are said to be "scattergun" and unjustified.

65. The submissions identify "the most financially significant allegation." It sets out what "was in fact known [to claimant] at the time" in the following terms paragraph 30 of the claimant submissions

> **30. Since the Rs' application proceeds from the startling assertion that the C knew or ought to have known from the outset that her claims had no reasonable prospect of success, it is instructive to consider what was in fact known to her at that time. Focussing for the moment on the most financially significant allegation (the designation of the C as passive member as an act of sex or maternity discrimination), the C knew that**
>
> **a. she was the sole female partner/member of R1.**
>
> **b. the decision to designate her a passive member was undocumented and unexplained- indeed, it was undocumented and unexplained to a striking degree.**
>
> **c. she uniquely had been designated as passive member; she uniquely had exercised her right to maternity leave.**
>
> **d. being designated a passive member was unfavourable treatment.**
>
> **e. her belief and case that her maternity leave was continued beyond the end of October (albeit on an unpaid basis) was supported – she subsequently will have learned – by contemporaneous documentation disclosed by the Rs which indicated that they treated her as being on maternity leave [references] after 1/10/21. She (obviously) did not know that despite that evidence the ET would hold that R2 had not agreed to extend maternity leave beyond 1/10/21.**
>
> **f. There was an excessive drinking culture at R1, led by R2, in which key business discussions and decisions were taken "after hours" in the pub. She knew that it was plausible that the Rs might assume that her participation in that culture would be curtailed as a mother of a young baby and that that might provide an explanation for the Rs freezing her out and her designation as passive member.**
>
> **g. She did not know what an ET might make of her evidence that R2 had explicitly told her via telephone in August 2021 that he felt she would not be able to work transactional hours (e.g. her previous role) now that she was a mother due to having childcare responsibilities. She did not know that (in the event) the ET appear to have attached no weight to the evidence.**

66. Further it is said that at the stage she brought the claim, she had not seen the disclosure, and it is alleged it follows she could not have known at the outset her case would fail.

67. In general, the claimant relies on the inherent uncertainty of the outcome of litigation.

Discussion and conclusions

68. When considering applications for costs, it is necessary to take into account the totality of the evidence and all the relevant circumstances.

69. It is necessary to consider whether the claimant knew what must be proven at the time she brought her claims. An assessment can then be made as to what evidence was reasonably available to her and whether she could reasonably assess the potential merit of the claim had she gone about matters sensibly. In deciding what was reasonably known to her at the time, it is appropriate to have regard to what revealed during the course of the litigation, and the judgment may cast light on what was known to the claimant at the outset. Provided the right approach is taken, there is no reason why the findings at trial cannot be taken into account when it reveals the facts that should have been known at the time.

70. The claimant is not expected to guess what conclusions a tribunal may reach on any matters that are properly in dispute. Analysing what facts were available at the time the proceeding were taken is appropriate, as is analysing the reasonableness of bringing the claim in the light of what was then known is appropriate.

71. We reject the suggestion that it is wrong to consider the judgment; it does not, inevitably, lead to some form of hindsight bias.

72. The claimant submissions and hindsight bias are unclear. Reference is made to Danieal Kahneman's "Thinking Fast and Slow." It is not clear on what basis the book is cited. We take it as an illustrative of hindsight bias. Hindsight bias is well recognised, not least of all in the case law, which make it clear he focus is what was reasonably known at the time. Hindsight bias concerns the phenomenon that allows individuals to convince themselves after an event that they accurately predicted it. The claimant's submissions state

> **13. It is opportunistic hindsight bias to pretend or assert that the outcome of the litigation was known by anyone before trial - and a fortiori that that was the case in respect of the C, from the outset of the litigation.**

73. It appears the claimant is suggesting the tribunal may be subject to hindsight bias by first convincing itself that the outcome could have been accurately predicted and then applying that bias by assuming the claimant should also have predicted the outcome. We accept that hindsight bias must be avoided. It is avoided by analysing what was known at the time and whether it was reasonable to bring proceedings in the light of what was known.

