Neutral Citation Number: [2025] EAT 152

Case No: EA-2024-000194-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 October 2025

Before :

MARCUS PILGERSTORFER KC
DEPUTY JUDGE OF THE HIGH COURT

Between :

MR W HUNTLEY

Appellant

- and -

SIEMENS HEALTHCARE LTD

Respondent

- -
- -

Leslie Millin (Direct Access Counsel) for the **Appellant**
No appearance for the **Respondent**

Hearing date: 1 July 2025

- -

JUDGMENT

SUMMARY

Practice and Procedure: Costs

Following a final merits hearing conducted in two parts (one in April and the other in November 2022), the Respondent made an application for costs on the basis that (i) it had been unreasonable for the Claimant to continue with his claims for discrimination arising from disability, reasonable adjustments, victimisation, automatic unfair dismissal and unfair dismissal after the April 2022 hearing dates, and (ii) at that point those claims enjoyed no reasonable prospects of success. £7,500 was sought corresponding to counsel's fees for attending the 5 days of hearing in November 2022. The Tribunal awarded those costs in favour of the Respondent.

Five grounds of appeal were advanced. Ground 3 concerned whether, as a matter of construction of Rule 76(1)(b) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the time for assessing when a claim had a reasonable prospect of success could only be the outset of the proceedings. The remining grounds concerned whether the Tribunal had correctly applied well-established principles.

Held, dismissing the appeal:

(i) Applying **Radia v Jefferies International [2020] IRLR 431** and **Opalkova v Acquire Care Ltd (Unreported, EA-2020-000345-RN),** for the purposes of an application for costs made under Rule 76(1)(b), it is open to a Tribunal to consider whether a claim or response had a reasonable prospect of success at a time subsequent to the outset of proceedings.

(ii) No error of law was disclosed in respect of the Tribunal's application of the legal principles governing an award of costs.

MARCUS PILGERSTORFER KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. In the Employment Tribunal, costs do not follow the event. There are criteria which, if met, open the door to the Tribunal exercising a discretion as to whether or not to make an order. The criteria appeared in Rule 76 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") and now appear in Rule 74 of the Employment Tribunal Procedure Rules 2024. The door can be opened, amongst other possibilities, where a Tribunal considers *"any claim or response had no reasonable prospect of success"* or where *"a party (or that party's representative) has acted… unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted"*. Once the relevant threshold has been met, the Tribunal must exercise its discretion, taking into account the legally relevant circumstances. The principles governing the exercise of discretion are now well understood. For the most part, this appeal concerns whether they were correctly applied when determining a Respondent's application for part of the costs of a final merits hearing. In addition, one point of construction of Rule 76(1)(b) is raised by the grounds of appeal: can the time for assessing whether a claim or response "had no reasonable prospect of success" be other than the outset of the proceedings?

Background

2. Mr Huntley worked for Siemens Healthcare Limited ("the Respondent") as a field service engineer. He started in that employment in May 1992. His role was to repair magnetic resonance imaging ("MRI") equipment, typically used in healthcare settings. Given the nature of the equipment, it was necessary for him to travel to hospitals and similar sites to undertake repair and maintenance in situ. He was based at his home. Jobs were allocated to Mr Huntley and his colleagues such that they would receive notification of their appointments the day before on a scheduling app.

3. On 3 April 2020, whilst still employed, Mr Huntley presented a claim form to the Employment Tribunal at Watford. He brought various species of disability discrimination claim, as well as a claim of detrimental treatment on the ground that he had made protected disclosures.

