EMPLOYMENT TRIBUNALS

Claimant: **Mr S Jarju**
Respondent: **John Lewis plc**

Heard at: Reading

On: 14 November 2024 (in chambers on 24 January 2025)

Before: Employment Judge Shastri-Hurst,
Ms H Edwards,
Ms J Stewart

Representation
Claimant: Mr H Ogbonmwan (lay representative)
Respondent: Mr D Hobbs (counsel)

RESERVED JUDGMENT ON COSTS

1. The respondent's application for costs to be paid by the claimant is successful. The claimant is ordered to pay to the respondent the sum of £15,750.

2. The respondent's application for wasted costs against Mr Ogbonmwan is successful. Mr Ogbonmwan is ordered to pay to the respondent the sum of £7,650.

REASONS

Introduction

1. The respondent has two trading divisions, those being John Lewis and partners department stores and Waitrose and partners supermarkets. The business is run on co-ownership principles and all partners are eligible to participate in a share of the respondent's annual profits.

2. The claimant was employed by the respondent as warehouse partner from 16 August 2004 to 20 April 2021. He worked at the Waitrose and partners warehouse in Bracknell. The respondent alleged that it dismissed the

claimant by reason of misconduct: this was found to be the case at the final hearing.

3. The claimant commenced the ACAS early conciliation process on 29 June 2021. This process completed on 10 August 2021, following which the claimant presented his claim form to the tribunal on 9 September 2021.

4. In the claim form, the claimant sought to present claims of unfair dismissal, disability discrimination, race discrimination, and discrimination on the grounds of religion or belief. He also brought pay claims, ticking all the boxes relating to all types of pay claims. The respondent provided a response to the claim denying all the claims in their entirety.

5. Following a six day final hearing, all the claimant's claims were rejected. Following receipt of the Tribunal's Reserved Judgment, the respondent made an application for costs against both the claimant and his representative, Mr Ogbonmwan.

6. In order to fairly and fully address this application and its decision, the Tribunal considers it necessary to set out a detailed history of this litigation.

Preliminary hearings

7. This claim was subject of three preliminary hearings.

<u>Preliminary hearing 1 – 2 September 2022</u>

8. On 2 September 2022, a standard case management preliminary hearing was held by telephone before Employment Judge Tynan. The events in advance of and during that hearing are summarised by Employment Judge Tynan at paragraph 3 of his Record of Preliminary Hearing:

> "I record my concern that there was no agreed List of Issues for the Preliminary Hearing. The Respondent's solicitors provided a draft List of Issues to Mr Ogbonmwan in advance of the Hearing, but he did not provide any comments on it to them or otherwise seek to agree its contents with them. Indeed, he came to the Hearing with an insufficient understanding of the claimant's case and unprepared to discuss the List of Issues. It took me approximately one and a half hours to secure from Mr Ogbonmwan the details of 14 matters, in addition to the 6 matters already identified in the Respondent's draft List of Issues, relied upon by the claimant as alleged acts of direct race discrimination, albeit even then it has been necessary for me to make an Order below for the claimant to provide further and better particulars of certain aspects of those 14 matters. During the hearing I impressed upon Mr Ogbonmwan the need for greater focus in future. The further consequence of the claimant/Mr Ogbonmwan's failure to address the issues in advance of the Preliminary Hearing is that there is no time available to the Respondent/Mr Hobbs, and indeed the Tribunal, to give consideration to whether the 14 matters identified by Mr Ogbonmwan in the course of the hearing are all included within the Particulars of Claim or will require that the Claim is amended to include any such complaints. I record here that there has been no application by the claimant to amend his claim and that such an application will be required if new complaints are sought to be introduced by virtue of any of the 14 matters referred to. Otherwise, I have made an Order below for the parties to co-operate to agree the

> Final List of Issues once the Claimant has provided outstanding information regarding his complaints."

9. The Judge went on to remark that he had concerns about the claimant's failure to comply with orders regarding disclosure of medical evidence as ordered around 5 months prior (on 16 April 2022 and varied on 2 August 2022). The Judge gave a clear warning to Mr Ogbonmwan that, if the claimant did not comply with the orders made on 2 September 2022, there was a risk that the discrimination claims could be struck out on the basis of there being no reasonable prospect of success, or for failure to comply. The Judge made numerous orders, including that any amendment application had to be made by 23 September 2022 and made it clear that, as at 2 September 2022, there was no application to amend before the Tribunal.

10. Regarding the List of Issues, the Judge made the order that the parties were to agree the List of Issues by 21 October 2022. The respondent was ordered to rework the existing List of Issues by 14 October 2022, then the claimant was to make any comments. If no comments were made by the claimant by 21 October 2022, the respondent's list was to stand as the List of Issues for the final hearing. Orders were also made regarding the claimant providing further and better particulars.

11. At the conclusion of this preliminary hearing, no further preliminary hearing was listed. The final hearing had already been listed; the dates were communicated to the parties by letter of 26 April 2022.

<u>Aftermath of Preliminary Hearing 1</u>

12. The claimant sent in various communications that were said to be further and better particulars. The matter was referred to Employment Judge Tynan, who determined that they were "not in a form acceptable to the Tribunal" - see the Tribunal's letter of 29 November 2022. The claimant was given a further 14 days to provide a "focused and intelligible" response to the order for further and better particulars. He was warned that, if he did not do this, the Tribunal would consider striking out the parts of the claim to which the order related.

<u>Preliminary hearing 2 – 3 April 2023</u>

13. Following correspondence from the parties, the case was listed for a public preliminary hearing to consider:

    13.1. A strike out application;

    13.2. Clarification of the issues;

    13.3. Any amendment application;

    13.4. Any case management orders.

14. In response to the Tribunal's order of 29 November 2022, Mr Ogbonmwan had sent in a document on 13 December 2022 which did not assist in making matters clearer. An additional document was sent on the morning of 3 April 2023 which again was said to provide the relevant particulars.

15. In advance of the hearing, the respondent had prepared an updated List of Issues to reflect the (now) 21 allegations of direct discrimination, and other claims. Mr Ogbonmwan had not contributed or provided comments on that document, as required by Employment Judge Tynan's orders.

16. The case was listed in front of Employment Judge Shastri-Hurst on 3 April 2023. It is recorded in the Record of Preliminary Hearing that Mr Ogbonmwan attended this hearing without a copy of the bundle that had been prepared by the respondent.

17. At the hearing, the Judge struck out the holiday pay claim and three allegations of direct discrimination.

18. The respondent made it clear at this stage that, in light of the strike out decision, the only allegations of discrimination which it said were not in the Claim Form (however obliquely) were Allegations 7 and 15. Mr Ogbonmwan was given the opportunity to highlight to the Judge where he said those two allegations could be found in the Claim Form. The Judge disagreed with his reading of the Claim Form in relation to the highlighted passages.

19. The Tribunal ran out of time to deal with all the matters for which the preliminary hearing had been listed. As such the matter was relisted as part-heard.

20. On the Judge's own initiative, and in light of the lack of clarity on the claims as at 3 April 2023, the Judge indicated that she would consider whether to strike out or make a deposit order against part of the reasonable adjustments claim and part of the victimisation claim at the reconvened hearing.

21. In relation to any application to amend, the Judge explained to the parties that she had identified one part of one piece of correspondence that could be an application to amend. That related solely to post-termination victimisation. The discussion on this is recorded at paragraphs 38 and 39 of the record of Preliminary Hearing:

> "Mr Ogbonmwan said that he had not sent in an application, as he had prepared a document in advance of the 2 September hearing, that the Judge had accepted as being, to all intents and purposes, an application to amend.
>
> I explained to Mr Ogbonmwan that the Judge's order is very clear: he did not consider that there was, as at 2 September 2022, any application to amend in front of him. He then ordered that any application to amend be presented by 23 September 2023 [sic - 2022]. Mr Ogbonmwan confirmed that he had not sent in any other application to amend, as he did not want to cause the Tribunal more work".

22. This is one example of an occasion on which Mr Ogbonmwan has stated something that is clearly untrue and flies in the face of contemporaneous documentation.

<u>Preliminary hearing 3 – 15 May 2023</u>

23. The reconvened preliminary hearing took place on 15 May 2023. At this hearing, the Tribunal considered any amendment to the claimant's claim, and strike out/deposit order. There was insufficient time for the Judge to give her decision at the hearing, and so she reserved her decision. The Judge made the following decisions:

    23.1. To strike out an element of the reasonable adjustments claim;

    23.2. To make a deposit order against part of the victimisation claim, namely whether one of the two alleged protected acts was in fact a protected act;

    23.3. To reject the application to amend the claim to include Allegations 7 and 15.

24. Following this hearing on 15 May 2023, the List of Issues was finalised to reflect the outcome of the various matters dealt with at that hearing. The claims were clarified as being as follows:

    24.1. Unfair dismissal under s98 of the Employment Rights Act 1996 ("ERA");

    24.2. Breach of contract/notice pay;

    24.3. Direct race/religious discrimination under s13 of the Equality Act 2010 ("EqA");

    24.4. Failure to make reasonable adjustments under ss20 and 21 EqA;

    24.5. Victimisation under s27 EqA.

25. We find that Mr Ogbonmwan's conduct directly led to the second and third preliminary hearings in this matter, for the following reasons:

    25.1. His failure to engage with the list of issues and attend the first preliminary hearing prepared to deal with the case and explain the issues meant that the first preliminary hearing was not as effective as we would reasonably expect it to have been;

    25.2. His failure to comply with the case management orders from the first hearing, his failure to engage with the preparation of the list of issues for a second time and his failure to fully engage, review and get to grips with his client's claim led to the need for a second and third preliminary hearing.