74. In analysing what the claimant's new or ought to have known had she gone about matters sensibly when bringing the proceedings, or indeed at any point thereafter, it is necessary to approach the analysis systematically, objectively, and logically. This is likely to involve at least the following: an identification of the claims; an understanding of what, broadly, must be proven in order for the claims to succeed; an analysis of what was known, or should have been known, to the claimant, as may be

revealed by the oral evidence given, the facts found by the tribunal, and the documentation which would have been available to the claimant at the appropriate time; and a consideration of the reasonableness of her action in bringing, or proceeding with, the claims, including those said to have had no reasonable prospect of success. In addition, it may be appropriate to consider motivation, particularly when vexation is alleged. However, motivation should be approached with some caution, in our view, as motivation is often inferred from primary findings of fact, and drawing inferences may be unnecessary or unhelpful when the primary facts are clear.

75. It is with all this in mind that we now consider the claim for costs.

76. We have identified the claims above. For a discrimination claim to succeed, there are three distinct elements which must be shown. First, there must be an allegation of some form of conduct. For example, a claimant may allege dismissal, or rejection from a post applied for. It is for the claimant to prove the conduct occurred. If there was no such conduct, for example there was no dismissal, or there was no application for the post, the claim fails at that point: there is no case to answer. This does not involve the reverse burden and is simply a question of fact, resolved on the evidence, on the balance of probability. Second, if the alleged conduct occurred, are there any facts from which it could be concluded that the relevant provision was contravened, i.e., are there facts that turn the burden. In doing so, the claimant may rely on any facts, whether or not advance by the claimants. The facts may not be directly relevant to the conduct complained of, but they will be facts from which it is said an inference could be drawn. This may include general behaviour. It is also possible rely on the failure to explain unreasonable conduct, when an explanation should be provided. Whether the burden shifts may depend on what inferences can properly be drawn from such primary findings. Third, has the respondent established a reason which in no sense whatsoever is tainted by the discrimination. That explanation may be known to the claimant at the outset, or it may not.

77. Whilst it is necessary to have in mind the whole picture, when considering the claims, it is not the claim form as a whole which must be scrutinised, but each claim. All claims may not be of equal importance. For example, where many detriments are advanced, an allegation of discriminatory dismissal may be the most important when valuing the claim. The fact that there are many claims which could succeed will not necessarily predict the strength of a claim of discriminatory dismissal.

78. With this in mind, we now consider the claims that were advanced, and what the claimant knew, or ought to have known had she gone about matters sensibly, when she bought the claims.

79. The allegations fall into three broad categories: first those allegations concerning Mr Millican's conduct in relation to the claimant leading up to

2019; second, comments made by Mr MacPherson and Mr Bunnis when the claimant took maternity leave; and third, the treatment of the claimant in relation to her LLP agreement, it being her allegation that it culminated in her being "divested" of her “career,” it being the claimant's case that she was removed from the LLP, such that she could no longer continue to work and receive a profit share. We will refer to this generally as removal of her partnership rights.

80. The first two categories are historical and it is not clear that they are directly relevant to her allegation that she was denied partnership rights. Undoubtedly, they were advanced, in part, to paint a picture of discriminatory attitude to be relied on in considering the true reason for removal of her partnership rights. The allegations in categories one and two do not appear to have any direct financial consequences, but may have led to damages for injury to feelings.

81. The most significant allegation, as recognised by the claimant, when considering the value of the claim, is the removal of her partnership rights.[9]

82. The financial loss was pleaded at £2.7 million, but, as noted above, it would have been subject to significant increase and, realistically, a claim of around £5 million was envisaged.

83. As the divesting allegation is by far the most important in terms of the value of the claim, we should consider, that first.

84. As noted, the allegation is essentially one that she was effectively removed from the partnership against her will, and that caused her significant financial loss. It is unfortunate that the pleading of the claim is obscure, and the true basis of the claim is not identified adequately in the issues, this reflecting an inadequate pleading in the claim form. In the context of this application, only during submissions was the true nature of the allegation ultimately made plain. Issue 2.1(7) refers generally to being sent an LLP agreement, but does not identify the importance of being deemed a "passive member." The importance of this allegation can only be understood when considering the alleged consequences. Issue 2.1(8) is unclear, it was considered at the liability hearing, and confined to payment of a “true-up” payment. What was meant by "divested" of "her career" was not sufficiently identified. The nature of the allegation is only made clear when viewed in the context the claim for loss.

