EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr William Hurley	**v**	**London Underground Limited**

Heard at: London Central (in chambers)

On: 10 June 2025

Before: Employment Judge P Klimov

JUDGMENT

1. The claimant's entire claim had no reasonable prospect of success.

2. The claimant has acted unreasonably in the way the proceedings have been conducted by him.

3. The claimant is ordered to pay the respondent **£10,080** with respect to the respondent's costs.

Reasons

Introduction

1. On 15 April 2024, the claimant brought a claim, containing complaints of direct and indirect age discrimination and harassment related to age. The respondent presented a response denying all the claims.

2. Following a case management preliminary hearing on 12 August 2024, at which the claimant unsuccessfully sought to expand his claim, the final list of issues was settled. It contained nine allegations of direct age discrimination, four allegations of harassment related to age, and six PCPs relied upon by the claimant for the purposes of his indirect age discrimination complaint.

3. The claim was heard over 5 days on 2 – 11 April 2025. During the hearing the claimant abandoned five allegations of direct age discrimination, and four allegations of harassment related to age. He maintained his indirect age discrimination complaint in full and further clarified four of the six alleged PCPs.

4. All the remaining complaints and allegations in the claim were comprehensively dismissed by a unanimous decision of the Tribunal, announced to the parties on 11 April 2025. The Tribunal gave detailed oral reasons for its decision. Neither party requested written reasons. There was no application for a reconsideration of the judgment, or, as far as I am aware, an appeal to the EAT.

5. At the end of the hearing, the respondent indicated that it would be applying for a costs order. I explained to the claimant what it meant and gave appropriate case management orders, sent to the parties on 15 April 2025.

6. The respondent presented its costs order application on 7 May 2025. The claimant sent his representations on 20 May 2025. Both parties consented for the application to be decided by me, sitting alone, without a hearing.

The application

7. The respondent seeks a costs order under Rule 74(2) of the Employment Tribunal Procedure Rules 2024 on two grounds:

    (i) the claimant has acted unreasonably in the way he conducted the proceedings - Rule 74(2)(a); and
    (ii) the claimant's claim had no reasonable prospect of success - Rule 74(2)(b)

8. The respondent's overarching submission is that the claimant's claim had no reasonable prospect of success for lack of evidence. Therefore, had the claimant taken a realistic look at his claim, at the latest - once the bundle and witness statements were prepared and exchanged, the lack of merit in his claim would have been obvious to him. In those circumstances, the claimant should have abandoned his claim, thus sparing the respondent having to incur unnecessary legal costs in defending the claim, which lacked any merits. It was, therefore, unreasonable for the claimant to pursue his claim beyond that point.

9. The respondent relies on the fact that during the hearing the claimant dropped many of his allegations of direct age discrimination and harassment, and those that he pursued to the end were comprehensively defeated.

10. The respondent submits, that the allegations of direct age discrimination failed not because, on the balance of probabilities, the Tribunal preferred the respondent's evidence, but because the claimant simply provided no evidence at all to support his allegation that his chosen comparators would have been treated differently with respect to the matters he complained about.

11. The respondent says that the claimant gave no evidence to suggest that the comment made by Mr Attard (the only remaining allegation of harassment), or the manner of its delivery, had anything to do with age, or that it had the purpose or effect of creating the proscribed environment within the meaning of s.26 of the Equality Act 2010.

12. The respondent highlights the fact that when these evidential matters were explored with the claimant during his evidence, the best the claimant could come up with in support of his allegations of age discrimination was that he had a "feeling" that discrimination was involved. The respondent argues that it should have been obvious to the claimant (even with giving allowance for him being a litigant in person) that relying on a "feeling" is insufficient to make good a discrimination claim, and he needed to provide evidence to substantiate the advanced allegations, which evidence he simply did not have. Pursuing the allegations regardless was, the respondent says, unreasonable conduct of the proceedings.

13. The respondent also criticises the claimant for picking out two comparators from a redacted document in the bundle (for the purposes of his allegation of direct age discrimination 3(i)[1]) "*blind*", without knowing who these people were and how their circumstances compared to his. The respondent says that the claimant pursuing this allegation until day 4 of the hearing (when he finally dropped it) was unreasonable and caused the respondent to incur unnecessary costs and lengthen the hearing.

14. The respondent also criticises the claimant for first obtaining a witness order for Mr Etimiri and then not calling him to give evidence. The respondent submits that it was unreasonable conduct, because was likely to have caused Mr Etimiry some concern and took up Tribunal time unnecessarily. However, the respondent accepts that it did not cause the respondent to spend further time in preparation.