Final hearing

26. The final hearing was listed to take place over five days, from 16 to 20 October 2023. The Tribunal in the event had to reconvene on 18 December 2023 due to the matter being part-heard. The parties are referred to the Reserved Judgment on liability at paragraphs 11 to 21 which sets out in detail the timetable of the initial five days, the reason why the five day listing was

exceeded and an additional day for evidence and submissions was required. In fact, paragraphs 22 to 96 set out the issues that the Tribunal was required to deal with during the course of the final hearing as preliminary or interlocutory matters.

27. In short, we find that Mr Ogbonmwan's conduct of his client's case directly led to the need for an additional day on 18 December 2024, for example:

    27.1. On Day 1, making unmeritorious applications that meant we did not start evidence until 1255hrs on Day 2;

    27.2. Interrupting and interjecting during his client's cross-examination by Mr Hobbs. The vast majority of those interjections (if not all of them) were unmerited and not sustained;

    27.3. Being repeatedly late for the agreed start time on numerous days of the final hearing;

    27.4. Repeated failure to comply with the Tribunal's timetabling of the final hearing;

    27.5. Making numerous unmeritorious applications through the course of the final hearing, as recorded in the Reserved Judgment on liability;

    27.6. Making spurious and wholly unfounded allegations against Mr Hobbs, including accusing him of white supremacy and threatening to report him to the Bar Council (see paragraphs 74 to 86 of the Reserved Judgment).

28. The Tribunal then met to deliberate, without parties, on 19 December 2023. A Reserved Judgment was sent to the parties on 27 February 2024, rejecting all the claims. Parties are referred to the Reserved Judgment as to the Tribunal's full reasons for rejecting the claims. A few points are highlighted here as being relevant to the costs application.

Findings at the final hearing

<u>Unfair dismissal and notice pay claims</u>

29. The claimant's claim fundamentally revolved around his summary dismissal from the respondent on 30 April 2021. We found that the claimant was fairly dismissed for the reason of conduct, and that he had acted in a way that amounted to a repudiatory breach of his employment contract, hence the respondent was right not to pay him notice pay.

30. The claimant worked at the Waitrose & Partners warehouse in Bracknell as a Warehouse Partner. As part of his duties, the claimant used a pallet truck to move items around the warehouse. This would include driving onto a lorry trailer in order to lift goods from the trailer and move them into the warehouse on the pallet truck, and vice versa. Each truck has a pallet guard that stands perpendicular to the ground, in order to protect the driver from items on his truck falling towards him and causing injury.

31. The act for which the claimant was dismissed occurred on 8 April 2021. He was dismissed for damaging a pallet truck and then not reporting the damage.

32. The claimant had been using pallet truck 202 during his shift on 8 April 2021. We found that the claimant drove Truck 202 onto a trailer with an undamaged, straight pallet guard. However, when he drove off the trailer, the pallet guard was clearly bent. As such the pallet truck was damaged by the claimant during the course of that manoeuvre. We found as a fact that he did not report the damage; it only came to light when a colleague reported it later on 8 April 2021.

33. Part of the evidence we used in reaching these findings was CCTV evidence. The summary of what that CCTV shows is at paragraph 150 of the Reserved Judgment on liability.

34. In the internal investigation, the claimant initially denied that he had damaged Truck 202. However, once confronted with the CCTV, he accepted responsibility. He latterly altered his evidence in the internal investigation, stating that he had been coerced into admitting fault by Mr Jimmy Crask (the investigating officer). That remained his case before us. Furthermore, before us, and for the first time, he denied that the man in the CCTV driving Truck 202 on and off the trailer was him. We found that the man in the CCTV was plainly the claimant.

35. On our findings, the logical conclusion is that the claimant lied in internal proceedings when he changed his account again to deny fault and lied when he asserted the Mr Crask put pressure on him to change his "plea". It also means he lied to us when he denied damaging Truck 202 and denied that the man in the CCTV was him. Furthermore, this means that his claims regarding his dismissal were based on lies, and that the claimant knew that he was guilty of the misconduct alleged by the respondent at the time of mounting his claim. This in turn means that he knew (or at least should reasonably have known) he was not entitled to notice pay at the point of entering his claim form.

<u>Direct discrimination claims</u>

36. The claim of direct discrimination on the grounds of race and religion consisted of 16 allegations. The alleged perpetrators were as follows:

    36.1. Jimmy Crask (investigating officer);
    36.2. Bill Mansfield (dismissing officer);
    36.3. Tracy McCreadie (appeal officer).

37. In relation to some of the allegations, the claimant and his representative were unable to identify who the alleged perpetrator was at the time of the commencement of the hearing. By the end of the hearing, Elliott Blair had also been identified as an alleged perpetrator in relation to two allegations.

38. There were six allegations against Mr Crask. One (Allegation 4) related to "giving the claimant a pay rise equivalent to 3pm per hour in 2020". The

remaining allegations related to the internal disciplinary process (Allegations 6, 8, 9, 10, 11).

39. There were two allegations against Ms McCreadie and ten allegations against Mr Mansfield.

40. At the final hearing, during the course of the claimant's cross-examination, he admitted that he did not believe that Ms McCreadie or Mr Mansfield were discriminating against him by their actions. This was simply a change in the claimant's belief with no good or clear explanation for that change.

41. In relation to the discrimination claims against Mr Crask and Mr Blair, our conclusion on each and every one of the allegations against these individuals was that there was no good evidence to shift the burden of proof from the claimant to the respondent (see paragraph 332-339 of the Reserved Judgment).

Victimisation

42. We found that the two alleged protected acts were not protected acts: the victimisation claim therefore failed at that point.

43. In any event, the detriment relied upon was the act of dismissal. We found that the reason for dismissal was conduct. Further, we found that there was no good evidence that the alleged protected acts significantly influenced the decision makers' minds in any event.

44. Given that the claimant knew the real reason for dismissal was the fact that he had damaged the pallet truck and not reported the damage, he would have been aware that the dismissal was not due to any protected act.

Failure to make reasonable adjustments

45. We found that the claimant was disabled by way of a shoulder injury, but that he was not disabled due to stress. His reasonable adjustments claim related to substantial disadvantages he said were induced because of his stress. None of his complaints related to his shoulder.

46. In terms of his stress, we found that this was not a disability as it had not lasted for 12 months and was not likely to do so – see paragraph 244 of our Reserved Judgment.

47. Furthermore, and in terms of the alleged substantial disadvantages, they were as follows:

    47.1. He was compelled to attend a disciplinary hearing on 30 April 2021;

    47.2. He was unable to prepare fully for that hearing due to his disability;

    47.3. He suffered an exacerbation of his mental health a a result of the disciplinary process.

48. As above, the claimant alleged that these were all substantial disadvantages related to his stress, not his shoulder. Our findings on the substantial disadvantages are at paragraph 319 of the Reserved Judgment. We note particularly that, regarding his attendance at the 30 April 2021 hearing, the respondent sought medical advice, which came back saying that the claimant was fit to attend a telephone hearing. In relation to the two other substantial disadvantages, we found that there was no good evidence to support these claims.

In advance of the costs hearing

49. On 14 August 2024, the Tribunal sent a Notice of Hearing in preparation of the costs hearing listed for 14 November 2024. A separate document was sent by the Tribunal on the same date containing Case Management Orders for the costs hearing. Those orders included the following:

> "1.8 The claimant is to provide a witness statement:
>
> 1.8.1 setting out whether or not Mr Ogbonmwan is acting in pursuit of profit with regard to these proceedings.
>
> 1.8.2 setting out his financial position at the moment, including monthly/weekly income from any/all sources, and monthly/weekly expenditure. This information must include any savings the claimant has.
>
> 1.9 Mr Ogbonmwan is also to provide a witness statement setting out whether or not Mr Ogbonmwan is acting in pursuit of profit with regard to these proceedings.
>
> 1.10 The witness statements from the claimant and Mr Ogbonmwan must be sent to the respondent within 10 weeks of the date on which this order is sent to the parties *[23 October 2024]*.
>
> 1.11 The claimant must bring 4 copies of his and Mr Ogbonmwan's statement to the Tribunal on the morning of the costs hearing."

50. No witness statements were received from either the claimant or Mr Ogbonmwan in advance of, or at, the costs hearing.

51. In inter-partes correspondence attached to an application to postpone the costs hearing, the Judge had sight of an email from the claimant's representative of 23 September 2024 in which he made it clear that the claimant intended to provide a witness statement, but that Mr Ogbonmwan had no intention of so doing. We find that this demonstrated a willing breach of the Tribunal's order of 14 August 2024.