4. Before that claim was heard, Mr Huntley was the subject of a disciplinary investigation and hearing, after which he was dismissed for gross misconduct with effect from 18 August 2020. The Respondent had found that Mr Huntley was, on Friday 9 August 2019, allocated a job in Heyford Park for the following day. It concluded that Mr Huntley had been aware of that assignment on the day of allocation (Friday 9 August); he had been contacted by the colleague with whom he was to attend the job and engaged in a WhatsApp conversation with that colleague on the Friday evening. During the WhatsApp conversation, Mr Huntley asked his colleague not to mention to his manager that he knew about the job. The Respondent went on to find that at 8am on Saturday 10 August 2019, Mr Huntley had been dishonest with its Customer Contact Centre ("CCC"): he told the CCC that no job had been showing in the app on the Friday and no-one had told him about it.

5. Following his dismissal, Mr Huntley presented a number of further claims to the Tribunal by way of Amended Particulars. These complaints included unfair and wrongful dismissal, victimisation, unauthorised deductions from wages, further allegations of disability discrimination, failure to make reasonable adjustments, and detriment for making protected disclosures. The disability relied on by Mr Huntley was a spine injury and depression and anxiety.

6. The final hearing of liability was heard by a Tribunal composed of Employment Judge Anstis, Mr A Scott and Mr P Miller. The hearing commenced on 11 April 2022 but took place over many days: 11-14 April, 19-21 April, and 21-25 November 2022. During the April dates, Mr Huntley represented himself. During the November dates, he was represented by Mr Downey of Counsel. The Respondent was represented by Ms Miller of Counsel throughout the hearing.

7. By the end of the liability hearing, Mr Huntley had refined his case considerably, and had withdrawn a number of his claims (which were dismissed upon withdrawal by the Tribunal). The following remained extant and required adjudication (see the Appendix to the Employment Tribunal's judgment):

i. Discrimination arising from disability (section 15 Equality Act 2010 ("EqA")); the detriment he alleged was that he was required to attend a face to face grievance appeal meeting;

ii. Failure to make reasonable adjustments (section 20 EqA). The provisions, criteria and practices ("PCPs") which Mr Huntley contended put him, as a disabled person, to a substantial disadvantage were:

(a) Applying a formal disciplinary process for acts of misconduct;
(b) When allocating work, supplying expected arrival times to engineers;
(c) Utilising GPS devices to check journey data and the location of the engineer;
(d) Applying a 5 day deadline for the submission of a grievance appeal; and
(e) Requiring attendance at a grievance appeal meeting; and

iii. Unfair dismissal (section 98 Employment Rights Act 1998 ("ERA")).

8. By a judgment given on the last day of the hearing, 25 November 2022, the Tribunal dismissed all of Mr Huntley's remaining claims and there is no appeal against that judgment. In somewhat more detail:

i. The section 15 EqA claim was dismissed because there was no suggestion that the grievance appeal officer's approach to the grievance appeal meeting was in any way influenced by matters arising from Mr Huntley's disability (see paragraph 102). Further, the Tribunal found that Mr Huntley was not in fact required to attend a grievance appeal hearing (see paragraph 104).

ii. The section 20 EqA claims were dismissed as follows:

(a) The claims concerning PCPs (b) and (c) in the list above failed because (i) they were out of time, (ii) the PCPs did not put Mr Huntley, as a disabled person, to a substantial

disadvantage, and (iii) no reasonable adjustment could be made to the PCPs (see paragraphs 57-66);

(b) The claim concerning PCP (a) failed because the Tribunal decided it would not have been reasonable for the Respondent to fail to apply a formal disciplinary process for acts of misconduct (see paragraphs 77-79);

(c) The claim concerning PCP (d) failed because the Tribunal found the PCP (a 5 day deadline for the submission of a grievance appeal was not in fact applied to Mr Huntley (see paragraph 95); and

(d) The claim concerning PCP (e) also failed because the Tribunal found the PCP (a requirement to attend a grievance appeal hearing) was not applied to Mr Huntley (see paragraph 104).

iii. Finally, in respect of the unfair dismissal claim, the Tribunal found the Respondent reached the conclusion that Mr Huntley had been dishonest; thus the reason for dismissal had been Mr Huntley's conduct (see paragraph 119). The allegation had been properly put to Mr Huntley (see paragraph 122) but he had no good response to it. In all the circumstances of the case, the dismissal was not unfair (see paragraph 124).

