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Case No: EA-2023-000020-AT
EA-2023-000280-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 February 2025

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MR VICTORMILLS IYIEKE

Appellant

- and –

BEARING POINT LIMITED

Respondent

- -
- -

Naomi Ling (instructed via Advocate) for the **Appellant**
The **Respondent** did not attend and was not represented

Hearing date: 4 February 2025

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JUDGMENT

SUMMARY

COSTS

During the pandemic, following the loss of the client contract to which he was assigned, the claimant in the employment tribunal was not furloughed and was dismissed. He brought a complaint of race discrimination, relying upon two colleagues (not of his race) who were furloughed at the time when he was dismissed, as statutory comparators. The claim failed at trial.

The respondent then applied for costs. In its first decision arising from the costs hearing the tribunal decided that the costs threshold was crossed. That was in particular because, following exchange of witness statements, the claimant should have realised that his reliance on his colleagues as actual comparators, and his overall claim, had no reasonable prospect of success, but fought on to trial. The tribunal erred, in particular having regard to features of the evidence that should have been regarded as giving the claimant a reasonable basis for continuing with his claim to a trial, at which the respondent's witness evidence could be tested, either relying on the colleagues as actual statutory comparators, or relying upon a hypothetical comparator, and on the treatment of the colleagues as evidentially relevant.

The tribunal also erred in a further decision fixing the amount of costs, in particular by awarding costs summarily limited to the maximum amount sought, which was considerably lower than the amount said to have been incurred in the relevant period, but without addressing whether an award of that maximum amount was, in and of itself, reasonable and proportionate.

HIS HONOUR JUDGE AUERBACH:

1. The claimant in the employment tribunal was employed by the respondent from October 2019 on a fixed-term contract. Following the onset of the pandemic, and then the loss of the client project on which the claimant was working, the respondent decided not to furlough him and to dismiss him on 1 April 2020. He thereafter brought a claim complaining of direct race discrimination in respect of both decisions, acting as a litigant in person.

2. Arising from a hearing at Birmingham in January 2022, the tribunal – EJ Wedderspoon, Mrs Forrest and Mrs Howard – dismissed the claim. The respondent then applied for costs. That was considered at a further hearing before the same panel in November 2022. The tribunal decided that costs should in principle be awarded. Following provision of further evidence as to the claimant's means, the tribunal met in chambers and produced a further written decision ordering him to pay costs to the respondent in the sum of £10,000.

3. The joined appeals I have heard are against both costs decisions. The notices of appeal prepared by the claimant himself, acting again as a litigant in person, were considered on paper not to raise any arguable grounds. But arising from a combined rule 3(10) hearing at which the claimant was represented by Ms Ling of counsel under the ELAAS scheme, amended grounds were directed to proceed to a full appeal hearing. The respondent's solicitors thereafter emailed the EAT stating that the appeals were opposed and that it relied upon the employment tribunal's reasons, but also stating that it would not be participating in the proceedings; and no representative has appeared for it today. Ms Ling has once again appeared for the claimant, through the auspices of Advocate.

4. In advancing his complaints of direct race discrimination, the claimant relied on two former colleagues as named comparators, both being not of his race and both of whom had at the beginning of April 2020 not been dismissed but been furloughed. They were referred to as "S" and "P".

5. The tribunal's liability decision included, in summary, the following salient findings and

conclusions:

a) The claimant was hired as a systems analyst on a one-year fixed-term contract from 21 October 2019, at a consultant-level salary of £45,000 p/a. He was assigned to work on a specific project for the respondent's client, JLR, called the SOTA project.

b) P was hired on a fixed term contract to work on the same client project as a systems analyst from 7 October 2019. P was appointed at the senior-analyst grade and paid £40,000 p/a.

c) S joined in November 2019 as a project manager on a fixed-term contract at the senior-analyst grade at a salary of £35,000 per annum. S was employed in the defect-management team.

d) By December 2019 the claimant had moved to the integration team, in which, from that point, he worked together with P and a third colleague, all under the same line manager.

e) In or around early March 2020 performance feedback was collated for the claimant and for P. The feedback was not as favourable for the claimant as it was for P. The negative feedback was conveyed to the claimant at a meeting on 16 March 2020. Over the course of the next couple of days further issues, and the need for improvement, were communicated to him in a further meeting and in an email.