Procedure at the costs hearing

52. In advance of the hearing, the claimant's representative made an application to postpone, dated 8 November 2024. The Judge determined to refuse the application for reasons given in a letter from the Tribunal, sent to the parties on 13 November 2024. Mr Ogbonmwan also applied at 1859hrs on 13 November 2024 for the Judge to recuse herself; this application was also rejected at the commencement of the hearing.

53. On the morning of the costs hearing, Mr Hobbs attended to start the hearing at the scheduled time of 1000hrs. Neither the claimant nor Mr Ogbonmwan were present at the Tribunal for a 1000hrs start. Having been asked by us to telephone the claimant and his representative, at 1013hrs the clerk informed us that the only telephone number on record was one for Mr Ogbonmwan and that when called the number rang off as being “no longer available”. On our instruction, the clerk emailed the claimant’s representative to inform him that the application to postpone had been refused and enquired as to when he and the claimant would be attending. The Tribunal proposed to start at 1030hrs, with or without the claimant and his representative, as is permitted under rule 47 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (as were then in force).

54. The hearing therefore commenced at 1030hrs without the claimant and his representative, the Tribunal having heard nothing from either individual. Mr Hobbs made his submissions on the respondent’s costs application. Part way through his submissions, the clerk informed the Tribunal that the claimant’s representative was on his way. The respondent’s submissions concluded at 1111hrs, at which point we adjourned to wait for Mr Ogbonmwan’s arrival: he arrived at 1120hrs and we recommenced the hearing at 1134.

55. Mr Ogbonmwan was given the opportunity to explain his lateness; he told us that he had been at the wrong bus stop, and that his normal bus stop had been cancelled. He told us that “it was not practicable to get the claimant to consent to attend”. This caused the Tribunal concern: the case had been listed for three months and, even if Mr Ogbonmwan had not received the refusal to postpone until late in the day, the assumption must have been (or should have been) that the claimant and his representative would need to attend the costs hearing unless and until they expressly heard from the Tribunal to the contrary.

56. Mr Ogbonman then, and only at this stage, explained that the claimant was “very uncomfortable to sit before this Tribunal”. This was purportedly because the Judge during the final hearing had said “by hook or by crook we are going to get through the case in the time allotted” (or words to that effect, the key phrase being “by hook or by crook”). The Tribunal acknowledges that the Judge used this phrase during the final hearing. Mr Ogbonmwan informed the Tribunal that this was a matter that had been appealed to the Employment Appeal Tribunal. At the time of the costs hearing, permission to appeal had been denied on the paper sift, and the claimant had exercised his right to a Rule 3(10) hearing, an oral hearing to seek permission to appeal. The matter is listed for a 1-hour hearing on 15 July 2025.

57. The “by hook or by crook” comment was also part of the basis for the application to recuse. It was said by Mr Ogbonmwan that this phrase was “derogatory and indicative of potential bias” and was “particularly concerning given the racial and ethnic backgrounds of both the claimant and his representative” - cited from the application for recusal. In short, it was understood by this Tribunal that the Judge was being accused of racial bias.

58. When directly asked by the Tribunal why the claimant was not in attendance, his representative said, "since I got the information [that the costs hearing was going ahead and the postponement application was rejected] I haven't been able to get hold of him". This concerned the Tribunal further. As above, it must have been the working assumption of both the claimant and his representative that the hearing was going ahead. Mr Ogbonmwan's answer to this question from the Tribunal necessarily leads to the conclusion that, prior to receiving an answer to the application to postpone, the claimant and his representative between them had determined that the claimant would not attend the costs hearing.

59. To save the respondent's representative from repeating his submissions, the Judge read back her near verbatim notes of his submissions and asked Mr Hobbs at the end whether he agreed with her account: he did.

60. When asked by the Tribunal whether he would like some time to consider his response to Mr Hobbs' submissions, Mr Ogbonmwan applied for the Tribunal to reconsider its decision on the recusal and postponement applications. During these applications, the Tribunal asked the claimant's representative to explain what he understood to be the racial connotation of the expression "by hook or by crook", given this formed a large part of his applications. The Tribunal had used the search engine Google to find an explanation of the origin of the phrase, which was as follows:

> "A widely held theory is that it comes from the custom of allowing commoners to take as much wood from royal forests as they could reach with a shepherd's crook and cut down with a billhook".

61. On Mr Ogbonmwan's request, this phrase was read out several times, slowly, in order that he could record it for his note. He also requested that various words were spelt out to him, which was done on his request.

62. Unfortunately, Mr Ogbonmwan was not able to explain what he said the racial connotation of the expression was and, instead, requested a break, which was duly granted to him for 15 minutes from 1230 to 1245. At 1247hrs, the Tribunal was informed by the clerk that Mr Ogbonmwan was on the telephone, then at 1257 the Tribunal was handed an email from the claimant, sent at 1253. This email was entitled "Representation Regarding Judge's Use of "Hook or Crook" and Related Concerns of Bias and Procedural Irregularity". The Tribunal read the email and took its contents into account.

63. We recommenced the hearing at 1300hrs. In answering the Tribunal's question as to the racial connotation of the "by hook or by crook" expression, Mr Ogbonmwan stated:

> "The King was seen as very oppressive, that is why there were a lot of suffragettes, and it is not a good period that is to be referred to, to connect that to modern times, it was not an appropriate word to have been used in the theatre of the Tribunal..."

64. The claimant's representative finished his submissions at 1312hrs. The respondent was given the opportunity to respond, which he did briefly. We then took lunch from 1315 to 1415 during which time the Tribunal reached the decision to reject the reconsideration application for reasons given at the

time. The claimant's representative was then given one hour to respond to the respondent's application for costs. With some questions from the Tribunal, the claimant's submissions concluded at 1539hrs, having started at 1428hrs. During the course of those submissions, the Tribunal asked Mr Ogbonmwan why there was no witness statement from the claimant. We were told that the claimant had hoped that the respondent would agree to a postponement of the costs hearing. We note that the Tribunal's Order was for service of witness statements by 23 October 2024. We understand from inter-partes correspondence that the possibility of an application to postpone was mooted by the claimant and his representative prior to that date, but the actual application to postpone came after 23 October 2024. We consider therefore that this rationale for not providing a witness statement is weak, unfounded, and disingenuous.

65. The parties' submissions are outlined in detail below. However, at this stage we record that Mr Ogbonmwan's submissions as to whether he was acting in pursuit of profit were to deny that suggestion vehemently.

66. At the end of his submissions, Mr Ogbonmwan was given the opportunity to confirm what he had told us about his relationship with the claimant being pro bono on a religious oath or non-religious affirmation. Mr Ogbonmwan refused, stating that he was not willing to "go under oath and be ambushed by cross-examination". The Tribunal then clarified that, given he had breached the Tribunal order and not provided a witness statement, he was being given the opportunity simply to take the oath or affirmation and to confirm the truth of what he had already told us. Mr Ogbonmwan refused, stating:

> "We think you are impartial and I will not be swearing an oath until the outcome of the Employment Appeal Tribunal and if necessary we will then do so. I do not think I need an oath, I am not a witness, I am a representative..."

67. Mr Hobbs' reply to the submissions on behalf of the claimant lasted five minutes. Mr Ogbonmwan wished to give a response to that reply, which he was allowed to do; his reply lasted 9 minutes. We concluded the hearing, reserving our judgment, at 1553hrs.

68. We have summarised the parties' submissions below. This is not intended to be a complete record of the submissions of both parties, but a detailed summary of the key points.

Respondent's submissions

No reasonable prospects of success

69. The respondent's position was that the entire claim never had any reasonable prospects of succeeding.

70. In terms of the unfair dismissal claim, the respondent's position was that there was CCTV which showed the claimant driving an undamaged pallet truck onto a lorry, then driving out with the front grill bent. It was said that it was inevitable that the Tribunal would return a finding that dismissal had been fair when on the CCTV evidence it was clear that the claimant had damaged the respondent's property and not reported it.

71. Furthermore, on the documentary evidence of the internal investigation, the claimant initially denied the incident. He was then shown the CCTV at which point he admitted fault. However, at the Tribunal final hearing, the claimant told the Tribunal that it was not him on the CCTV (this was the first time this was mentioned by the claimant). He also said that the only reason he confessed was because he was placed under pressure. The Tribunal rejected the claimant's evidence on these two points. The respondent averred that these claims were based on lies.

72. Regarding the direct discrimination claims on the grounds of race and/or religion, the alleged perpetrators were Jimmy Crask, Bill Mansfield and Tracy McCreadie. The claimant raised a total of 21 allegations all relating to the investigation and disciplinary process.

73. During the claimant's cross-examination, the claimant admitted that he did not think that either Tract McCreadie or Bill Mansfield had discriminated against him. That meant that instantly two thirds of the s13 Equality Act 2010 ("EqA") claim fell away. It is fair to point out at this point that this analysis by the respondent neglected to mention the two allegations against Mr Elliott.