85. When considering these allegations, which essentially involve the alleged removal of her partnership rights, it is necessary to understand what fell to be proved in order for the claim to succeed. As noted above, for a discrimination claim to succeed, there are three stages. First, the conduct must be identified and thereafter proved by evidence. The allegation is founded on the following key points. First, the claimant wanted to, and

[9] See paragraph 30 of the claimant's submissions.

was willing to continue working for the partnership, and thereby would have been entitled to profits. Second, action was taken by the partnership that resulted in removal of her partnership rights. Third, that the partnership's action was inappropriate. Fourth, that action was not consented to. It follows the pleaded case, as reflected in the issues, should identify the alleged conduct. It is not enough to insinuate there was some form of discriminatory intent. It is necessary for her to identify the conduct which was said to constitute the removal of her rights. All of this must be established, as a fact, having regard to the evidence, and on the balance of probability. The reverse burden does not engage at this the stage.

86. If the claimant could show that the relevant conduct occurred, there is a second stage which concerns the motivation, conscious or subconscious, for the action of the relevant respondent. In doing so, it is necessary to look at the mind of the decision-maker or decision-makers. Findings of discrimination may depend on inferences that can properly be drawn from the conduct itself, and any surrounding circumstances.

87. Finally, if the burden shifts, the respondent may show a reason which in no sense whatsoever is tainted by the discrimination. The claimant must consider whether there is any such explanation.

88. We have considered the totality of the finding of fact of the original tribunal, and the submissions made by the claimant. The claimant's submissions refer to the difficulty faced by claimants in proving discrimination cases. Whilst the case of **Saka v Fitzroy Robinson** EAT/0241/00 is referred to, we did not find that case of particular assistance, and we doubt it establishes any principle of law. The difficulty of proving discrimination is well known and is has been noted in a long line of authorities.[10]

89. However, it is not all elements of a claim of discrimination which are notoriously difficult to prove. Proving the alleged conduct took place, generally, presents no more difficulty than proving any allegation of fact. It is simply a question of making a clear allegation, and then supporting it with appropriate evidence to demonstrate the conduct occurred. The particular difficulty in discrimination cases is the attribution of motivation,[11] which may depend on what inferences can be drawn from the primary findings. It is showing the evidence for the drawing of inferences which is notoriously difficulty.

90. Whatever the difficulty, it is also recognised that the second stage may not fall to be considered where there is a clear explanation, the consideration of that explanation being the third stage.

[10] E.g., see *King v The Great Britain - China Centre* [1991] IRLR 513 and the later cases that refer to it.
[11] Conscious or subconscious.

91. When considering whether conduct occurred, or whether an explanation could be established, it cannot be assumed that the claimant has no knowledge, or cannot assess the strength of the relevant arguments, before exchange of documents and evidence, or before the evidence is tested at the final hearing. The claimant's ability to assess the strength of a case at the outset is fact specific.

92. With all this in mind, we consider what the claimant knew or ought to have known at the outset concerning the allegation that she had been divested of her career by removal of her partnership rights.

93. The first question is did the conduct occur.[12] As to what the conduct was, the claimant's pleading is unclear, and it appears be rest largely on an allegation that she was sent a draft LLP partnership agreement, which effectively removed her. It is unclear how that, in itself, divested her of her career.[13] It would have been possible for her to protest, and insist on continuance with the original agreement.

94. The findings of the Grewal tribunal make it clear that the claimant was not willing to continue working for the partnership. She had the option of returning to her old position. She was given an option of returning part-time in a different profit "silo." The claimant did not actively engage in negotiation, but ignored Mr Millican.[14] When the meeting did take place at the end of September 2021, she made it clear that she was not interested in either option. It was the claimant who failed to continue the partnership agreement, leading to the position where she would either have to resign or her partnership would be paused.