f) On 17 March 2020 both the claimant and P received a bonus. That reflected work done to the end of December 2019 and the respondent's practice of giving employees with three months' service a £500 bonus; and so the tribunal found it was not inconsistent with the negative feedback concerning the claimant's work in the integration team.

g) On around 26 March 2020 JLR informed the respondent that it would not be renewing its contract after 31 March. The position of the 13 employees working on the SOTA project was then reviewed. The decision was taken to dismiss the claimant and a number of other employees. The decision was made to furlough S and P on the basis that the respondent considered that it may be able to utilise them in a potential future opportunity with the same client.

h) On 1 April 2020 the claimant was informed of the decision to dismiss him. He asked to be furloughed and indicated that he was willing to reduce his salary to the level of the £2500 monthly grant available from the government under the Coronavirus Job

Retention Scheme (CJRS). However, at that time the respondent's policy was to pay furloughed employees 80% of actual salary, even if that exceeded the monthly grant, and the claimant's offer was declined.

i) At the beginning of April 2020 P and S were both furloughed at 80% of actual salary. However, at the end of June the respondent agreed confidentially with P that his furlough pay would be limited to the CJRS amount of £2500 for the final month of his contract, being July 2020. In the event, no further project work from JLR came through and the employments of both P and S were terminated. In the case of P, that was at the end of July 2020. In the case of S, although the tribunal does not mention the date in its decision, it appears from the documents that that was at the end of September 2020.

6. The tribunal concluded that neither P nor S were what it called actual comparators because, as between each of them and the claimant, the requirement of section 23(1) **Equality Act 2010** that "there must be no material difference between the circumstances relating to each case" was not met. The tribunal found that there were material differences between the circumstances relating to S and those relating to the claimant, in particular because S had a lower salary than the claimant and was employed in a different team, being the defect-management team, which required different skills than did the claimant's role.

7. In relation to P, the tribunal said this:

> **"51. In respect of employee P, the Tribunal accepts that both employee P and the claimant were employed on a fixed term contracts; were described as systems analysts; worked under the SOTA project; were managed towards the end of the claimant's employment by the same managers; previously had worked for JLR as engineers; had engineering degrees; had similar visas to remain in the UK; and were awarded performance bonuses. Further by the end of the claimant's employment employee P and the claimant were carrying out the same roles in the integration department. Initially the claimant was employed in a different team the design team but by December 2019 it was deemed by the client that the claimant's skills were not a good fit and he was moved to integration team where Employee P worked and where there was a need for support.**
>
> **52. However, the Tribunal is not satisfied that employee P is an actual comparator for the purposes of section 23 of the Equality Act 2010. There were material differences. Employee P was less experienced, than the claimant, was paid less money that then claimant; the claimant was employed on a higher grade with the consequent difference of expectations in their performance and fundamentally and materially the claimant had significantly less positive feedback about his performance. The**

> **concerns about his performance were raised by the client JLR and both Amy and Ms. Sukhera had concerns about the claimant's performance."**

8. At [53] to [56] the tribunal further considered the position regarding performance assessment of both P and the claimant, and in particular the claimant's argument that P had been treated more generously and given a better opportunity to improve than he, the claimant, had been given. The tribunal concluded that there was overall far more positive feedback concerning P than there was concerning the claimant, and it did not accept that the performance concerns that had purportedly been expressed about the claimant were disingenuous.

9. The tribunal went on to conclude as follows:

> **"57. The respondent had to make a difficult decision and took the view that taking account of the claimant's performance, the cost of retaining him in the light of their policy to pay employees 80% of their salary and benefits and not cap it at £2500 and there was no other job opportunity for the claimant he should be dismissed. The respondent took the view that there might be a limited opportunity for employees S and P to work for JLR in the future and taking account of their lower salaries and performance were retained on furlough on the respondent's policy.**
>
> **58. The Tribunal do not make an inference from a change in the respondent's policy in the summer of 2020 to pay the cap of £2500 to employee P. At page 122 Employee P had only one month left of his contract and the respondent decided to change its policy to cap salary at £2500 for that last month of employee P's employment. That was at a different time to the decision made bout the claimant in March 2020 not to furlough the claimant.**
>
> **59. There was a difference in treatment between the claimant and employees P and S but the Tribunal concludes that there were no other matters from which an inference of discriminatory treatment can be drawn. The case law is clear that the difference in treatment alone is insufficient to surpass the initial burden of proof; it could not be inferred that this difference in treatment was because of the claimant's race."**

10. Rule 76(1)(a) **Employment Tribunals Rules of Procedure 2013** (which was the applicable rule at the time) provided that, among other possibilities, a costs order may be made where the tribunal considers that a party has conducted the proceedings unreasonably. That may include a case where the party does so by unreasonably pursuing a complaint which he should have realised had no reasonable prospect of success.