74. Finally, the respondent dealt with the claimant's victimisation claim under s27 EqA. This claim was subject to a deposit order, the basis of which was the basis on which the claimant's claim failed at the final hearing. Again, we must point out that it was not quite that straight forward. The deposit order was made against one of two protected acts and was not therefore made against the entire basis of the victimisation claim.

75. Furthermore, we note that the respondent did not specifically address in oral submissions the claims of failure to make reasonable adjustments and breach of contract (notice pay).

76. The respondent submitted that it had sent a letter, being "without prejudice subject to costs", on 6 September 2023. In terms of relative chronology, this was after the preliminary hearings, but before the final hearing. This letter highlighted the weaknesses in the claimant's claims; in the event, the main points raised by the respondent were points found by the Tribunal.

77. At paragraph 2 of that letter was a costs warning, with a settlement proposal. That proposal was for the respondent to pay the claimant £4000 in full and final settlement on the basis that the claimant withdrew his claim. This was proposed as a commercial settlement, rather than being any indication that the respondent admitted any weakness in its case. The respondent says that, in being faced with the weaknesses of his claim, the claimant should have realised that his claims had no reasonable prospect of succeeding.

<u>Unreasonable conduct by the claimant</u>

78. In any event, the respondent argued that the claimant's conduct in rejecting the 6 September 2023 offer and forcing the respondent to defend the claims through to a final hearing was unreasonable conduct that merits a costs order.

Wasted costs – pursuit of profit

79. Mr Hobbs stated that Mr Ogbonmwan had been given a fair chance and fair warning; he invited us to draw an inference from Mr Ogbonmwan's failure to provide a witness statement that he was not acting with a charitable status.

80. Mr Hobbs raised that Mr Ogbonmwan has recently begun to sign off his emails with the signature "Howard Ogbonmwan CAMC CHARITY". This was not the case during litigation until just before the costs hearing. He also averred that the reason that we are unable to ascertain the nature of any retainer between Mr Ogbonmwan and the claimant is due to the lack of evidence forthcoming from both individuals.

81. It was further highlighted that Mr Ogbonmwan is known to be providing assistance to other employees of the respondent, and that the Tribunal can take judicial notice of the fact that Mr Ogbonmwan is a regular attendee at Reading Tribunal. Mr Hobbs stated that "it beggars belief that he is acting in a status of charity"; as such, he invited us to conclude that Mr Ogbonmwan is pursuing a profit in this case.

Representative's improper/unreasonable/negligent conduct

82. In summary, the respondent's submission was that this case did not need three preliminary hearings and should not have required a sixth day for evidence and submissions.

83. The respondent set out the history of those three preliminary claims, which broadly matched the summary as set out herein above. We will not repeat it here.

84. The respondent's point was that this was a claim that should reasonably only have required one preliminary hearing at which the issues in the claim should have been capable of identification.

85. There were numerous breaches of Tribunal orders, which were set out in more detail in the respondent's written costs application dated 24 March 2024.

86. In summary, regarding the preliminary hearings, the respondent averred that the reason why this case required an additional two preliminary hearings was purely down to Mr Ogbonmwan's conduct. This was conduct that continued into the final hearing, given that even at that stage the claimant's representative still did not accept the List of Issues as produced by the Judge following 15 May 2023 hearing.

87. Regarding the final hearing, the respondent highlighted the conduct relied upon to equate to improper, unreasonable or negligent:

    87.1. Attending late every day;

    87.2. Making repeated unmeritorious applications;

87.3. Interjecting on the grounds of white supremacy and racism against Mr Hobbs and the Judge;

87.4. Interrupting cross-examination (on some occasions before the question had even been asked).

88. The respondent's position is that this conduct directly led to the need for a sixth additional day.

Costs claimed

89. The respondent's costs application was capped at £20,000. The costs schedule set out the figures claimed as follows:

Costs incurred	Amount
Burgess Salmon Fixed Fee	£5,000 + VAT
Counsel's fee for preliminary hearing 2 September 2022	£1,250 + VAT
Counsel's fee for preliminary hearing 3 April 2023	£2,250 + VAT
Counsel's fee for preliminary hearing 15 May 2023	£1,500 + VAT
Counsel's fee for the final hearing	£15,750 + VAT
	Total £25,750 + VAT

90. In terms purely of the amount of the costs as set out above, the Tribunal finds that the fees set out above are reasonable in light of the preparation and work required by solicitors and counsel in this matter. Mr Ogbonmwan did not make any representations as to the amounts claimed.

Claimant's submissions

91. Mr Ogbonmwan commenced by reiterating his and his client's concerns about our impartiality and "procedural inconsistency", which affected the claimant's trust in the Tribunal.

92. The claimant's representative reminded us that the Tribunal is designed to allow access to justice, and that costs are only typically awarded in cases in which the conduct has been extremely unreasonable. He stated that any challenge to procedure during the final hearing had been about the "racism claims" rather than any "intention to disrupt". He also highlighted the complexity and importance of this case.

93. It was submitted that in fact any confusion and delays were caused by the respondent's failure to comply with its disclosure duties. This failure, and the respondent's being "economical with the truth" led to various of the claimant's applications being necessary. Mr Ogbonmwan asserted that the "pattern of behaviour by the respondent was classic of class and influence on the claimant" and suggested that the respondent had ignored all rules and procedures that are in place to ensure the efficient running of the Tribunal. For clarity, we reject this assertion; we find that the respondent's conduct has been perfectly proper. In particular, we highlight Mr Hobbs' extremely reasonable and professional conduct in the face of accusations of white supremacy and assassination attempts that were made against him at the final hearing by Mr ogbonmwan.

94. Mr Ogbonmwan revisited the postponement application made in advance of one of the preliminary hearings, on the basis of the claimant having suffered a bereavement. He highlighted that that application was dismissed.

95. The Tribunal must state that, on occasion, it was difficult to follow the claimant's representative's submissions. As an example, below are two passages of his oral submissions (taken from the Judge's note):

> "It is quite astonishing to find that those processes were processes that have been put in place by the impartial Employment Tribunal Rules of Procedure upon which any disputed party can have remedy and have remedy which is consistent with the law. The issue of the claimant acting unreasonably did not really exist, it was an issue that was created, given the influential authority of Mr Hobbs. He was willing to use those opportunities to drive his own agenda and not that of his client";
>
> "There was nothing evidential in the use of process which the claimant's representative followed in the context of managing the claimant's interests. This is quite common. There was no abusive communication, this is not even close to where people have jumped over the table to attack a Judge or a respondent or something. None of these issues, other than the actual confrontation that happened which I raised a complaint about that you have said today was dismissed – the fact that they were dismissed, it [Mr Hobbs' conduct] was in fact much closer to the behaviour which would lead to a costs order".

96. Mr Ogbonmwan repeatedly raised the alleged impartiality of the Tribunal in his submissions, despite the application to recuse, and the application to reconsider our decision on the recusal application, being rejected.

97. In terms of the CCTV evidence, the claimant's representative submitted:

> "You [the Judge] admitted that you could not see the claimant in the CCTV. Also, the [non-legal members] did not take the position that the claimant was the individual in the CCTV".

98. We note at this stage that evidently Mr Ogbonmwan is wrong on this statement, and we refer back to our findings on this point within our Reserved Judgment on liability as summarised above. This is another example of Mr Ogbonmwan simply misrepresenting past events, despite documentary evidence to the contrary. Given that he has misrepresented matters in one way that can be proven on the documents to be clearly otherwise, we find that we are unable to rely on his representations as being credible.

99. Mr Ogbonmwan continued to argue, even at this stage, that the CCTV evidence was contested, defective and unreliable. He continued to argue, at this stage, post-liability judgment, that the dismissal was unfair. At this point we note that Mr Ogbonmwan by his behaviour demonstrated throughout both the final hearing and the costs hearing, no willingness to accept the Tribunal's decision, and would repeatedly continue to argue matters that had been determined and exhausted within the jurisdiction of the Tribunal.

100. He went on to submit that, for the purposes of a costs application, it was not sufficient to say that, just because a claim failed, it must have lacked merit at the beginning. We agree with this principle.

101. It was argued that there was no evidence of any conduct that reached the threshold under the costs rules, and that the alleged breaches of orders were in fact due to the respondent's conduct. Furthermore, it was said on the claimant's behalf that the implementation of a deposit order on one minor part of the claim should not be taken as an indication that the whole case was unreasonable. In terms of the alleged protected act that was the subject of the deposit order, Mr Ogbonmwan submitted that "the claimant was not given the opportunity to prove his case, which leads to the question of impartiality and bias". This last assertion is simply not true; we had a six day hearing, with documentary and oral evidence, and submissions from both sides, at which the claimant had every opportunity to put forward his case. Again, this leads us to the conclusion that we cannot rely on Mr Ogbonmwan's representations as being credible, or indeed true.

102. In terms of a wasted costs order, Mr Ogbonmwan told us that "no money exchanged hands", that he has known the claimant's family for a long time, and that he is "someone they run to when people need support". He said that the respondent's request for a witness statement and detailed financial disclosure was "premature and unnecessary".