95. Any limitation on the claimant's right to receive profits occurred because she did not agree to return to work. That was her choice. The claimant was not removed from the partnership. Her rights were paused because an impasse had been reached, but she remained part of the partnership, and ultimately there was a potential to proceed. The respondent's action was not inappropriate or unexplained. It simply reflected the reality of the position as caused by the claimant. It may have been possible to consider expelling the claimant, if her action was in breach. Instead, the partnership took a far more generous approach, simply pausing her position, such that she remained part of the partnership, but would not receive profits, which reflected the reality of her not undertaking any work. It would be wrong to say that this was not implicitly consented to by the claimant. The respondent took appropriate action to preserve the legal position because of the claimant's intransigence and unwillingness to engage.

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[12] *Anya v University of Oxford* CA 2001 IRLR 377 is authority for the proposition that if the tribunal does not accept there is proof that the act complained of in fact occurred, the case will fail at that point. (see Sedley LJ at paragraph 9).

[13] This is, perhaps, recognised as the reference to divesting her of her career forms issue 2.1(8).

[14] See para. 106 of the liability judgment.

96. It follows that in relation to each of the elements of the alleged conduct which could lead to a finding that she was divest of her career, the position was hopeless. The claimant was in full possession of all the relevant facts, at all material times. Any reasonable consideration, and any reasonable reflection, at the time the claim was brought, should have revealed to the claimant and her advisers that a claim for future loss of profits based on the allegation she was divested of her career was hopeless.

97. The claim she was divested of her career does not turn on the notorious difficulties of establishing motivation by reference to inferences to be drawn from primary findings of fact. It was clear that it would fail at the first stage. Conduct causing her to be divested of her career was a perquisite for the claim of future loss, but there was no such conduct, and that was known to the claimant.

98. It would also follow, logically, that the claimant would, or should have, understood the reason for the treatment. In the case of the service of the draft LLP agreement, this reflected the inevitable position reached between the parties after considerable discussion and negotiation. No reasonable analysis of the facts, which were known to the claimant at the time she brought the proceedings, could have led her to conclude other than the respondent had an explanation which in no sense whatsoever was tainted by discrimination.

99. The claimant's motive in wishing to limit her work, or change her circumstances, may well have come about because of her pregnancy and her maternity leave. However, it is not the claimant's mind which is being considered, but the minds of those who made the decision, and viewed in that light, there can be no rational challenge to the reason advanced by the respondent, and no possibility of believing it would not be accepted. However, if there has been an error of approach by the claimant in failing to concentrate on the motivation of the decision maker, it is not one that is reasonable, and an error which no competent advisor should make.

100. It follows that the claim which was summarised as divesting the claimant of her career was hopeless, and the claimant ought to have known that at all material times. The claim had no reasonable prospect of success, and it was unreasonable conduct to bring it.

101. We do not have to finally decide whether the bringing of that claim was also vexatious. The relevant facts are as follows: the claimant knew the reason why a new LLP agreement had been issued, and her profit share limited. The claimant knew that she would not be entitled to profit because she had not agreed to return to work. The claimant knew that she could agree to return to work, and thereby renew her entitlement to profit share. Nevertheless, the claimant's has chosen to plead these matters obscurely and attached to that pleading a claim for losses which runs into millions. It is arguable that in so doing her behaviour has been vexatious; it is unreasonable conduct of the proceedings. However, in this

case vexation adds nothing to the concept of unreasonableness, and we consider it no further.

102. It is necessary to consider the remainder of the allegations. We deal these more briefly.

103. Allegations 2.1 (1) and (2) concern the interaction between Mr Millican and the claimant concerning CH, a junior female employee, who had become pregnant following an affair with Mr Millican. The essence of the claimant's allegation is that, in some manner, she was manipulated by Mr Millican or she acted against her free will because she feared reprisal in the form of interference with her career. These matters were fully considered by the Grewal tribunal. It is appropriate for us to consider the totality of the picture that emerged in evidence.