15. The respondent submits that the claimant's indirect age discrimination claim was equally poorly evidenced. The claimant changed the four PCPs he relied upon but still failed to provide cogent evidence to make out the constituent elements of this claim, including by showing group and personal disadvantage.

16. The respondent seeks a costs order in the amount £10,230, being:

    (i) solicitors' fees for preparing witness statements and attending conference with Counsel with respect to two witnesses (Mr Marriott and Mr Taggart), who were not called at the end, because the claimant's withdrawal of allegations related to them - £2,500,
    (ii) Counsel brief fee (£4,200) and three refreshers (£960 each), and
    (iii) solicitors' fees for preparing the costs application and fee schedule (£150).

[1] *Allowed others to complete the course and move into new roles earlier than the claimant in contravention of established agreement. The established agreement is that transfers take priority over promotions*.

The response

17. The claimant in his response argues that as a litigant in person he genuinely believed that his claim was meritorious. He submits that age discrimination claims are complex. Him not having legal expertise and professional assistance meant that he did not appreciate what he needed to prove to succeed on his claim. He also relies on his stress-related medical condition and financial constraints. The claimant alleges that the respondent's conduct of the proceedings was unreasonable (in delaying the exchange of witness statements and disclosure of trainee data), which, he says, prevented him from refining his claim earlier.

18. The claimant argues that him withdrawing part of his claim during the hearing was not unreasonable "*but demonstrate[ed] a reasonable approach*". He submits that his lack of legal expertise to fully assess the evidential requirements before the hearing left him "*completely overwhelmed and out of [his] depth*". When the evidential weakness became apparent during the hearing he withdrew some allegations. That was, he says, "*an honest attempt to adapt to the Tribunal's process …. not an intention to waste time or resources*."

19. The claimant criticises the respondent's delay in providing trainee data, which he says, hindered his ability to assess suitability of the two comparators he picked from the anonymised list at the hearing. He claims that he acted in good faith, believing that these comparators supported his case. The claimant also criticises the respondent for delaying the exchange of witness statements, which he says was unreasonable and limited his ability to fully review the respondent's evidence and refine his claims earlier.

20. The claimant says his decision not to call Mr Etimiri was not unreasonable. It was to avoid prolonging the hearing. It was taken once he had realised that Mr Etimiri's evidence became less critical to his remaining complaints.

21. The claimant submitted two GP notes, signing him off as not fit for work from 9 December 2014 until 31 March 2025 for "*stress-related problems*". He argues that his medical condition impacted his ability to prepare and manage the case as effectively as a represented party might have done.

22. The claimant makes further submissions by reference to each of the allegations in his claim with the overall theme that he genuinely believed that the treatment complained of was "age-related", and it was the lack of legal knowledge and him feeling overwhelmed that was the reason why he has failed to meet the legal test.

23. The claimant claims that the legal costs claimed by the respondent are excessive. He says that an award of £20,000 would cause him financial hardship. He says he has no savings and would need to take out a personal loan to cover any award. He asked for the application to be dismissed or, "*in the alternative, to significantly reduce any award, considering my status as a litigant in person, my medical condition, and my lack of savings.*"

The Law

24. Rule 74 of the Employment Tribunal Procedure Rules 2024 ("the ET Rules") states:

> *(2) The Tribunal must consider making a costs order or a preparation time 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, response or reply had no reasonable prospect of success,… "*

25. Rule 76(1) of the ET Rules gives the Tribunal various options of assessing costs, including making an "*order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party.*"

26. The following key principles relevant to the Tribunal's powers to make costs orders can be derived from the case law.

27. Costs awards in the employment tribunal are still the exception rather than the rule. The tribunals should exercise the power to order costs more sparingly than the civil courts - (*Yerrakalva v Barnsley Metropolitan Borough Council* 2012 ICR 420, CA).

28. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered - (*Haydar v Pennine Acute NHS Trust* UKEAT/0141/17).

29. In a recent EAT decision- (*Mr M Willis v 1) GWB Harthills LLP 2) Miss Hester Russell 3) Mrs Elizabeth Lord: [2025] EAT 79)*, HHJ Tayler, having reviewed the relevant legal principles applicable to costs order applications, summarised the three-stage approach the Tribunal should follow in deciding such applications:

> *"6. The application of these rules can be split into three stages:*
>
> > *Stage 1: is there conduct that could warrant making a costs order ("threshold conduct")*
> >
> > *Stage 2: if so, should an award of costs be made ("the discretionary decision") – the Employment Tribunal may have regard to ability to pay at this stage*
> >
> > *Stage 3: if so, what amount of costs should be awarded ("the quantum decision") – the Employment Tribunal may also have regard to ability to pay at this stage*
>
> *7. At stage 2 a wide range of factors can be relevant, such as the party's subjective belief in the merits of a complaint or defence, the type of complaint and whether the party had the benefit of legal advice. Rule*

84 gives the Employment Tribunal the power to have regard to the paying party's ability to pay as part of the Stage 2 discretionary decision. An Employment Tribunal might conclude where a party is guilty of threshold conduct, and there are no other factors pointing against making a costs order, that a party's total inability to pay is such that no costs order should be made. In other cases, the Employment Tribunal might decide it is appropriate to make a costs order but take account of the party's ability to pay in limiting the award when making the Stage 3 quantum decision.