103. His position was that the alleged breaches were due to procedural difficulties and were not deliberate but was a response to the respondent's lack of transparency and co-operation. In terms of the numerous applications made by Mr Ogbonmwan, he stated that these were not obstructive, but procedural, were conducted in good faith and in line with the Tribunal rules. We find to the contrary, that the applications made, albeit permitted by the Tribunal Rules, were obstructive to the hearing. We make no finding as to whether they were done in good faith or not.

104. He went on to say that "it was Mr Hobbs who ran the CCTV for two days, intentionally eating into the time allowed for the claimant". As above, the timetable for the final hearing is set out in our reserved judgment on liability, and will demonstrate that Mr Hobbs did not run the CCTV for two days. This is a further misrepresentation and untruth.

105. Mr Ogbonmwan made further submissions, accusing the Tribunal of bias. He stated as follows:

> "all of Mr Hobbs' behaviour was tolerated by the Tribunal. This is one other reason why we consider this case should not have been heard by this Tribunal; because of

> what happened, on reflection it is very difficult to approach the Tribunal and understand the Tribunal would be fair in this case and we have seen that being demonstrated in the way the Tribunal heard the applications from the claimant today. Proper and fair mechanisms were not put in place to manage Mr Hobbs; he is too powerful, he has all the knowledge and the approach. Everything he said was admitted by the Tribunal; that is played out in the Tribunal".

106. We consider that this is emblematic of how parties who act in an obstructive or unreasonable manner, who may not understand the rules and procedures as well as others, view Tribunals. Their opinion is that the Tribunal must be biased, as everything they say is dismissed, whereas everything said by the other side is accepted. However, the reality to an objective bystander is that everything one side says is rejected because it is misguided and without merit, whereas the other side's arguments are cogent and meritorious.

107. At one point, Mr Ogbonmwan accused Mr Hobbs of being dishonest and misleading the Tribunal, in order to "make money for him and his family". These were further unfounded, absurd allegations to make against an officer of the court.

108. One thread that ran throughout Mr Ogbonmwan's submissions was that black people are disadvantaged in the justice system and that:

> "the justice system is not in [black people's] interests. These individuals approach the Citizens' Advice Bureau and unfortunately he did not get representation. The CAB gives representation to white folks...We have seen in the parliamentary investigation that was conducted by parliament, within the last 5 to 8 years, it was established that white lawyers don't wish to take on black cases".

109. At this point, the Tribunal did query this, as it was not an investigation with which the Tribunal was familiar. The Tribunal's view is that Mr Ogbonmwan has his own agenda, and his own views on the Tribunal system and wider justice system being inherently racist. He used this hearing as an opportunity to air those views, despite those views not being relevant to the issues at hand.

110. Mr Ogbonmwan explained that he represented people "as a charitable channel" and that the charity is CAMC. He told us that he is recommended amongst the Black Christian community, but also that White people recommend him too. Despite a steer from the Tribunal that we wished Mr Ogbonmwan to stick to matters involved in this case, as opposed to others of his cases, he told us that the barrister in one of his other clients' cases attempted the same type of behaviour of which he accused Mr Hobbs of being guilty.

111. Mr Ogbonmwan told us about work he had done in the Immigration Tribunal. He told us that the court in one case ended up apologising to him and stating that it was clear that he was kind and compassionate, and that there was no truth in the assertion that he was working for a profit. At this point, Mr Ogbonmwan started talking about Russia, stating that "we should not kill people". The Tribunal attempted to bring Mr Ogbonmwan back to the matter in hand, specifically the point he had been making about not being paid by his clients.

112. Mr Ogbonmwan explained that his clients do provide him with food and pay for his transport and photocopying.

113. In ending his submissions, he stated to the Tribunal:

> "You made an example of defining the comments of by hook or by crook, but that was a statement being used as oppressive. In every circumstance, given the classist position that you and Mr Hobbs sat in, it was very easy to buy into whatever he was saying".

114. Mr Ogbonmwan was directly asked again why there was no witness statement from the claimant. The Tribunal was told that the claimant had hoped that the postponement of this hearing would be agreed to by the respondent.

115. As outlined above, the Tribunal gave Mr Ogbonmwan the opportunity to swear to the truth of his submissions regarding the pro bono relationship between himself and the claimant, on oath or affirmation, given that he had failed to provide a witness statement, as ordered. Mr Ogbonmwan declined, stating that he was not willing to go under oath and be "ambushed" by cross-examination. At that stage, the Tribunal clarified that he was simply being asked whether he wanted to affirm or swear an oath that what he had already told us was true. Again, he declined, stating that he would not swear an oath until the outcome of the appeal was known. He also stated that he did not think it necessary to take an oath, given that he was not a witness but a representative.

Respondent's reply

116. Mr Hobbs was given the right to reply, given that he had made submissions first.

117. Mr Hobbs told us of another first instance case, Mrs L Oyebisi v Hyde Housing Association Ltd (2306525/2020 & 2305977/2020), in London South Employment Tribunal, heard by Employment Judge Wright. In that case, a £20,000 costs order was made against Mr Ogbonmwan's client. One notable remark from the Judge was as follows:

> "unfortunately, and not for the first time, the claimant's representative has misrepresented the discussion that has taken place and therefore the Tribunal cannot rely on anything Mr Ogbonmwan can say, but Mr Ogbonmwan cannot be trusted to tell the truth."

118. In that case, the Judge recorded that Mr Ogbonmwan had made certain assertions about the respondent' counsel that were repeated against Mr Hobbs in this case.

119. At paragraph 79 of that decision, it was recorded that Mr Ogbonmwan's conduct was "unreasonable" and that there had been a "disregard for standards of reasonable behaviour".

120. At paragraph 94, the Tribunal held that "furthermore, it was not clear whether Mr Ogbonmwan was acting in pursuit of profit. Neither the claimant nor his representative came prepared to answer that question"; much like in the index case. The Judge did record that the claimant had informed him that she had paid Mr Ogbonmwan around £5000, whereas Mr Ogbonmwan denied this assertion.

121. Mr Hobbs' position was that "we have been here before" and that Mr Ogbonwan "leaves behind him a trail of unsuccessful claimants who foot the costs bill which he sidesteps by suggesting that he is not pursuing a profit. That needs to stop today".

Claimant's reply

122. In relation to the Oyebisi case, Mr Ogbonmwan stated that the decision had been to conclude that he was not acting for profit. He went on to state that the Judge in that case "did not come to this conclusion honourably", but that Mr Ogbonmwan had been added as an interested party but was not sent the correspondence, and was not given a chance to defend the costs order. We note that this is blatantly not the case: we explore the Oyebisi case in more detail below, but it is evident that Mr Ogbonmwan was aware of the hearing by very nature of having attended, and he was clearly given the chance to make representations.

123. He told us that he only saw the Oyebisi judgment three months ago and that "this is what they want the narrative to be of a black man". He explained that the question the claimant in that case had been asked by the Tribunal was not "how much did you pay Mr Ogbonmwan" but "how much have you spent on the case". Mr Ogbonmwan made reference to the Employment Judge finding that he (Mr Ogbonmwan) was on a "crusade".

The case of Oyebisi

124. In light of Mr Ogbonmwan's reference to previous clients of his, the specific reference then of Mr Hobbs to the case of Oyebisi, and MR Ogbonmwan's specific reply, we have considered the Costs decision, and underlying Strike Out Judgment and Reasons.

125. This was a case that was heard at London South Tribunal. The claims were struck out by order of 8 October 2021, on the grounds of:

    125.1. The manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious; and,

    125.2. The claimant had not complied with the Order of the Tribunal dated 9 April 2021.

126. This was following a public preliminary hearing on 8 October 2021. The reference to a crusade mentioned by Mr Ogbonmwan is as follows, at paragraph 4 of the Written Reasons sent to the parties on 12 May 2022:

> "The Tribunal was satisfied and as had been demonstrated over the two day hearing, that Mr Ogbonmwan sees this case as a crusade. He is not acting in the claimant's best interests and is pursuing his own agenda against the respondent. His conduct has been disrespectful and that was evidence [sic] by him laughing and smiling when [Respondent's counsel] was making his application. There has been a persistent disregard of the Tribunal's orders and during the course of the hearing and flagrant breaches of protocol..."

127. The Written Reasons go on to state:

> "7. ...Even with the threat of the two claims being struck out, Mr Ogbonman continued to make scurrilous allegations, entirely without foundation. Furthermore he would not engage with the Tribunal when attempting to identify the issues, which was a matter which this hearing was clearly listed to consider.
>
> 9. The Tribunal accept the submission made about Mr Ogbonmwan's repeated outrageous allegations and was taken to various examples in the bundle. He was warned, referring to the exchange the previous day when it was said that the Interim Relief application was concluded, it having been reconsidered and there had been no appeal. Mr Ogbonmwan was asked to move on and to respond to the application to reject the ET1 and he replied that the Tribunal was biased and had pre-judged matters. Despite that warning, he continued to make allegations against Judges and on this occasion [the respondent's counsel]...
>
> 10 Mr Ogbonmwan repeatedly made misleading statements. He said for example Judge Andres agreed the claimant had made protected disclosures, she clearly said the opposite...
>
> 15. Due to Mr Ogbonmwan's disruptive and therefore unreasonable conduct, what should have been more than ample time of two days to deal with the five matters listed, resulted in unsuccessfully attempting to identify the issues at 1135am on the second day, when Mr Ogbonmwan did not rejoin and did not provide any explanation after a break (which was granted to assist the claimant).
>
> 16. To conclude, Mr Ogbonmwan has demonstrated contempt towards the Tribunal and the processes to be followed...".