104. At 116 the Grewal tribunal stated

> **116 There was no dispute that the Claimant was actively involved in the relationship between Mr Millican and CH and that she spoke to both of them and supported and advised both of them. The only issue was whether it was something that she was instructed or made to do against her will by Mr Millican, or it was something that she engaged in willingly and voluntarily. All the evidence indicated that it was the latter. Generally she did not respond to requests for advice and support but offered them unsolicited (see paragraphs 24-26 above). On occasion, such as on 13 January 2019, Mr Millican sought her support. She provide that support – her evidence was that she was happy to help because she thought that it would promote her career and her husband's view was that it would be an opportunity for her to gain more power with him. We have also found that the Claimant was able to confront and challenge Mr Millican when she felt that she was being treated differently as a woman partner (see paragraph 39 above). If Mr Millican had sought to involve her in his relationship with CH against her wishes, she could and would have made her objections clear to him. We have not found that Mr Millican instructed the Claimant to persuade CH to resign. He said to the Claimant that he thought that it would be very difficult for CH and not in her best interests to continue working there but added, "*I don't know that I have it in me to push her out.".* The Claimant's response was that she understood and agreed and added, "*She knows my thoughts and I will stay consistent to my recommendations to move onwards to other things."* (paragraph 28 above). It appears from that that the Claimant's view was that it would not be in CH's best interests to stay and that she should move on to other things.**

105. Mr Millican did not instruct the claimant to persuade CH to resign. The strongest argument presented was that the claimant was asked by Mr Millican to call the clinic and pretend to be pregnant, in order to gain information. The question was whether this was something she was, in some manner, forced to do, or did she do it willingly. The tribunal summarised the position at 118.

> **118 In respect of both of these complaints we would have concluded that the Claimant had not been subjected to any detriment and that she had not been treated less favourably than any man had been or would have been.**

106. A tribunal resolving facts in favour of one party does not itself mean that the claim was advanced dishonestly, or that the finding of fact is correct, or that the claimant should have known the finding would be made. Each case turns on its facts. These allegations are unusual in that the basic circumstances were not in dispute. What was in dispute was her willingness to cooperate. It is possible the Grewal tribunal was wrong and the claimant was unwilling. However, its decision was based on a careful consideration of the contemporaneous documentation. That documentation was consistent with the claimant being fully involved in undertaking all actions willingly. At the outset of the case, the claimant would have known that the evidence showing her involvement existed, that evidence was inconsistent with any suggestion that she was forced to assist or that she did so out of some form of fear. She should have known that the chance of establishing her contention that the treatment was unwanted, or based on her sex, was very poor, as it was contradicted by the contemporaneous evidence. Perhaps her strongest argument was that a man would not been asked to phone the clinic, but the claimant should have realised that her willingness to engage in that process would prevented a finding that the treatment was detrimental. The claimant ought to have known, at the outset, had she gone that matter sensibly, these allegations had no reasonable prospect of success.

107. Allegation 2.1 (3) which concerns the events 11 November 2019 when Mr Millican was said to have attempted to kiss the claimant, put his hand on her knee, and told her that he had always wondered whether something could happen between them was introduced by amendment late. There can be little doubt it was introduced to paint Mr Millican in a poor light, and to bolster the claimant's primary allegation which concerned her being divested of her career. Moreover, it was introduced late, and it is unclear why the claimant considered it was just equitable to extend time. Even less is it clear why she believed that there may be a course of continuing conduct established, and neither the pleadings as amended, nor the claimant's submissions, addressed the question of continuing course of conduct adequately. For those reasons, Allegatoin 2.1(3) had very little prospect of success.

108. That said, it is not clear from the findings the Grewal tribunal why the allegation that she was kissed was rejected. It may have been reasonable for the claimant to doubt that discrimination would be found given the contemporaneous documentation referred to by the tribunal and the fact that she remained in the pub for the next hour. She would also be aware the lack of contemporaneous documentation indicating any concern at the time. Nevertheless, whilst this was objectively a weak allegation which, because it was presented late, had extremely limited prospects of success, the possibility existed that the events of 11 November 2019 were unwelcome detrimental treatment, and whilst the evidence suggests an exaggerated account, it is not clear that the claimant set out to deliberately

exaggerate or mislead. It is not clear to this tribunal that it was inevitable that her account would be rejected; had her account been accepted, there would have been a some limited possibility, subject to the very real problem of securing and extension of time, of the allegation succeeding.