8. There is no requirement to identify these stages in the analysis of an application for costs, although they may provide a useful framework to ensure a necessary component is not missed…."

30. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative - (*AQ Ltd v Holden* [2012] IRLR 648).

31. Where the paying party has taken legal advice, the Tribunal should proceed on the assumption that the party has been properly advised - (*Brooks v Nottingham University Hospitals NHS Trust* UKEAT/0246/18 EAT).

32. The term "*vexation*" shall have the meaning given by Lord Bingham LCJ in *AG v Barker* [2000] 1 FLR 759: "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" - (*Scott v Russell* 2013 EWCA Civ 1432, CA).

33. "*Unreasonable*" has its ordinary English meaning and is not to be interpreted as if it means something similar to "*vexatious*" - (*Dyer v Secretary of State for Employment* EAT 183/83).

34. In determining whether to make a costs order for unreasonable conduct, the tribunal should consider the "*nature, gravity and effect*" of the paying party's unreasonable conduct — (*McPherson v BNP Paribas (London Branch)* 2004 ICR 1398, CA), however the correct approach is not to consider "*nature*", "*gravity*" and "*effect*" separately, but to look at the whole picture.

35. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances – (*Yerrakalva v Barnley MBC* [2012] ICR 420). Mummery LJ gave the following guidance on the correct approach:

> "*41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of*

> *giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

36. Whether a claim or a defence had reasonable prospects of success is an objective test. It is irrelevant that the party genuinely thought that their case had reasonable prospects of success – (*Scott v. Inland Revenue Commissioners* [2004] ICR 1410 CA, at [46]).

37. In considering whether a claim or a defence had no reasonable prospects of success, the tribunal is not to look at the entire claim, but each individual cause of action – (*Opalkova v Acquire Care Ltd* EAT/0056/21 at [17]).

38. Whether a claim or a defence had no reasonable prospects of success from the outset is to be judged by reference to the information that was known or was reasonably available at the start of the proceedings – (*Radia v. Jefferies International Ltd* EAT/0007/18, at [65]). The tribunal should be wary of being wise with hindsight. But *Radia* is not authority for the proposition that, as long as a claim had had reasonable prospects of success at the outset, pursuing it after it has become clear that it does not have reasonable prospects of success will not engage the costs jurisdiction.

39. In *Cartiers Superfoods Ltd v Laws* [1978] IRLR 315, the EAT said that the the Tribunal must: *"... look and see what the party in question knew or ought to have known if he had gone about the matter sensibly*."

40. *Radia*, at [62], is also authority for the proposition that there may be an overlap between unreasonable conduct under rule 74(2)(a) and no reasonable prospects of success under rule 74(2)(b).

41. The failure by the receiving party to apply for a strike out or issue a costs warning on the ground that the paying party's case has no reasonable prospect of success may be a factor for the Tribunal to take into account when exercising its discretion – (*AQ Ltd v Holden* [2012] IRLR 648 EAT). However, such failure to apply for a strike out or to issue a costs warning is not sufficient as the evidence "*that those claims had in fact any reasonable prospect of success.*" – (*Vaughan v Lewisham LBC* [2013] IRLR 713 EAT, at [14]).

42. Where a party makes an offer to settle a case, which is refused by the other side, costs can be awarded if the tribunal considers that the party refusing the offer has thereby acted unreasonably – (*Kopel v Safeway Stores plc* [2003] IRLR 753, EAT, at [16-18]).

43. Costs awards are compensatory, not punitive – (*Lodwick v Southwark London Borough Council* [2004] ICR 884 CA).

44. Under Rule 82 of the ET Rule, the tribunal may but is not required to have regard to the paying party's ability to pay. In *Jilley v Birmingham and Solihull Mental Health NHS Trust* (21 November 2007) HH Judge David Richardson said:

> *"[44] Rule 41(2) gives to the Tribunal a discretion whether to take into account the paying party's*

> *ability to pay. If a Tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy written reasons are not required. A succinct statement of how the Tribunal has dealt with the matter and why it has done so is generally essential."*

45. However, where the costs award may be substantial, the tribunal must proceed with caution before disregarding the paying party's means – (*Doyle v North West London Hospitals NHS Trust* [2012] ICR D21, EAT, at [14-15]).