11. In the first costs decision the tribunal concluded that the claimant had so acted from 9 December 2021. By that date, he had received the respondent's disclosure and witness statements. The tribunal relied on the fact that these showed him the evidence that the respondent would rely upon in support of its case that there were material differences between him and each of P and S as regards salary, role and experience, and/or performance issues. The tribunal considered that he should have realised from that point, that his case that they were actual comparators within section 23 had no reasonable prospect of success; and for this reason it concluded that his conduct in continuing to pursue his claim to trial after that date was unreasonable. The tribunal also considered that the claimant had acted unreasonably in fighting on to a full hearing, rather than accepting an offer of settlement which the respondent had made, by way of a renewed offer to settle for £10,000 that it reiterated on 10 December 2021, but which the claimant rejected.

12. The tribunal went on to decide that in all the circumstances it should exercise its discretion to award costs. However, it was not satisfied that it had full and clear information regarding the claimant's means and so it ordered him to provide further disclosure of bank and credit card statements. It gave the parties the opportunity then to make further written submissions, following which it would determine the amount of the award on paper without a further hearing.

13. In the second costs decision, the tribunal analysed the evidence as to the claimant's means. He was a PhD student at the time. The tribunal concluded that he had provided what it described as incomplete disclosure about his financial situation. He had provided bank account and credit card details and statements and had stated that these were "the only relevant details I can remember that I have" [7]. The tribunal analysed the evidence of income and expenditure shown in these statements. In the course of this section of its reasons, it said at [9]:

> **"The Tribunal takes into account that the government offers maintenance loans of up to £9,488 per annum for students who live away from their parents outside London to cover living costs (not fees). If the Tribunal assumes that the claimant's accommodation costs and utility bills are paid for by the stipend, in the Tribunal's judgment the claimant's spending remains below what could reasonably be expected in terms of food, transport and mobile telephone costs."**

14. The tribunal went on to analyse other features of the statements that it did have, as to the income and expenditure that they showed, to the effect that it felt that these did not fully account for the expenditure that the claimant must have incurred. At [10] it concluded:

> **"Taking all these matters into account the tribunal found the documentary evidence to be unsatisfactory and failed to provide the Tribunal with the full picture of the claimant's financial situation. The reasonable inference to be drawn by the inadequate disclosure of material was that the claimant's financial situation is in a far better financial state than he wishes to portray."**

15. The tribunal noted that it could take some account of what it assessed to be the prospective future means of the claimant. It considered that if he obtained his PhD, he would then have the capacity to earn more than he had done with the respondent. But, in any event, it considered that his present financial position was "far better than the claimant wishes the tribunal to consider" [11]. The tribunal went on to find that from 9 December 2021 onwards the respondent had incurred costs of £19,082 and counsel's fees of £3,700. It noted that it could only summarily award up to £20,000 but that the respondent was seeking an award of £10,000. At [13] it said:

> **"The tribunal takes into account the respondent's request for £10,000. The tribunal takes into account the claimant is likely to be at present a better financial state than he wishes to disclose. Significant costs have been incurred by the respondent as a result of the claimant's unreasonable behaviour from 9 December 2021. The tribunal finds that the respondent incurred over £20,000 in costs for this period. The tribunal summarily assesses the costs of £10,000 and the claimant must pay the sum to the respondent."**

16. I turn to consider the live grounds of appeal and, first, the challenge to the first costs decision, that in principle the tribunal would make an award of costs. The grounds focus on the tribunal's conclusion that the costs threshold was crossed because it was unreasonable conduct for the claimant to have fought on after 9 December 2021, as he ought to have realised by then that there was no reasonable prospect of the tribunal concluding that either S or P was an actual comparator within section 23.

17. There are, in substance, two strands to this challenge. First, it is said that the tribunal erred because in any particular case the question of whether the relevant circumstances of the claimant and the individual relied upon as a comparator are materially the same is a subtle one on which there may be legitimate room for reasonable argument.