109. We can consider together allegations 2.1 (4) and (5). The Grewal tribunal rejected these allegations. In relation to the reference to garden leave, issue 2.1 (5) the finding was it was an innocuous icebreaker. Similar findings were made in relation to the reference to taking a sabbatical (issue 2.1 (4). These allegations were peripheral and had little or no influence on the question of whether costs should be ordered. There can be no doubt from the findings of the Grewal tribunal that they were fundamentally and inherently weak, and the claimant should have at least understood the weakness of the claims.

110. There is insufficient information form which we could find the claimant should have known that they had no reasonable prospect of success at the point she brought them. It may not be possible to say that there was no prospect of time being extended in relation to them. However, at the very least, she should have realised that it was unlikely they formed a continuing act with the allegations concerning the treatment of her partnership. In any event, the alleged divesting of her career was a hopeless allegation, and therefore, not an end point. She should have realised the chance of time being extended was poor. We have no doubt that these claims were brought in order to bolster her general claim. A finding of discrimination in relation to these matters would, undoubtedly, have been relied on as a fact from which inferences could be drawn concerning the primary claim concerning the treatment of a partnership status. It follows that they cannot be entirely divorced form the main claim and the overall conduct.

111. Finally, we consider the claim of victimisation at 2.4. This concerned the removal of access to her emails and restricting her mobile phone access. This is advanced on the basis that the respondent believed that she would perform a protected act. The Grewal tribunal considered this, particularly at paragraphs 111-114.

112. The tribunal accepted the respondent knew the claimant may make a protected act. It considered the reason for the treatment, the treatment not being in dispute, and concluded the respondent suspended access because it had concerns about the claimant having access to confidential information. Those concerns had come about because the claimant's husband, who worked for a competitor, had made reference to a confidential deal and appeared to have obtained that information, because the claimant had inappropriately divulged it. At the time the claimant brought the victimisation allegation, she would have known the conversation with her husband, as it is apparent that they were constantly discussing all matters relevant to the claimant's continuing involvement. All this occurred at a time when it became apparent that the claimant was not going to return to work. The strength of the respondents reason for

removing access would have been known to the claimant at all times. In light of that, the allegation that the treatment was because the respondent believed she would make a protected act was so weak that the claimant should have realised that it had no reasonable prospect of success.

113. For all the reasons given above, it is clear that the threshold for ordering costs is met.

114. As the threshold to make a costs is met, we are obliged to consider whether an order should be made; in so doing, the first question is whether we should exercise our discretion at all.

115. There may be occasions when tribunal may decide to make no award for costs, even where the threshold is met. The claimant's submissions deal with discretion at paragraph 83 as follows:

> **83. If, contrary to the above, the ET concludes that one or more of the threshold conditions for the making of a costs order have been met, it is denied that it would not be appropriate, as a matter of discretion, to make an award of costs against the C in the terms sought. This is for a number of reasons including the following:**
>
> **a. the ET is entitled to have regard to the paying party's ability to pay: see Rule 84 of the 2013 Rules. The C has provided or will provide evidence of her (in)ability to pay any significant costs order. She has not earned any commensurate remuneration since her last payment from the R1 in September 2021.**
>
> **b. Even if (which is denied) the entire proceedings were misconceived and known to be so from the outset, it does not mean that it would be just to order the C to pay the entirety of the proceedings (having regard to the normal rule that the losing party does not pay the costs of the winning party). In Vaughan for instance, the claimant was ordered to pay 1/3 of the costs of the proceedings (to be assessed if not agreed) notwithstanding the highly critical comments made about the claimant in that case.**
>
> **c. In any event it and on any view it would be quite wrong for the C to be ordered to pay the R's costs associated with (a) their (failed) opposition to the C's amendment application to introduce the allegation of sexual harassment in November 2019, and their failed application to strike out out of time claims or to seek a deposit in respect of the same; and (b) the dispute regarding the redacted WhatsApp messages. The C "won" on the first application which should never have been brought (and which would have saved both parties significant costs had they not); and the Rs specifically agreed not seek costs in respect of the second issue.**
>
> **d. More generally, if the C's claims were hopeless and known to be hopeless at the outset the Rs should not have spent over £700,000 to establish that fact. There is no need to instructing Leading Counsel to defend what are known to be hopeless claims. In reality of course, the Rs chose to instruct Leading Counsel, to spend money on witness training, and to produce inordinately long witness statements which included commenting on multiple documents because they knew the claims might succeed and wished to leave no stone unturned in their (ultimately successful) attempt to maximise the prospects of winning. But if (which is denied) the claims never had a reasonable prospect of success this expenditure is obviously unreasonable and the ET should at this stage impose a (low) cap on the total recoverable amount.**