128. In terms of the costs application. A hearing took place by CVP on 5 June 2023. The judgment sets out that the claimant was ordered to pay to the respondent the sum of £20,000. The respondent's application for wasted costs against Mr Ogbonmwan failed and was dismissed. The Judgment and Reasons in that matter are twenty three pages long.

129. We highlight the following parts of the Judge's reasons:

    129.1. It was common ground between Mr Ogbonmwan and the respondent that, "although he is a lay representative, he had acted and continues to act for a number of claimants and as such, he is familiar with Tribunal proceedings and the standard of conduct required of representatives" - paragraph 8;

    129.2. Mr Ogbonmwan told the Tribunal that he was acting via a charity called "CAMC" (Christ Ambassadors Miracle Centre) - paragraph 9;

129.3. "[Mr Ogbonmwan] said that he represented the claimant as a family friend of over 20-plus years. He said that he was not paid, but that he received expenses for things such as photocopying, taxis and hotels. The claimant said that she had paid Mr Ogbonmwan a sum of approximately £5,000 or just under that sum" - paragraph 10;

129.4. Mr Ogbonmwan accused the Tribunal and the Judge of bias and "an orchestrated conspiracy to avoid a fair hearing and entrenched white privilege" - paragraph 12;

129.5. In relation to an exchange about costs that had taken place at the previous hearing, "[u]nfortunately and not for the first time, Mr Ogbonmwan has completely misrepresented the discussion which actually took place. The result of that is that the Tribunal cannot rely upon anything Mr Ogbonmwan has to say" - paragraph 18;

129.6. The Judge found, in relation to the wasted costs order, that Mr Ogbonmwan's conduct was unreasonable so as to be vexatious and that the conduct caused the respondent to incur additional costs. The application for wasted costs fell down on the third limb as to whether it would be just to make a wasted costs order. This was on the basis of litigation privilege, as the claimant did not waive privilege and it was not clear whether Mr Ogbonmwan in his conduct was acting on instructions. As such, the Tribunal gave him the benefit of the doubt – paragraphs 92 and 93;

129.7. The Tribunal was also unclear as to whether Mr Ogbonmwan was acting in pursuit of profit, as neither Mr Ogbonmwan nor the claimant attended prepared to cover this matter – paragraph 94.

Legal framework

130. The applicable rules are as follows, under the new Employment Tribunal Rules 2024 (which mirror the rules under Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, rules 75 to 84:

> 73 – (1) A costs order is an order that the paying party make a payment to –
>
> (a) the receiving party in respect of the costs that the receiving party has incurred while represented by a legal representative or a lay representative, or
>
> (b) ...
>
> ...
>
> 74 - (1) The Tribunal may make a costs order ...on the application of a party ...
>
> (2) The Tribunal must consider making a costs order...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 of it, or the way that the proceedings, or part of it, have been conducted,

(b) any claim...had no reasonable prospect of success, or

(c) ...

75 - (1) A party may apply for a costs order...at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties.

(2) The Tribunal must not make a costs order or a preparation time order against a party unless that party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order).

76 - (1) A costs order may order the paying party to pay

(a) the receiving party a specified amount, not exceeding £20,000, in respect of th costs of the receiving party;

(b) ...

78 – (1) A wasted costs order is an order against a representative in favour of any party where that party has incurred wasted costs.

(2) The Tribunal may make a wasted costs order in favour of a party, whether or not that party is represented, and may also make such an order in favour of a representative's own client.

(3) A wasted costs order may not be made against a representative where that representative is representing a party in their capacity as an employee of that party.

(4) In this rule, and in rules 79 (effect of a wasted costs order), 80 (procedure) and 82 (ability to pay), "representative" means a party's legal representative or lay representative or any employee of such representative, but it does not include a person who is not acting in pursuit of profit with regard to the proceedings, A person acting on a contingency or conditional fee agreement is considered to be acting in pursuit of profit.

(5) "Wasted costs" means costs incurred –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative, or

(b) which, in the light of any such act or omission occurring, after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

79 A wasted costs order may order a representative to pay the whole or part of any wasted costs of the party in whose favour the order has been made, or to disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to their client any costs which have

already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

80 - (1) The Tribunal may make a wasted costs order...on the application of a party.

(2) A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties.

(3) The Tribunal must not make a wasted costs order unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in respect of the application or proposal.

(4) The Tribunal must inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

82 In deciding whether to make a costs order, preparation time order, or wasted costs order, and if so the amount of any such order, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

Law – costs against a party

131. The relevant Rules are set out above. There are three stages to a costs application:

    131.1. The Tribunal will determine whether or not the relevant threshold has been reached. In other words, the Tribunal will determine whether the claimant acted unreasonably in pursuing litigation through to a final hearing, and whether the claim had no reasonable prospect of success ("Stage 1");

    131.2. If at least one of the thresholds is met, the Tribunal will decide whether to exercise its discretion to make a costs order ("Stage 2");

    131.3. If the Tribunal decides to make a costs order, it will then determine the amount of any award ("Stage 3").

Stage 1 – the relevant thresholds

132. The burden of proof is on the applying party (here, the respondent) to prove that the Tribunal's jurisdiction at Stage 1 is engaged – Haydar v Pennine Acute NHS Trust EAT 0141/17.

Unreasonable conduct

133. The term "unreasonable" is to be given its normal meaning, and will not be interpreted as a synonym for vexatious – Dyer v Secretary of State for Employment EAT 183/83.

134. The Tribunal will need to give consideration to the "nature, gravity and effect" of a party's unreasonable conduct – McPherson v BNP Paribas (London

Branch) [2004] ICR 1398, CA. However, it is important not to lose sight of the wood for the trees, and to take an overarching view of the case – Yerrakalva v Barnsley Metropolitan Borough Council and anor [2010] ICR 420, CA (paragraph 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 any 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..."

135. Regarding an application against a party, it is not necessary for the Tribunal to limit itself to awarding costs caused by the conduct that is held to be unreasonable – McPherson, paragraph 41.

No reasonable prospect of success

136. The focus under this ground is on the claim itself, judged on the information that was known or reasonably available at the commencement of litigation – Radia v Jefferies International Ltd EAT 0007/18. This is not a retrospective test: the Tribunal must consider how prospects looked before all the evidence and submissions were heard at the final hearing, and what view the claimant should reasonably have taken about his prospects in light of what he knew or ought to have known about the facts.

Stage 2 – factors relevant to exercising discretion

137. It will be an error of law to miss out the second stage, and jump straight from establishing that a relevant threshold is met to determining the amount of any award.

138. The purpose of a costs order is to compensate the receiving party, not to punish the paying party – Lodwick v Southwark London Borough Council [2004] ICR 884.

139. In the case of Kopel v Safeway Stores plc [2003] IRLR 753, the EAT held that the rule of the Calderbank letter that applies in civil litigation has no place in the Tribunal. A party facing a costs application will not automatically be liable for costs just because the purported receiving party had written a letter alleged to have the effect of a Calderbank letter. The refusal of an offer to settle is however a factor to weigh into the melting pot at this second stage.

140. Conversely, the fact that a respondent has made an offer to settle shall not be taken as an indication that it considers the claim has some reasonable prospects – Vaughan v London Borough of Lewisham and ors [2013] IRLR 713.

141. Whether or not the purported receiving party has applied to strike out a claim on the basis that it had no reasonable prospects of success can be a factor to add into the balance at this second stage, although it is not determinative – AQ Ltd v Holden [2012] IRLR 648.

142. Under r82, the Tribunal may take into account a paying party's ability to pay. However, it is permissible to weigh this against the need to compensate a receiving party who are left (unreasonably) out of pocket – Howman v Queen Elizabeth Hospital Kings Lynn UKEAT/0509/12, paragraph 13:

> "In the final analysis, if the Tribunal decides to have regard to someone's ability to pay in deciding what order for costs it should make, what it needs to do is to balance the need to compensate the litigant who has unreasonable been put to expense against the other litigant's ability to pay. The latter does not necessarily trump the former, but it may do so".

Stage 3 – amount of costs order

143. The Tribunal may take into account a paying party's ability to pay, however there is no obligation to do so under r82. It is however wise for a Tribunal to at least enquire as to the paying party's means – Ono v NHS Leicester City [2013] ICR 91.

144. The Tribunal is not limited to consideration of a paying party's ability to pay as at the date of the costs hearing. In Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT, it was held that a Tribunal would not necessarily be wrong to make a costs order that a paying party could not, at the date of the order, afford to pay, if the Tribunal considered that at some point in the future, they may be able to pay.

145. If the Tribunal decides not to take into account a paying party's ability to pay, it should explain why – Jilley v Birmingham and Solihull Mental Health NHS Trust and others UKEAT/0584/06 paragraph 44.