18. In the present case, submitted Ms Ling, notwithstanding the contents of the respondent's disclosure of documents and witness statements, there was reasonable scope for the claimant at a full hearing to challenge the respondent's reliance on the three differences between the claimant and each of the actual comparators that it asserted: with respect to roles, performance assessment and salary. Ms Ling noted that in its original grounds of resistance the respondent relied only upon differences in salaries and the existence of performance concerns in relation to the claimant, but not S and P. It had not originally relied also on a difference in roles. That was added in an amended response, but the tribunal in the liability decision had found that difference not shown in the case of P, as it found that the claimant and P were carrying out the same role in the integration department.

19. In relation to salaries, in so far as this was said to be relevant to the cost of furlough, Ms Ling noted that the respondent had modified its position in its amended grounds of resistance, indicating that for S and P these were "entirely or largely" covered by the government grant. I observe that it does appear to have been mathematically correct that, for the higher paid of those two, the monthly allowance from the grant would not have been quite sufficient to cover 80% of his salary. Ms Ling also submitted that the tribunal was not entirely clear in the liability decision as to why the difference in salaries was regarded by it as material.

20. Ms Ling submitted that the tribunal also erred in the first costs decision when it concluded that the claimant had received all the relevant pay slips by 9 December 2021, and that only one pay slip was missing from March 2020, which he received following an order made on 16 December 2021. In fact, none of the comparators' pay slips for the entire furlough period from April 2021 onwards were provided as part of the original disclosure. These were only disclosed after the claimant

requested specific disclosure and the tribunal made a further order on 16 December 2021.

21. The materials in my bundle for the appeal hearing show that the claimant had indeed made such a request, which the respondent had resisted, although oddly the terms of the tribunal's order of 16 December were narrower than the request. But I was shown that, following that, the respondent in any event provided the claimant, on 21 December, with disclosure of all of the pay slips for his two comparators, including in respect of the periods when they were furloughed – pay slips that had not previously been provided to him. Ms Ling submitted that these were material further evidence, because, in the discussion at the start of April 2020, the claimant had offered to the respondent to be furloughed at a salary no higher than the CJRS guarantee, and hence at no cost to the respondent, but that offer was rejected; whereas the respondent had been prepared later to cap P's furloughed salary in that way for the month of July 2020, something on which he sought to rely.

22. In relation to the performance issue, Ms Ling noted that the respondent's pleaded case was that there were no performance concerns *at all* with P and S, who had both received good feedback; but the position turned out to be more nuanced, as found by the tribunal in the liability decision. There had been some criticism of employee P in the feedback and some need for improvement on his part had been identified. It was also, submitted Ms Ling, not unreasonable of the claimant to seek to contest the respondent's assessment of his own performance, no matter what the contemporaneous communications that had been disclosed had to say about that.

23. Secondly, the tribunal is said to have erred by not taking into account that, even if S and P were not found to be actual comparators within section 23, the tribunal would still have needed at the full hearing to consider the position of a hypothetical comparator, and the claimant could have sought to rely upon S and/or P as evidential comparators in this regard. She cited as authorities for those propositions: **Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting [**2001] EWCA Civ 2097; [2002] ICR 646 and **Watt v Ahsan** [2007] UKHL 51; [2008] 1 AC 696. In this case, said Ms Ling, it would have been open to the claimant, even if he did not make good that P

was a section 23 comparator, to rely upon the fact that P was kept on for July 2020 at a capped furloughed salary, in challenging the respondent's explanation for why his own offer of the same thing was refused in April 2020.

24. More generally, Ms Ling submitted in support of these grounds, that the tribunal had failed to keep in mind the difficulties of proving a discrimination case which turned upon what had or had not influenced the minds of the respondent's decision-makers, and the potential importance of the ability to cross-examine and challenge the respondent's witnesses in this regard at a trial. She cited what the EAT said in **Saka v Fitzroy Robinson Ltd** EAT/0241/00 at [10] where it referred to the "very real difficulties which face a claimant in a discrimination claim", that there is often a lack of over evidence and so "it may be and often is very difficult for the claimant to know whether or not he has real prospects of success until the explanation of the employer's conduct which is the subject of complaint is heard seen and tested." She also cited remarks by the EAT in **Oko-Jaja v London Borough of Lewisham**, UKEAT/417/00 at [20] to similar effect. She submitted that it was noteworthy that, in its self-direction in the costs decision, while the tribunal cited copiously from the authorities specifically relating to the costs rules, there was no reference to any of the authorities relating to the fact-sensitive nature of such discrimination claims and the difficulties of proof.