> **e. If the ET finds that some aspect of the C's conduct was unreasonable, it has to have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of discretion: see McPherson v BNP Paribas [2004] ICR 1398 at [40] per Mummery LJ. For instance, if (which is denied) it was unreasonable for the C not to have withdrawn at an earlier juncture those claims that she did withdraw, that fact plainly does not justify the order for costs sought by the Rs in this case. The marginal costs reasonably incurred by (on this hypothesis) the "delayed withdrawal" of claims are likely to be de minimis or very modest – not the eye-watering costs claimed in this case.**

116. We consider each of the submissions.

117. First, the claimant has advanced no evidence, or submissions, on her ability to pay. She was aware of the need to. We therefore must assume that the claimant has the ability to meet an order for costs.

118. Second, we have considered each of the claims individually, as well as having regard to the cumulative picture. The most important claim is the one on which the claim for financial loss is based. Bringing that claim was unreasonable. We note the reference to **Vaughan**;[15] however, we are not constrained to limit payment to one third of the costs.

119. We accept that there may be elements of the respondent costs which should not be recoverable. We are not, however, obliged to limit the costs order to additional costs incurred as a result of unreasonable conduct. Our discretion is broad. It may be some costs have been unreasonably incurred by the respondent, but engaging in a consideration the minutiae of specific aspects of the claim, and how unreasonable the conduct was, may be disproportionate, it may also impinge on the territory of a detailed assessment.

120. The claimant suggest there should be a cap on the amount recoverable. We accept that, as part of our discretion, we can cap the costs. We have regard to the case of **Kuwait v Al-Tarkait** [2021]ICR 718. Little guidance is given as to how to approach. However, reference is made paragraph 25 to the tribunal limiting it to such costs as it considers reasonable.

121. We do not accept the claimant's submissions that the amount spent by the respondent should be seen as unreasonable if the respondent believed it had a good defence. Respondents face particular difficulties when claims are advanced on a basis which is unclear and which may be potentially based on inaccurate, or even dishonest, evidence. Cases advanced in that manner may lead respondents to incur greater costs, not least because the scope of preparation needed in dealing with generalised and insufficiently particularised allegations is uncertain.

[15] *Vaughan v London Borough of Lewisham* [2013] IRLR 713

122. We note the reference to **MacPherson V BNP Paribas**. However, this should be read having regard to Mummery LJ's later comments in **Yerrakalva** (see above).

123. In any event, when we consider the nature and gravity, we observe that the allegations on which the claim for significant financial loss were based were hopeless, as set out above. This exposed the respondent to the cost of the proceedings. The fact that some claims may have had, at least in theory, some limits prospect of success does little or nothing to reduce the gravity of the claimant's actions in seeking damages of millions of pounds on a claim that she knew, or ought to have known, was hopeless.

124. It may be appropriate to award no cost in specific circumstances. For example, an individual's action may reflect mental health difficulties which could be taken into account. Similarly, impecuniosity may be taken into account.

125. We have considered the matters advanced by the claimant, and consider the relevant circumstances more generally. We find it is appropriate for us to exercise our discretion to award costs. We next come to the amount.

126. For the reasons we have given, the most financially significant claim had no reasonable prospect of success, and it was unreasonable to bring it. The claimant persisted with her allegation that the respondent's conduct had led to losses running into millions. Whilst there were other claims, each had difficulties, as we have explained, and it is not possible to fully delineate claims which had some limited chance of success from claims which did not, as the entirely of the conduct is relied on to establish discriminatory removal of partnership rights.

127. In the circumstances, we consider the starting point is that there should be an order for costs for the entirety of the claim.