Law – wasted costs against a representative

146. Wasted costs orders are not limited to legally qualified representatives; their remit covers lay representatives also. However, a wasted costs order may only be made against a representative acting in pursuit of profit.

147. In this scenario there is a separate three-stage test to apply, from Ridehalgh v Horsefield and Anor [1994] Ch 205:

    147.1. Has the representative acted improperly, unreasonably or negligently?

    147.2. If so, did that conduct cause the applicant to incur unnecessary costs?

    147.3. If so, is it just, in all the circumstances of the case, to make a costs order for all or some of those costs?

148. The definitions for each of these three terms were set out in Ridehalgh as follows – page 232:

> ""Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or

> other serious professional penalty...Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> "Unreasonable" ... aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive...The acid test is whether the conduct permits of a reasonable explanation.
>
> ...
>
> ...we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession"

149. The threshold for making a wasted costs order, in particular the definition of unreasonable, is higher than the threshold for a costs order against a party. Another difference is that, for a wasted costs order, there must be a causal link between the costs and the conduct; as opposed to a costs order, in which this is a factor for consideration only.

150. If the case relates to pursuing a claim or defence that has no prospects, the question will be whether that was because the party insisted and the representative was simply following instructions, or whether the case was pursued because of the representative's negligence or improper/unreasonable conduct. The former will merit a costs order, the latter is more likely to warrant a wasted costs order. Due to the effect of legal/litigation privilege, it will rarely be clear into which category a certain case falls and so applications are made against both a party and their representative. In such cases where there is lack of clarity due to legal privilege, the benefit of the doubt is to be given to the representative, and a costs order, not a wasted costs order, made.

151. In Ratcliffe Duce and Gammer v Mrs L Binns T/A Parc Ferme, Mr N Mcdonald UKEAT/0100/08/CEA at paragraph 19, Elias J held:

> "The notion that a wasted costs order can be made against a lawyer simply because his client is pursuing a hopeless case is entirely erroneous. Such conduct does not of itself demonstrate that their representative has acted improperly or unreasonably. Clients frequently insist on pursuing a case against the best advice of their lawyers".

152. At paragraph 20 of Ratcliffe, Lord Hobhouse's decision in Medcalf v Mardell [2003] 1 AC 120 was cited:

> "...The litigant is entitled to be heard: to penalise the advocate for presenting his client's case to the court would be contrary to the constitutional principle to which I have referred. The position is different if the court concludes that there has been improper time wasting by the advocate or the advocate has knowingly lent himself to an abuse of process".

153. At paragraph 21 of Ratcliffe, following on from the words of Lord Hobhouse, it was held that:

> "The distinction therefore is between conduct which is an abuse of process and conduct falling short of that."

154. Rule 74(2)(a) provides a route to make a costs order against a party for their representative's conduct where that conduct is vexatious, abusive, disruptive or otherwise unreasonable.

Conclusions – costs application

Stage 1a – did the claim have no reasonable prospects of success

155. We will consider each claim in turn. First, we make a general point. The respondent sent to the claimant a "without prejudice save as to costs" letter dated 6 September 2023. It set out therein a summary analysis of the claimant's claims and why they were bound to fail. At this stage, we consider that, had the claimant reasonably reviewed his prospects with his representative (as he should have done) he would and should have reached the conclusion that his claims had no reasonable prospect of success. Broadly, the analysis given within the respondent's letter was the same as the analysis of the Tribunal following the final hearing.

156. As at 6 September 2023, the claimant had all the evidence disclosed that formed the bundle used at the final hearing. He knew therefore what all the relevant contemporaneous documentary evidence stated, and had seen the CCTV footage. Even without the documentation received following the disclosure exercise, had he reasonably examined his own knowledge of events, he should reasonably have reached the conclusion that his claims were without merit.

Unfair dismissal and breach of contract (notice pay)

157. We accept that this claim never had any reasonable prospect of success. It was based on lies, given that the claimant knew that he was guilty of the conduct for which he was dismissed. Furthermore, he should have known that his conduct was sufficient to amount to conduct meriting summary dismissal.

Direct discrimination

158. The claims against Ms McCreadie and Mr Mansfield clearly never had any prospect of success. The reason they failed was because of the claimant's view, given freely in cross-examination, that those two individuals had not discriminated against him. No evidence was given as to the reason for the claimant's change of heart on this issue. We therefore conclude that the claims against those two individuals had no reasonable prospect of success from the get go.

159. In terms of the claims against Mr Crask and Mr Elliott, we concluded at the final hearing that the allegations did not get past the initial burden of proof. In other words, the claimant had not put any good evidence before us from which we could have concluded that Mr Crask or Mr Elliott had contravened the Equality Act 2010.

160. We consider that the claimant should have reviewed his case at the latest on 6 September 2023, and ought to have reached the conclusion that he had no good evidence to put before the Tribunal on this matter. This is particularly so given he had an experienced lay representative advising him. The claimant ought to have come to the conclusion that these claims were bound to fail and had no reasonable prospect of success, particularly on receipt of the 6 September 2023 letter from the respondent.

Victimisation

161. We consider that the claimant should have been aware, with advice from Mr Ogbonmwan, that the alleged protected acts were unlikely to amount to protected acts at law. This is particularly true given that a deposit order was made on this point in relation to one of the two alleged protected acts.

162. In any event, and more importantly, as we have set out above, the claimant knew of the reason for his dismissal. He knew he was guilty of the misconduct alleged. As such, he knew that his dismissal (the only pleaded detriment under the s27 EqA claim) was not because of any protected act. As such, he knew that this claim had no merit.

Failure to make reasonable adjustments

163. We conclude that, had the claimant reasonably reviewed his prospects on this claim, he ought to have come to the conclusion that he would not be found to be disabled by way of his stress, and therefore this claim would fail.

164. Furthermore, on the documentary evidence, that evidence being disclosed prior to 6 September 2023, and with his knowledge of the facts, the claimant ought to have concluded that this claim had no prospects of success. This assessment should have occurred, at the latest, on receipt of the 6 September 2023 letter from the respondent.

Stage 1b – did the claimant act unreasonably in pursing the litigation

165. The conduct relied upon by the respondent was the failure of the claimant to accept the offer of 6 September 2023, and to walk away from litigation.

166. The refusal of an offer, in and of itself, does not automatically mean that a claimant has acted unreasonably and a costs order will be made (Kopel). We understand that when such costs warning letters are received, they are not always considered to be sent in good faith and the analysis of the merits not always trusted by the recipient. It cannot be said that the rejection of the letter in and of itself was unreasonable so as to reach the threshold required by this limb of the test.

Stage 2 – should we exercise discretion

167. We consider that this is a case in which we should exercise our discretion to make a costs order. We take into account the following matters:

    167.1. The respondent had sent a costs warning letter, and attempted to strike out/obtain a deposit order in relation to certain of the claims;

167.2. The Judge of her own volition considered certain of the claims for strike out and deposit order at a preliminary hearing;

167.3. We take into account that the unfair dismissal claim was mounted on lies, specifically the untruths that the claimant was not the individual in the CCTV and that he was not guilty of damaging the pallet truck;

167.4. We take into account that the majority of the discrimination claim should never have been brought, on the basis of the claimant's own evidence that Ms McCreadie and Mr Mansfield had not discriminated against him. To accuse individuals of discrimination when that accusation is not believed in by the claimant is to put those individuals to the stress and burden of such allegations wholly unnecessarily.

168. We have not exercised our discretion to consider the claimant's ability to pay any costs order. This is because we gave the claimant the opportunity to provide a witness statement and he failed to do so in breach of our order. As such, we have no evidence of his financial means or ability to pay, and do not wish to speculate on such matters. The claimant was given the chance to provide evidence by way of a statement, and he had a representative to make any representations or produce any documentary evidence as to the claimant's means. However, the Tribunal has seen nothing. Further, the claimant failed to attend today. Had he attended, and despite not providing a witness statement, he may well have been given the opportunity to give evidence on oath as to his means. Whether he was advised to stay away on the basis that this would inhibit us making a costs order, decided to stay away on his own volition, or there was a miscommunication about the postponement between him and Mr Ogbonmwan, we find to be irrelevant and in any event to determine the reason behind his absence would be to speculate. The point is that we have no evidence before us of the claimant's ability to pay, and as such do not take that ability into account.

Stage 3 – amount of the order

169. The respondent seeks its full costs of this litigation. We are not satisfied that this would be just. We have found that, at the latest, the claimant should have reasonably reviewed his claim and concluded it had no merits on receipt of the letter from the respondent dated 6 September 2023. We understand that, by that time, the respondent's solicitors' fixed fee was incurred in full, and as such we do not award that figure.

170. We do however consider that, on a reasonable review, the claimant should not have proceeded to the final hearing. As such, we are satisfied that it is appropriate to award the respondent the costs incurred as counsel's fees for the final hearing. We will return to the point as to whether the claimant should pay for the initially envisaged five day trial, or whether he should also be liable for the sixth day too, once we have considered the application against Mr Ogbonmwan.