25. Ms Ling submitted that the present tribunal appeared, if anything, to have applied too high a standard to the claimant's conduct in continuing to pursue his claims after disclosure and exchange of witness statements in what it said at [42] of the costs decision:

> **"An allegation of direct race discrimination is a serious allegation. A claim should therefore be brought and/or pursued where there is a basis for it. There is a statutory requirement to consider pursuant to section 13 of the Equality Act 2010 whether a claimant has been treated less favourably than an actual comparator if one is identified; a comparator being an individual pursuant to section 23 of the Act where there is no material difference between the circumstances relating to each case. The case of *Madarassy* made clear that simply a difference in status and nothing more is insufficient to establish a prima facie case of discrimination."**

26. Turning to the challenge to the second costs decision, as to the amount awarded, at the rule

3(10) hearing four amended grounds were permitted to proceed, the fourth of which is a *Meek* challenge. However, Ms Ling indicated that ground 2 was no longer pursued.

27. By ground 1 it is said that the tribunal erred in failing to take account of evidence given by the claimant that he was largely financially dependent upon his wife; and in relying upon judicial notice of the fact that "the government offers maintenance loans of up to £9,488 per annum for students who live away from their parents outside London to cover living costs".

28. As to the former, I was told that the claimant had in answer to questions in oral evidence at the first costs hearing, indicated that he relied for support financially upon his wife. Ms Ling acknowledged that ordinarily an appellant seeking to rely on what had been said in evidence, should seek to agree a note with the respondent or, if necessary, the EAT could be asked to request the judge's comments or notes. In the present case, the claimant had set out his account of his evidence in a sworn statement for the purposes of today's hearing and an email had been sent to the respondent's solicitors a week or so ago attaching that statement and explaining that, notwithstanding that they would not be participating, they were being given the opportunity to comment upon it if they wished to do so. I was told that no reply had been received.

29. As to the maintenance-loan issue, the accuracy of the tribunal's *general* statement that such loans are available from the government, and their current amount, was not challenged, as such. That information is available and verifiable on the public gov.uk website. But Ms Ling said that the tribunal had erred in purporting to take judicial notice of a fact, or finding as a fact, that the *claimant* was entitled to, and in receipt of, such a loan. Ms Ling noted that that public information itself indicates that there are nationality and/or residency conditions attached. Further, the tribunal's bundle for the original substantive hearing included a copy of the claimant's current residence permit at the time of that hearing indicating that he had leave to remain in the UK but without recourse to public funds until July 2022; and he had also referred in his witness statement for that hearing to being on a visa that allowed him to remain but without recourse to public funds.

30. Ground 3 challenges the tribunal's conclusion with respect to the amount of costs that the respondent had incurred since 9 December 2021 and the amount that the tribunal decided to award. Originally, Ms Ling's first point was that, as the tribunal acknowledged, and in line with the guidance in **Yerrakalva v Barnsley MBC** [2011] EWCA Civ 1255; [2012] ICR 420; the costs awarded needed to be broadly referable to costs incurred in the relevant period. Originally she advanced a criticism that the tribunal had relied on figures in the respondent's summary schedule, which only showed the total of costs incurred since 18 November 2021 without distinguishing what part of these had been incurred after 9 December. However, she acknowledged in discussion that, on scrutiny of the tribunal's decision and the available evidence, it appears, as stated also in that schedule of costs, that witness statements were in fact exchanged on 5 November 2021, rather than 9 December, as the tribunal appears to have assumed at that point in its costs decision. So this difference in dates may not be so significant a factor.

31. However, a second point raised by Ms Ling was that, in any event, in point of time after both 5 November and 9 December, the tribunal made its further disclosure order on 16 December 2021, and further disclosure was then provided on the 21 December 2021. It was not clear that the tribunal had taken any account of what costs might have been incurred by the respondent in the further disclosure process, which ought not to have been laid at the claimant's door or factored in.

32. Thirdly, Ms Ling submitted that the tribunal had not given, or shown that it had given, any proper scrutiny, to what she said was the very high level of costs claimed. In particular the solicitors' costs during this period of just over £19,000 included 47.6 hours spent by the associate who formed part of a team consisting of a partner, an associate and a paralegal. The tribunal appeared to have given no consideration to that very large number of hours. Ms Ling surmised that the high figure might perhaps indicate that the associate had attended the three-day hearing with counsel. But, if so, the tribunal had not considered whether that was reasonable or necessary.