128. If it can properly be said that there are elements of the claim which had been brought reasonably, or conducted reasonably, it may be appropriate to order the claimant to pay a percentage. There is no such clear distinction in this case.

129. We accept that the costs of over £700,000, are high. However, the reasonableness of those costs can be considered on a detailed assessment as envisaged in **Kuwait**. Nevertheless, we retain a broad discretion. Part of that discretion is to cap the costs. In capping costs we are neither undertaking a detailed or a summary assessment of costs; that is not our role. We do not constrain the findings of a detailed assessment.

130. In the courts, there has been emphasis placed on management of costs, to include setting cost budgets. In that context, and when considering costs awarded on a standard basis, the question of proportionality arises, and the costs to be recovered may be limited by proportionality, even if they are necessarily reasonably incurred. There is no such provision in

the tribunal, the concept of proportionality does not exist in our rules. However, **Kuwait** is authority for considering what it is reasonable for a paying party to pay, and thereafter imposing a cap. Those factors the court may apply could give useful assistance. CPR 44.3(5) provides costs are proportionality of they bear a reasonable relationship to – (a) the sums in issue in the proceedings; (b) the value of any non-monetary relief in issue in the proceedings; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; and (e) any wider factors involved in proceedings, such as reputational public importance.

131. It is neither necessary nor appropriate to introduce the concept of proportionality when deciding what order for cost may be made.[16] It is helpful to have regard to the factors identified when considering what would be a reasonable sum to be paid.

132. We are conscious that we have little information from the respondent. We do not know the hourly rate charged, and we have no more than the bare figures.

133. We do not have any proper information as the claimant's costs. We observed during submissions that whilst the level of the respondent's costs was criticised, the claimant's costs were not disclosed. We noted there was not obligation to do so. In response to this counsel indicated that the claimant's costs were less than 20%. No figure was given. We observed this would put them in the region of £140,000. However, how that may be is broken down, and whether it includes counsel's fees, is unknown. It can be taken that the claimant's costs are significant.

134. It is not unusual, in claims of this nature which are hard fought, and where the hearing before the tribunal lasts seven days, for there to be significant costs. The claimant's costs in the region of £140,000 at least gives some, tentative, benchmark and are not unexpected

135. When considering whether to impose a cap on costs, and considering what could be reasonable for the claimant to pay, we have particular regard to the following factors: the sum in issue was significant and was in excess of £2.7 million; significant damages were sought for injury to feelings; the litigation was complex, as is inevitable in discrimination claims - the fact that many discrimination claims are equally complex, does not mean that this was not; there are arguments on both sides that work has been generated by the unreasonable conduct of the other party; and in discrimination claims of this sort, there are wider factors involved, including the importance of reputational damage, which could have commercial and personal ramifications.

136. In discrimination claims it is relatively simple for a claimant to make an allegation. The costs involved to the claimant in making an allegation may

[16] A consideration of proportionality remains a matter for detailed assessment.

be minimal. However, there may be a disproportionate effect on the respondent. If the treatment is established, there is a risk the burden shifts and the respondent will be called upon to give an explanation, supported by relevant cogent evidence. That can be an enormous burden on the respondent and lead to significant costs. The position of the respondent is made worse where the allegations are poorly pleaded, leading to uncertainty. Where there is fundamental dispute as to the alleged conduct, that complicates matters, and makes the production of the explanation more uncertain. Undoubtedly it is for that reason that a respondent's costs are often vastly in excess of the claimant's costs.

137. This is a case suitable for a cap which reflects the maximum the claimant should reasonably pay. In deciding the cap, we have regard to the fact that some of the costs incurred by the respondent may be unreasonable.

138. We have formed the view that it is appropriate to cap the maximum costs to those which are reasonably payable by the claimant. We place that cap at £225,000. We reiterate that it is open to the detailed assessment to find the cost awarded should be lower.

139. It follows that there will be a detailed assessment of costs. Given the level of costs and the time need for a detailed assessment, we consider the county court is the better venue to hear the detailed assessment.

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Employment Judge Hodgson

Dated: 25 January 2024

Sent to the parties on:

.25/01/2024

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For the Tribunal Office