46. The assessment of means is not limited to the paying party's means as at the date of the hearing. The tribunal is entitled to take account of the paying party's ability to pay in the future, provided that there is a "realistic prospect" that he will be able to satisfy the order in the future - (*Vaughan v LB Lewisham* [2013] IRLR 713, EAT, at paras.26-28).

47. Once a tribunal has decided to have regard to the paying party's ability to pay, it must take into account his or her capital, as well as income and expenditure. In *Shields Automotive Ltd v Greig* EATS/0024/10, unreported, (at [47]), the EAT in Scotland stated that '*assessing a person's ability to pay involves considering their whole means. Capital is a highly relevant aspect of anyone's means. To look only at income where a person also has capital is to ignore a relevant factor*.' The EAT also rejected the claimant's submission that capital is not relevant if it is not in immediately accessible form, observing that '*a person's capital will often be represented by property or other investments which are not as accessible as cash but that is not to say that it should be ignored*.'

48. In *Howman v Queen Elizabeth Hospital Kings Lynn* EAT 0509/12, the EAT said that any tribunal when having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

49. In M Willis v 1) GWB Harthills LLP 2) Miss Hester Russell 3) Mrs Elizabeth Lord: [2025] EAT 79, the EAT said:

> *"9. Reading Rule 84* [equivalent to Rule 82 in the current version of the ET Rules] *and the relevant authorities, and applying a little common sense, establishes several principles that will often be of assistance. Rule 84 provides a discretion to have regard to ability to pay but there is no requirement to do so. If an Employment Tribunal decides not to have regard to ability to pay generally it should succinctly explain why:* ***Jilley v Birmingham and Solihull Mental Health NHS Trust*** *UKEAT/0584/06. In many cases it is desirable to have regard to ability to pay:* ***Jilley****. Factors that might lead an Employment Tribunal not to have regard to ability to pay include where a party has failed to attend or take the opportunity to provide evidence about ability to pay or where an Employment Tribunal considers that such evidence that has been provided is so unreliable as to be worthless:* ***Jilley****. Where an Employment Tribunal does have regard to ability to pay it should give a brief explanation of how it has done so that is* ***Meek*** *compliant in that the parties can understand in broad terms how ability to pay has been taken into account:* ***Jilley****. This may require some analysis of income and outgoings and of any assets or debts. Capital assets may be an important aspect of a party's ability to pay even if not immediately or easily realisable:* ***Shields Automotive Ltd v Greig*** *UKEATS/0024/10. Where assets are jointly owned, such as a family home, it may be relevant to consider the share held by the party against whom the costs application is made:* ***Howman v The Queen Elizabeth Hospital Kings Lynn*** *UKEAT/0509/12/JOJ; including the effect of the sale on the other person who jointly owns the asset.*"

50. The Presidential Guidance on General Case Management state:

> *"17. Broadly speaking, costs orders are for the amount of legal or professional fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party."*
>
> *18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows:*
>
> *18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);*
>
> *[…]*
>
> *21. When considering the amount of an order, information about a person's ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings."*

Analysis and Conclusions

"Threshold conduct"

51. I shall first consider whether the "threshold conduct" condition is met, that is whether the claimant's claim (or part of it) had no reasonable prospect of success, and/or whether the claimant bringing his claim (or part of it) or continuing to pursue it was him acting unreasonably in the conduct of these proceedings.

52. On the facts of this case, these two alternative grounds are closely linked and largely overlap. It would be artificial to separate them and consider individually. In other words, it is the evidential hopelessness of the claimant's claim, which, the respondent says, rendered it having no reasonable prospect of success, which in turn made the claimant's pursuit of the claim despite of that - unreasonable conduct on his part.

53. As a broad proposition, I agree, pursuing a claim that you have no evidence to substantiate is pursuing a claim that has no reasonable prospect of success. And from there it follows that pursuing such a claim in most cases will amount to unreasonable conduct of the proceedings, absent some strong mitigating factors.

54. I, however, remind myself that in assessing the claimant's claim I must not fall into the trap of being "wise by hindsight". The question is not how things looked after the trial, but what the claimant's claim looked like (in terms of its prospect of success) before the trial.