33. I turn to my conclusions. As to the first strand of the challenge to the first costs decision,

Ms Ling fairly makes the point that, in considering whether the claimant in a discrimination claim ought reasonably at a certain point to have realised that his claim had no reasonable prospect of success, the tribunal needs to keep in mind the difficulties of proving discrimination in a case which turns on matters said to have influenced the mind, consciously or unconsciously, of the alleged discriminator or discriminators, and the potential importance of the opportunity to put the alleged discriminator's stated explanation to the test through the process of cross-examination at a trial. On the other hand, as the authorities also recognise, there can be cases where it may be said that, for example, contemporaneous documentation is so compelling and unambiguous in the light that it casts on the true reasons for the impugned conduct that, once disclosed, it can be relied upon as itself demonstrating that there is no reasonable prospect of the complaint succeeding at trial.

34. In the strike-out jurisdiction, the tribunal is, in the nature of things, usually called upon to make a judgment of this kind ahead of trial on the basis of the material currently then available. In the costs jurisdiction, in the nature of things, the exercise is usually carried out in point of time after a trial, by which time the tribunal has itself been exposed to all of the evidence and reached its conclusions. But nevertheless what the tribunal has to decide in a case of this type is whether the claimant ought at the relevant time *pre-trial* to have appreciated that their claim had no reasonable prospect of success on the information *then* available. The tribunal therefore needs to be wary when making such a costs decision, of being influenced by the hindsight of how the evidence in fact unfolded at trial. Nevertheless, there can be cases where the tribunal can properly conclude that what the claimant knew pre-trial should have made the position reasonably clear to them at that point. (See: **Radia v Jefferies International Ltd** [2020] IRLR 431 at [61] – [67].)

35. In the present case, I do consider that a number of the features highlighted by Ms Ling in her submissions might have suggested to the claimant, at the relevant time, that there was still room for reasonable argument and testing of the respondent's case at trial in relation to his chosen comparators, in particular given the commonality of roles between him and P at the relevant time and the fact that

the claimant had offered to be furloughed at a capped salary, but that was declined, but then P later had his furloughed salary capped.

36. Ms Ling's submission in relation to the performance issue is not as strong, because the issue for the tribunal would be whether the respondent was *genuinely* influenced by performance concerns, even if the claimant disagreed with them or thought their views unfair; and the tribunal was entitled to take the view that the evidence of contemporaneous internal communications on the subject, that formed part of the respondent's disclosure, provided significant support to its case that such concerns were genuinely held at the time. Nevertheless, the claimant was still not totally bereft of material to work with in challenging the respondent's case in this regard, given the evidence that P's record was not, on the respondent's own case, entirely spotless and that he had received indications that there was *some* need for improvement on his part as well.

37. It is noteworthy that the tribunal in its liability decision devoted a number of paragraphs of the discussion to considering both the various evidence and its conclusions in relation to the performance issue, which included taking account of the evidence that it had heard from witnesses, as well as considering the claimant's argument about what significance might be attached to P's furlough salary being reduced to the equivalent of the government guarantee in the final month of his employment. These were not points that the tribunal itself had felt able to dismiss in its liability decision without careful consideration of the relevant evidence, including witness evidence.

38. The point about the timing of the disclosure of the pay slip for July 2020 for P may not be as significant, although the tribunal did make a factual error as to when the claimant received this. That is because it is apparent that there will have been in the bundle, which had been disclosed to him by 9 December 2021, an email between the relevant manager and P indicating that his salary was to be reduced for the month of July 2020. But what the tribunal did not do is consider whether the claimant had reasonably pressed for further disclosure of pay slips, or whether the email, and/or the relevant pay slip for P, might be reasonably relied upon by him as at least providing a strand of his own case

challenging the respondent's reliance on the cost of furloughing him as being part of the explanation why it did not do so.

39. As to whether the tribunal took sufficient account of the difficulties of making good a claim of discrimination which, as in this case, turns upon what did or did not influence the minds of the alleged discriminators, its failure to cite relevant authorities on that point in its costs decision does not by itself show that it erred in law. But I do see force in Ms Ling's submission that what it said at [42] gives rise to a concern that it set the bar too high for the claimant, given its reference to an allegation of direct race discrimination being a serious allegation. Undoubtedly such allegations *are* of course serious, both for the person making them and for the subject of them; but that is a different question from what evidence might be sufficient to raise an arguable case and/or what scrutiny of the evidence might be reasonably needed fairly to determine such a complaint.