Conclusions – wasted costs

In pursuit of profit

171. In total, Mr Ogbonmwan was given three opportunities to swear to the truth of the information he gave us about working for the claimant for no pay:

    171.1. In the form of a witness statement, as per the order of 14 August 2024;

    171.2. In the hearing, when the Tribunal asked if he wished to swear to the truth of his submissions on this point;

    171.3. In the hearing, when the Tribunal clarified that he could simply swear to the truth of what he had already told the Tribunal, in other words, without being cross-examined.

172. Mr Ogbonmwan willingly refused to take up each of those three opportunities.

173. We find that this is sufficient basis on which to draw the inference that Mr Ogbonmwan is not being truthful to this Tribunal. We see no good reason why he would otherwise refuse to swear to the truth of his submissions. This conclusion is supported by the occasions, cited in the course of our judgment above, on which Mr Ogbonmwan has misrepresented matters that are plain from the documentation or simply misrecord what happened when this Tribunal was present and aware of the facts.

174. We have no evidence from the claimant as to the funding relationship or lack thereof between himself and Mr Ogbonmwan, despite having the opportunity to provide us with the same by way of a witness statement (an order that was not complied with) and by attendance at the costs hearing.

175. The only information (notably not in the form of evidence but as submissions) that we have is from Mr Ogbonmwan which, as above, we do not accept as truthful.

176. We set out above in some detail the decision in the case of Oyebisi. The purpose is not to conflate this case with that, but to demonstrate that there appears to be a modus operandi to Mr Ogbonmwan in his representation of his clients. There also appears to be similarity in the account he gave in that case and this, as to the relationship between him and his client.

177. Mr Ogbonmwan made the same submissions at the Oyebisi hearing as at the index one: namely that he had been friends with the claimant's family for years, and that he was reimbursed for items such as food and transport. Moreover, in the Oyebisi case, Mr Ogbonmwan made similar baseless allegations against the respondent's counsel and judiciary as he did against Mr Hobbs and the Judge in the case before us.

178. In short, we consider that the account of Mr Ogbonmwan's conduct and submissions in the Oyebisi case only goes to support our decision to draw an inference from his conduct before us at the costs hearing.

179. We are concerned that Mr Ogbonmwan's conduct in the proceedings before us is not unique or novel, but is a general modus operandi. The pattern is that his clients' claims fail, the respondent makes an application for costs and,

at the costs hearing, Mr Ogbonmwan is absolved of any risk of being the subject of a wasted costs order as there is no evidence that he is being paid for his services. This means that any unreasonable conduct by Mr Ogbonmwan is paid for under a regular costs order against his client, and he escapes being the subject of a wasted costs order.

180. However, we consider that this case is different, in that we have sufficient facts before us from which we can draw an inference that Mr Ogbonmwan was being paid. We find this to have been the case and conclude that Mr Ogbonmwan acted in pursuit of profit in the index matter.

181. As such, we are able to make a costs order against Mr Ogbonmwan, if appropriate to do so, under rule 78(4) of the 2024 Rules.

182. We therefore turn to the question of whether Mr Ogbonmwan's conduct in his representation of the claimant reached the threshold required of improper, unreasonable or negligent conduct.

Improper, unreasonable or negligent

183. We conclude that Mr Ogbonmwan's conduct at various stages of this litigation has reached the heightened definition of "unreasonable". We need not determine the motivation behind his conduct: even if he is right, and his conduct comes from excessive zeal, this does not preclude a finding of unreasonableness. We cannot see that there is any reasonable explanation for some of his conduct.

Causation

184. In terms of the second and third preliminary hearing, we refer to our findings at paragraphs 25 above. There has been no evidence, and no submissions, to the effect that Mr Ogbonmwan's preparation for these hearings was inhibited by the conduct of his client. For example, there is nothing to suggest that Mr Ogbonmwan was unable to get clear instructions from his client in relation to the List of Issues.

185. In any event, we take into account that Mr Ogbonmwan's lack of preparation and lack of clear understanding of his client's case at the first preliminary hearing can only be from a lack of case preparation on his part. His client had completed the claim form with his assistance: Mr Ogbonmwan's job as representative then was to work with the other side to produce a list of issues to reflect the claims within that claim form. Although we understand that a representative may need final "sign off" from his client, he should be in a position to work with the other side to disseminate the claim form into a workable List of Issues, even if it is subject to final approval from the client. As such we are satisfied that the unreasonable conduct leading to the need for a second and third preliminary hearing is not affected by litigation privilege and was caused by Mr Ogbonmwan himself.

186. In terms of the sixth day of the final hearing, time was added to the final hearing by Mr Ogbonmwan's conduct, as we have set out at paragraph 27 above.

187. In terms of litigation privilege, we reach the following conclusions:

187.1. On Day 1, making unmeritorious applications that meant we did not start evidence until 1255hrs on Day 2. We accept that we do not and cannot know whether these applications were made on the claimant's instructions, or of Mr Ogbonmwan's own volition;

187.2. Interrupting and interjecting during his client's cross-examination by Mr Hobbs. The vast majority of those interjections (if not all of them) were unmerited and not sustained. This cannot have been on his client's instructions, as his client and Mr Ogbonmwan would have been unable to discuss the case whilst the claimant was giving evidence and being cross-examined;

187.3. Being repeatedly late for the agreed start time on numerous days of the final hearing. We consider it beggars belief that the claimant would have instructed Mr Ogbonmwan to be deliberately late repeatedly as a tactic. We consider that this lateness was the responsibility solely of Mr Ogbonmwan;

187.4. Repeated failure to comply with the Tribunal's timetabling of the final hearing. Again, we consider that it would beggar belief that the claimant would have specifically instructed Mr Ogbonmwan to have flouted the Tribunal's timetables. We consider that it is for a representative to manage the time allocated to them for questioning of witnesses;

187.5. Making numerous unmeritorious applications through the course of the final hearing, as recorded in the Reserved Judgment on liability. We once more accept that we cannot be clear as to whether these applications were made on the instructions of the claimant or of Mr Ogbonmwan's own volition;

187.6. Making spurious and wholly unfounded allegations against Mr Hobbs, including accusing him of white supremacy and threatening to report him to the Bar Council (see paragraphs 74 to 86 of the Reserved Judgment). Even if Mr Ogbonmwan was instructed to make such damaging and insulting assertions, we consider that Mr Ogbonmwan has sufficient experience as a lay representative to understand that he has a duty to the Tribunal to follow and further the overriding objective as a representative of a party to litigation. We consider it highly unlikely that the claimant instructed Mr Ogbonmwan to make these spurious allegations of his own volition.

188. Taking all the facts of this litigation in the round we conclude that Mr Ogbonmwan's conduct, which directly led to more Tribunal time and more costs being spent, was an abuse of process.

Just in all the circumstances

189. We consider that it is just in all the circumstances to make a wasted costs order against Mr Ogbonmwan for the following reasons:

189.1. He has a modus operandi which, unless a wasted costs order is made, would lead to his client paying for conduct which we consider is the fault of Mr Ogbonmwan;

189.2. His conduct throughout this litigation has fallen dramatically below the standard we would expect from any lay representative, particularly one who is experienced in that role and familiar with Tribunal process;

189.3. Mr Ogbonmwan needs to understand that he cannot act in this manner with impunity and without consequences.

190. We have not taken Mr Ogbonmwan's ability to pay into account on making this order. We did not have any evidence before us of his current means or his current or future ability to pay.

191. Although Mr Ogbonmwan was not specifically asked by the Tribunal to address the issue of ability to pay, he had the reasonable opportunity to address us in response to the wasted costs application in any way he felt fit. In any event, he refused to give evidence on oath or affirmation, or to provide a witness statement. Both modes would have been capable of being used to put before the Tribunal evidence of his means, had he chosen to do so. He did not, as such we are without any such evidence.

Conclusion – amount of awards

192. As above, in principle, we consider that the claimant should pay the respondent's costs of the final hearing. However, we have concluded that the reason it expanded from a five day to a six day hearing was the fault of Mr Ogbonmwan.

193. We therefore conclude that the claimant should pay for the first five days of trial, as that was the planned length of the hearing. Mr Ogbonmwan should pay for the sixth day of trial.

194. Mr Hobbs' trial fee did not change with the addition of an extra day. As such, we calculate the daily fee for Mr Hobbs as being (£15,750 + VAT)/6 = £2625 + VAT = £3,150.

195. Therefore, in relation to the final hearing fee;

195.1. The claimant will be liable for (5 x £3,150 =) £15,750 for Days 1 to 5 of the final hearing; and,

195.2. Mr Ogbonmwan will be liable for £3,150 for Day 6 of the final hearing.

196. Mr Ogbonmwan is also liable, we conclude, for the respondent's costs of the second and third preliminary hearings, that being (£2,250 + £1,500) + VAT. That equates to £4,500.

197. In total therefore, the wasted costs order against Mr Ogbonmwan stands at (£3,150 + £4,500 =) £7,650.

Approved by

Employment Judge Shastri-Hurst

Date 10 February 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21/02/2025

FOR EMPLOYMENT TRIBUNALS