55. It is worth recalling that the entire claim arose from the claimant's failure to successfully complete the Communication Based Train Control ("CBTC") course, which was the prerequisite for him being appointed to the Service Controller role at the Hammersmith Service Control Centre, the role he applied for. As the Tribunal found in its liability judgment, the claimant failed the course because of his lack of commitment and effort. His failure had nothing to do with

anyone acting in a discriminatory way towards him (which the Tribunal found that none of such conduct had taken place), or any discriminatory features of the course itself (which the Tribunal found did not exist).

56. Despite being offered the second opportunity to attend the course and extra free time before the start of the course to familiarise himself with the training environment and discuss his specific requirements to maximise his chances of successfully completing the course at the second attempt, the claimant declined that opportunity and instead raised a grievance, which he later turned into this Tribunal claim. The claimant made various complaints about things he did not like about the course and the trainers running it (and indeed the fact that he was required to pass it in the first place), and then essentially "shoehorned" all his complaints into various allegations of age discrimination and harassment.

57. In the interests of brevity and proportionality, I will not repeat in detail the facts of the case, or the Tribunal's findings and conclusions on the substantive issues in the claim. The Tribunal's detailed reasons for dismissing the claimant's claim in its entirety were announced orally at the end of the substantive hearing. Neither party requested written reasons. The claimant did not ask for the judgment to be reconsidered, or, as far as I am aware, appealed it. Therefore, I proceed on the basis that the claimant and the respondent know why he (it) lost (won), and both parties accepted the Tribunal's decision.

58. Returning to the "threshold conduct" question, I find that:

    (i) the claimant's entire claim had no reasonable prospect of success from the start;
    (ii) the latest the claimant must have (or should have) realised that his entire claim had no reasonable prospect of success was when he received and read the respondent's witness statements, which was on 14 March 2025. Therefore, it was unreasonable for the claimant to continue to pursue his entire claim after he had received and read the respondent's witnesses' statements;
    (iii) it was unreasonable for the claimant to bring allegations against Mr Marriott and Mr Taggart in his claim.

    I say that for the following reasons.

59. As far as his complaints of direct age discrimination and harassment related to age are concerned, on the claimant's evidential case there was simply not a shred of evidence that could possibly link any of the conduct the claimant complained about to his or anyone else's age, or indeed even create a reasonable suspicion that age was a factor in any of these acts, omissions, or decisions.

60. I explored that with the claimant at the start of the hearing, suggesting that, having read his witness statement and the documents in the bundle he relied upon, it was hard to see what evidence he was putting forward, from which the Tribunal could conclude, absent any other explanation by the respondent, that

the claimant's or anyone else's age motivated various people he complained about to take those actions and decisions, or refrain from taking them.

61. Whilst the claimant then withdrew some of the allegations, he insisted on pursuing others and said that he would establish facts from which the Tribunal would be able to draw inferences of age discrimination. He came nowhere close to that.

62. At its highest, his direct age discrimination claim was based on him having "*a feeling*" that his age "*might*" be a reason, but he could not even explain on what basis he had that "*feeling*". His evidence in cross-examination was that he was "*unable to tell at this point in time*", and that was the point in time when his evidential case should have been at its highest. The claimant then started to develop (and without putting forward any supporting evidence), what essentially was taking a shape of some conspiracy theory about the whole respondent's organisation being predisposed against older employees[2], only to drop this theory in his closing submissions.

63. I am cognisant that, as was highlighted by the EAT and the Court of Appeal on several occasions, it is rare to find direct evidence of discriminatory conduct, and often employees, who felt being discriminated against, might not have any "killer" evidence at their disposal. They should not be prevented or penalised from pursuing their genuine discrimination complaints for that reason.

64. As was stated by the EAT in *Mr A E Madu v Loughborough College*: [2025] EAT 52, quoting from another EAT authority *Saka v Fitzroy Robinson Ltd* EAT/0241/00 at paragraph 10 the "*very real difficulties which face a claimant in a discrimination claim", is that there is often a lack of overt 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*".

65. The claimant's case, however, is different. It is not the case where the claimant mistakenly ascribed the difference in treatment between him and another employee to age. The allegations of discriminatory conduct primarily failed on the facts, that is because these matters simply did not happen (or did not happen in the way the claimant claimed they had happened). These facts were known to the claimant from the start.

66. In any event, the claimant was provided with very clear, cogent and detailed explanations by the respondent with respect to all these matters, both through his grievance process, and as part of these proceedings - in the respondent's witnesses' statements.

67. It is not, of course, to say that the claimant had to accept the respondent's evidence without a challenge. However, with respect to the allegations against

[2] At the relevant time the claimant was 55 years of age. The respondent, being a large employer, employs thousands of staff of all ages, including many employees in their sixties.