40. Also of some concern is the fact that [42], as do other parts of the liability decision, focusses specifically on the section 23 provisions in relation to actual comparators, although, reading the decision as a whole I note that the tribunal did come to positive findings about the non-discriminatory explanation for the treatment complained of. Nevertheless, in the first costs decision the tribunal focussed specifically on the question of whether the claimant ought to have realised that there was no reasonable prospect of P and S being found to be actual comparators without giving any further express consideration to whether he might nevertheless have had a reasonable basis for considering that he still had an arguable case by reference to a hypothetical comparator and/or relying on features relating to either or both of P and S as evidentially of assistance.

41. Putting all of these aspects together leads me to the conclusion that the tribunal did err in reaching the conclusion that the claimant had acted unreasonably in fighting on to trial after 9 December 2021 on the basis that he should have realised that he had no reasonable prospect of success. The tribunal's reliance on the claimant's decision to fight on after having received and rejected a reiterated offer of £10,000 to settle on 10 December 2021 must also fall away, as this was

essentially parasitic on its conclusion that he ought reasonably to have considered that he had no reasonable prospect of success. The appeal in respect of the first costs decision therefore succeeds.

42. Ms Ling invited me, if I allowed that appeal, as I have done, not to remit the matter to the tribunal for fresh consideration as to whether in principle a costs award ought to be made, but to substitute my own decision that the costs threshold was not crossed, on the basis that this was the only conclusion properly open to the tribunal applying the law to the facts.

43. I am persuaded that Ms Ling is right about that, having regard in particular to (a) one of the two individuals relied upon as a comparator having performed the same role as the claimant and having had a number of other relevant features in common with him (although the tribunal also found in the liability decision that there were differences); (b) the fact that the claimant had offered to be furloughed at the CJRS rate, but the respondent declined that offer, but then went on to reduce the pay of the other comparator to that rate for the final month of his employment; and (c) the potential issues that the claimant wished to raise about the approach to stated concerns with regard to his performance and with regard to the performance of one of his comparators.

44. Whilst the tribunal's *liability decision* on these questions, and the findings and conclusions that it reached on all the evidence it had at trial, cannot be impugned (and the claimant's attempt to appeal that decision did not get beyond a rule 3(10) hearing), what I am concerned with now is whether it was open to the tribunal, having regard to these contested features, to conclude that, as matters stood following disclosure and exchange of witness statements, the claimant should have realised that his claims had no reasonable prospect of success. Having regard to these features, I do not think that any tribunal properly directing itself as to the law, including the relevant guidance in relation to discrimination claims of this type, could have properly concluded that he should have realised that he had no reasonable prospect of success, and acted unreasonably by carrying on.

45. For the decision of the tribunal, I will therefore substitute a decision that the threshold

condition in rule 76(1)(a) relied upon was not satisfied and that the costs application is dismissed.

46. This means that necessarily the appeal against the second decision, as to the actual award of costs, must also be allowed. But I will address the points of challenge to that decision on its merits that were raised by the second appeal.

47. On the question of the availability of a maintenance loan, it is clear that for the reasons advanced by Ms Ling the tribunal did err, because it was not in a position to take judicial notice of the fact that *the claimant* was, in the circumstances of his particular case, entitled to or in receipt of such a loan; and, indeed, it had been provided with evidence which indicated to the contrary.

48. As to the significance of this error, on one reading the tribunal could be read as having treated this mistaken assumption as a point in the claimant's favour. It was addressing in this part of its decision a concern that the low levels of expenditure it could see from the bank and credit card statements he had provided tended to indicate that he must have some other undisclosed source of income, as realistically his outgoings must have been considerably higher. The tribunal's own partial answer to that concern was that part of the explanation might be that further expenses had been partially funded by such a loan, although the tribunal's view was that that could still not sufficiently explain how he had been able to cover the whole of the expenditure that it inferred he must have been incurring. Nevertheless, this was an error on the part of the tribunal, by way of effectively a perverse finding or assumption of fact, and it may potentially have materially influenced its view of the claimant's credibility, and so its decision, more generally.

49. As to the error said to have been made, by failing to take into account the claimant's evidence that he relied to some extent on the financial support of his wife, even though I do not have before me a statement that has been expressly agreed by both parties, of what evidence he gave, nor any comment or notes from the judge, I am prepared in all the circumstances of this case, where I do have an uncontested sworn statement from the claimant, to proceed on the basis of that.

50. I note that where there is evidence before the tribunal that an individual is living with a spouse or partner who may be making some contribution to their support, care is required as to how this is approached. On the one hand, the tribunal is concerned only with the means or ability to pay of the individual concerned, and should therefore not presumptively take into account the means of others. On the other, if the tribunal does have evidence that the proposed payee in fact can call on financial support from a third party, it may potentially be entitled to take that actual evidence into account. (See the discussion in **Abaya v Leeds Teaching Hospital NHS Trust** UKEAT/258/16.) What matters in the present case, however, is that the tribunal did not consider this evidence.

51. Standing back, what is significant is that the tribunal plainly drew an adverse inference, that the claimant had deliberately not been candid with the tribunal as to his overall means or financial resources at his disposal. Whilst such an inference can be properly drawn in appropriate cases, the tribunal should take care before doing so, particularly in a case where it will have a direct consequence in terms of the amount of a costs order, and particularly where, as in this case, that decision was reached on paper without the tribunal having had a further hearing.

52. I turn to whether the tribunal erred in relation to its assessment of the costs incurred by the respondent and hence the costs awarded. The tribunal was on this occasion engaged in an exercise of summary assessment and it had before it a summary costs schedule. This certainly showed the figures that the tribunal cited in its decision as having been incurred after 18 November 2021 and described as being in respect of preparing for, and attending, the final hearing from 5 to 7 January 2022. It is, however, difficult to tell from the formatting and content of the schedule whether or not that figure also included the cost of the disclosure exercise which was completed in the second half of December 2021. That said, that perhaps would, on any view have been a relatively limited cost compared to the cost of preparing for and attending the trial, including counsel's fees.

53. However, I see force in Ms Ling's point that the 47.6 hours figure for the associate, whether or not that is explained by the associate, rather than, perhaps, the paralegal, having attended the

hearing with counsel, does seem to be strikingly high; and the tribunal does not give any indication in its decision of having considered this.

54. It is, of course, the case that the respondent limited itself to seeking an award of £10,000, and that was the award that the tribunal made. It might be said that the figure of £10,000 was one that the tribunal could reasonably have regarded as fair and proportionate; and Ms Ling fairly acknowledged that she did not say that an award of that amount would in that sense have been perverse, leaving aside the issue as to the claimant's means. Ms Ling, however, said that there was at the very least an insufficiency of reasoning as to how the tribunal had arrived at the figure of £10,000, other than it being the limit of the amount that the respondent was seeking.

55. In the course of argument, Ms Ling referred to the concluding observation of Mummery LJ in **Yerrakalva**, at [55], when sending the costs assessment in that case back to the tribunal, that the claimant in that case should be ordered to pay 50% of the costs "reasonably and necessarily incurred" by the respondent in that case in respect of the part of the litigation to which that order related. However, I observe that in **Yerrakalva** the total costs sought by the respondent were some £92,000; and the language of "reasonably and necessarily incurred" suggests that Mummery LJ probably had in mind the test that would have been applied at that time to the detailed assessment that would have been necessary, even in relation to a potential award of up to 50% of that amount. In the present case, the tribunal was engaged in an exercise of summary assessment and I do not think that it would be bound to apply the "reasonably and necessarily incurred" test.

56. However, I do consider that in a case where the costs applicant (in this case the respondent), has sought a particular figure lower than the overall amount of costs that it says it has incurred, it is incumbent on the tribunal to give some consideration to whether that figure is itself reasonably proportionate, or whether it seems to the tribunal to be excessive or disproportionate. (See the discussion, for example, in **Ayoola v St Christophers Fellowship**, UKEAT/508/13, and in **Abaya**).

57. It may not require more than a line or a sentence of explanation, but the tribunal does need to show that it has given some consideration to the reasonableness or proportionality of the amount, beyond the fact of it being the maximum amount sought and the fact of it being appreciably lower than the amount actually incurred. This tribunal did not do that. Had I not allowed the appeal against the first costs decision, I would therefore, in any event, have allowed the appeal in respect of the amount awarded in the second costs decision.

58. For all of these reasons, both appeals are allowed; and for the tribunal's decisions awarding costs, I substitute a decision dismissing the costs application.