Mr Marriott and Mr Taggart, he simply dropped his allegations at the hearing, without challenging these two witnesses on their evidence. Therefore, the claimant's conduct of making these allegations against Mr Marriott and Mr Taggart, taking them all the way to the hearing (despite not having any cogent evidence to support them, and despite knowing what Mr Marriott and Mr Taggart say in response to his allegations), and then dropping the allegations without challenging their evidence, cannot be justified by the lack of explanations by the respondent, or the claimant wanting to challenge the respondent's explanations.

68. I reject the claimant's contention that him withdrawing these allegations before the evidence were heard was not unreasonable "*but demonstrate[ed] a reasonable approach*" and "*an honest attempt to adapt to the Tribunal's process …. not an intention to waste time or resources*." The claimant had no valid basis to make these allegations in the first place. While he might have disagreed with Mr Marriott's decision on his grievance and was unhappy about Mr Taggart taking longer to deal with his appeal than the claimant had anticipated, he still had no evidence whatsoever to show that any of that was <u>because</u> of his age.

69. The claimant knew that, or at any rate it should have been apparent to him from the start. He had no valid comparators for these allegations. He had no other facts that could give raise to any reasonable inference that Mr Marriott's or Mr Taggart's decisions and actions were somehow motivated by the claimant's age, or age in general.

70. It should have been obvious to the claimant that making these unsubstantiated allegations would still put the respondent to task of responding to them, and that would require Mr Marriott and Mr Taggart giving their evidence to answer the allegations. The claimant could not have sensibly expected that Mr Marriott or Mr Taggart would give evidence to say that they discriminated against the claimant because of his age.

71. Therefore, the claimant, whilst having no positive evidential case to put to the respondent on these allegations and no reasonable expectation that anything to support his allegations of discrimination could come from Mr Marriott's or Mr Taggart's witness statements, still pursuing these allegations, thus putting the respondent to trouble and costs of having to call Mr Marriott and Mr Taggart as its witnesses to defend the allegations, was, in my view, a clear example of unreasonable and, indeed, vexatious conduct by the claimant.

72. In my judgment, the claimant cannot hide behind the lack of legal knowledge or "*being out of [his] depth and overwhelmed*". It is a poor excuse for someone to make a frivolous allegation, cause the other party the trouble and expense of defending it, and then simply give up on that allegation without either putting a positive case or challenging the other side's case. It is not a matter of legal knowledge, but of common sense, and of having or not having reasonable conviction in your case.

73. Furthermore, the claimant's attempts to shift his case (for example, by saying in his closing submissions that in fact his complaint was not about being given just one opportunity to pass the course (as pleaded), but about not being told upfront that he would have more than one opportunity) demonstrates that he knew (or, at any rate, it should have been reasonably apparent to him) that his pleaded age discrimination claim was unsubstantiated and unsustainable, both because it was based on the facts that were not true (or at the very least - not true in the way he presented them), and because there was simply nothing by way of evidence that could link anything he complained about to his or anyone else's age. It is telling that in his written closing submissions, with respect to some of the allegations, his submissions on the question: "*Was this related to Age*" were a "?" or an "x".

74. The harassment complaint was equally hopeless[3]. Again, I explained to the claimant at the start of the hearing (and in some detail) what issues he needed to prove to succeed on this complaint. I repeated that explanation again during the hearing.

75. In particular, I highlighted to the claimant that, on the face of it, nothing in what Mr Attard said, which was subject to the claimant's complaint, could be sensibly read as being related to age. Furthermore, the claimant himself said that he had no issue with the information conveyed to him by Mr Attard in that message, but took exception to "the manner" in which Mr Attard said that, where the "manner", the claimant said, was the choice of words, rather than the tone, volume, mimics, gesticulation, etc.

76. The claimant, however, could not come up with any cogent explanation as to how "the choice of words", none of which words had anything in them that could remotely be linked to age, could be said to be conduct related to age. Instead, the claimant was very keen to put to Mr Attard that other trainers nicknamed Mr Attard "Hitler", which had no relevance whatsoever to the claimant's harassment claim and was simply designed to cause embarrassment.

77. The claimant's indirect discrimination claim was equally hopeless. Out of six claimed PCPs, the claimant has failed to establish four on the facts. More importantly, he presented no cogent evidence of group disadvantage. It seems he randomly picked the dividing line of 45 years of age and older vs. under 45. He did not explain why. More importantly, the claimant had no evidence to show how those in 45+ group were put at a particular disadvantage by any of the alleged PCPs. His statistical evidence was so thin and unreliable that on any sensible view could not have got the claimant's case off the ground. Again, I explored these issues with the claimant at the start of the hearing, explaining what he would need to establish to succeed on this complaint and why his evidential case appeared unpersuasive.

[3] 13a) Mr Attard informed the claimant on the second week of the course with words to the effect of "*You are the weakest in the class. I've spoken to the Manager and he said that if you don't pass, you are going straight back to the Piccadilly Line and you are not getting a second attempt*."

78. The claimant's reliance on various articles about neuroplasticity was fundamentally flawed. In fact, the evidence he presented under that banner went to undermine his case of indirect age discrimination. Instead, the evidence supported the respondent's case that it was the claimant's lack of effort and engagement with the course that was the real reason for him failing it, as the Tribunal found in its judgment.

79. In summary, I find that the claimant's entire claim had no reasonable prospect of success for the very simple reason that all the matters about which the claimant complained in his claim, even if proven on the facts (which the claimant has in main failed to do) could not have been sensibly linked to his or anyone's age. The claimant had no evidence to make that link. He knew that, or at any rate it should have been obvious to him. Furthermore, he saw the respondent's evidence, which gave clear and cogent explanation for all the treatment he complained above, none of which had anything to do with age. He still decided to pursue his claim to the end. I find that he has acted unreasonably in doing so.

80. I do not accept the claimant's submission that he genuinely believed that he had a meritorious case. His conduct at the hearing showed the opposite. He was dropping some allegations, shifting his case on others, randomly picking up comparators, developing "a conspiracy theory", not making any cogent closing submissions on what possible evidential basis his claim could succeed. Even if the claimant had had a genuine belief in merits of his claim, for the reasons explained above, I find that it would have been wholly unreasonable for the claimant to hold such a belief.

81. In any event, the test is objective (see paragraph 36 above), and the claimant's belief in his case could only be relevant at the second stage of this exercise, to which I shall turn now.

The discretionary decision

82. The next question is whether I should exercise my discretion and make a costs order against the claimant. I find the nature, gravity and effect of the claimant's unreasonable conduct justifies making a costs order. What I said above about why the threshold conduct was established equally supports my decision why it is just and proper to make a costs order against the claimant.

83. The claimant's claim was not merely comprehensively defeated by the respondent's defence; his case was such that on most of the allegations the respondent did not need to open its defence for the allegations to fail. The claimant has failed to overcome the initial burden of proof under s.136 of the Equality Act 2010. He simply had no cogent evidence to substantiate any of the allegations in his claim.

84. Furthermore, the Tribunal took considerable time to explain to the claimant all the matters he needed to establish and why based on the evidence he was

putting forward he could have some serious challenges meeting that burden. The claimant said that he understood all that, but wanted to continue, albeit dropping some of the allegations.

85. The claimant brought his misconceived claim and ran with it to the end despite the respondent comprehensively explaining, as part of the internal grievance procedure and appeal, the rationale for all the actions and decisions the claimant complained about. If the claimant genuinely and sensibly considered the respondent's explanations, it would have been apparent to him that his (or anyone else's) age was in no sense whatsoever a reason for any of the treatment he complained about.

86. He brought the claim, at the core of which was his failure to pass the CBTC course, despite the respondent offering the claimant to have another chance to sit the course, and with additional free time before the course to enable the claimant to discuss adjustments he needed to maximise his chances of completing the course successfully. Inexplicably, the claimant turned that offer down, despite maintaining that he wanted to take the Service Controller role at the Hammersmith Service Control Centre, which necessitated him attending and successfully completing the course. Instead, he chose to take the respondent to the Tribunal seeking £145,705.02 in compensation.

87. It is also telling that the very first thing the claimant asked at the start of the hearing (before any evidence were heard and liability issues determined) was for the Tribunal, when awarding him compensation, to take into account that he was unlikely to be able to return to work for the respondent in any role (that is despite him remaining employed by the respondent), and therefore the award should reflect that, effectively giving him financial compensation up to his normal retirement age. That does not sit well with his assertion that he was genuinely interested in successfully completing the course and taking the Hammersmith SCC role.

88. The claimant's unreasonable conduct of bringing and continuing with the claim caused the respondent to incur significant legal costs in defending it. I take into account the fact that the respondent did not apply to strike out the claim (in whole or in part) or for a deposit order. I, however, do not give a significant weight to this factor. It is notoriously difficult to strike out discrimination claims. Making such an application invariably means incurring more legal costs, which would be very difficult to recover whatever the outcome of the application might be. Therefore, in my view, it was very sensible for the respondent not to pursue any such application.

89. I also take into account the fact that the claimant is a litigant in person and should not be judged by the same standard as a professionally represented party. However, his claim has failed not on some legal technicality. It was not the lack of the claimant's legal knowledge that defeated his claim. He lost simply because he did not have any evidence to support any of the allegations he was making.

90. That was a matter of common sense. It should have been reasonably apparent to the claimant that what he was alleging in his claim was unsubstantiated and unsustainable as a matter of fact; and whatever he might have felt about the matters he complained about, there was simply nothing on the facts that he could sensibly link to his or anyone's else age. Therefore, the allegations of age discrimination were simply a means for the claimant of getting his foot in the Tribunal's door.

91. I do not accept that the claimant's medical condition of "*stress related problems*" is a sufficient factor to mitigate against making a cost order. Firstly, the claimant issued his claim on 15 April 2024, where the GP notes cover the period from 9 December 2024 to 31 March 2025. Secondly, these two GP notes, as medical evidence justifying the claimant's unreasonable conduct, is wholly inadequate. Other than having a rather nebulous diagnosis of "*stress related problems*", there is nothing in them to explain what those "problems" were, and, importantly, how they made the claimant to bring and pursue a claim that had no reasonable prospect of success or to act unreasonably in the conduct of these legal proceedings.

92. I reject the claimant's criticism of the respondent's conduct with respect to the exchange of witness statements or disclosure. I cannot see how the claimant having CBTC trainee data earlier could have made any difference. He was given that data at the hearing and used it to pick up two random persons as comparators. He did not abandon his claim as a result of being presented with that data. In his submissions he does not explain how him not having that data earlier "*hindered [his] preparation and contributed to [his] persistence with certain claims*".

93. By 14 March 2025 the claimant had the respondent's full evidential case before him. He knew what the respondent's witnesses would be saying at the trial. He failed in his claim not because he did not have enough time to "refine" his claims. He failed because he did not have a valid claim to pursue in the first place. Based on the evidence he had before him, if he had taken a sensible look at his case the evidential hopelessness of his case should have been reasonably clear to him. I say that giving full allowance to the fact that the claimant is a litigant in person.

94. For the same reasons, I do not accept the claimant's excuse of being out of his depth and overwhelmed. At the risk of repeating myself, his lost because he simply did not have factual evidence to support any of the allegations in his claim, not because the complexities of discrimination law.

The quantum decision

95. The final question is what amount of costs should be awarded. The respondent seeks £10,230 - solicitors' fees for preparing witness statements and attending conference with Counsel with respect to Mr Marriott and Mr Tabbart - the two witnesses, who were not called at the end because the claimant's withdrawal of allegations related to them, and Counsel brief fee and three refreshers.

96. The claimant did not provide any detailed evidence as to his ability to pay, expect for saying that an award of £20,000 would cause him financial hardship and that he would need to take out a personal loan to cover any award.

97. On 15 April 2025, I issued detailed directions with respect to the costs order application, which stated:

> *"2) Within 14 days of receiving the respondent's costs order application, the claimant must submit his representations on the application. If the claimant wishes the Tribunal, when deciding the application, to have regard to his ability to pay, the claimant must, at the same time, provide full and frank disclosure of his means (current and anticipated income and outgoings, any capital and savings, any debts, any available financial support). This will need to be supported by documentary evidence (pay slips, bank account statements, etc.). The claimant is referred to Part 13 of the Employment Tribunal Procedure Rules 2013."*

98. The claimant chose not to give full and frank disclosure of his means. I find the reference in his submissions to "financial hardship", lack of savings, and that he would have to take a personal loan to pay any award is so limited as the evidence of his ability to pay that I cannot place any reliance on it. I, therefore, simply do not have any reliable evidence as to the claimant's ability to pay for me to take into account.

99. I find the respondent's legal costs (£3,000), incurred for preparing witness statements of Mr Marriott and Mr Taggart and attending conference with Counsel for Mr Taggart's statement, reasonable. These costs were essentially wasted as a result of the claimant first making baseless discrimination allegations against Mr Marriott and Mr Taggart and then dropping them before the respondent opened its defence.

100. I also find Counsel's fees reasonable and that it was reasonable and proportionate for the respondent to instruct a barrister of 2010 call to represent it at the hearing.

101. I, however, do not accept that the solicitors' costs (£150) of making the costs order application and preparing the schedule of costs could be properly added to the costs order. That is because the mere fact that the costs application succeeded is not enough to award the costs of making the application. The respondent did not argue, and I do not find, that it was unreasonable for the claimant to contest the costs application, or that his defence of the application had no reasonable prospect of success.

102. I, therefore, make a costs order award against the claimant in the total amount of **£10,080**.

Employment Judge Klimov

10 June 2025

Sent to the parties on:

18 June 2025

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For the Tribunals Office