9. As well as determining the claims that remained extant, the Tribunal's liability judgment also provides an explanation of how the issues in the case changed as the hearing progressed. Materially:

(i) On the first day (11 April 2022), the Tribunal raised with Mr Huntley a number of issues with the way he was framing his complaints. This included, *inter alia*, how – for the purposes of his section 15 EqA claim – the alleged requirement to attend a grievance appeal meeting was said to have been done because of something arising in consequence of his disability (see paragraph 7b).

(ii) On the second day (12 April 2022), the Tribunal asked Mr Huntley to reflect whether the matters

identified by him in relation to his section 15 EqA claim *"were really meant as claims of discrimination arising from a disability, as they did not seem easily to fit within the concept of discrimination arising from a disability"* (see paragraph 12). Further issues were discussed concerning the viability of Mr Huntley's case on protected disclosures and victimisation. The Tribunal adjourned to allow Mr Huntley to take legal advice.

(iii) On the third day (13 April 2022), the Tribunal discussed changes to the list of issues and also noted Mr Huntley's explanation of his unfair dismissal claim: *"it would be his case that despite the ostensible independence of Ms Barry (the dismissing officer) she had been prevailed upon by other members of management (and HR) to ensure that he was dismissed"* (see paragraph 16).

(iv) On the fifth day (19 April 2022), the Tribunal noted that whilst the Claimant acknowledged a particular detriment pre-dated the first alleged protected act, he would not accept its removal as an allegation of victimisation (see paragraph 21).

(v) During his cross examination on the sixth day (20 April 2022), Mr Huntley accepted that he could not identify any of the detriments listed on the list of issues as having been caused or contributed to by his alleged protected disclosures and agreed that all of his case of detriments for having made protected disclosures should be "crossed out" (see paragraph 22). He maintained a case of automatic unfair dismissal for having made protected disclosures, but conceded he had no evidence to support this (see paragraph 24).

(vi) At this point (20 April 2022) the Tribunal said this (at paragraphs 25-6):

"25. At the conclusion of the claimant's evidence, we felt bound to point out to him the many difficulties that there appeared to be with his case following the conclusion of his evidence. Given his evidence, the claim in relation to protected disclosure detriments could not continue. The most prominent of his remaining claims was that of automatic unfair dismissal. For this to succeed it appeared at this point that he would have to show that Louise Malyon had made a

further disclosure of his one remaining alleged protected disclosure, also (on his case) that the colleague who he was to work with at Heyford Park's evidence had been interfered with by someone in management (yet the claimant had not yet identified any material inaccuracy in the record of that evidence, nor who had tampered with it and why they had tampered with it), and that in some way Ms Barry's decision was tainted by his protected disclosure. As the claimant accepted, he had no direct evidence to support any of these propositions, and his case seemed to rely on what he may obtain from the respondent's witnesses in cross-examination.

26. While acknowledging that it was possible that he would end up proving this, we cautioned him to consider carefully whether this was a proper basis on which to proceed, particularly in a case which would now go part-heard and was likely to be relisted for a substantial period of time later in the year. We also pointed out to him that there remained considerable difficulties in his linking of the "something arising from disability" with the detriments that he said resulted from that "something arising", as well as, on the face of it, considerable time problems with his disability discrimination claim. The claimant had not given any explanation of any delay in making his claim in his witness statement. In cross-examination he had said that at the relevant time he was in poor health and reliant on advice he was receiving, but it appeared that with the assistance of that advisor he had in that time produced a number of detailed and lengthy grievances, including citation of relevant case law and statute, and it was not obvious to us at this stage how he could do this at that point but not also submit an employment tribunal claim."

(vii) On the seventh day (21 April 2022), before adjourning the hearing to dates in November 2022, the Tribunal *"repeated its observations made the previous day to the claimant about the difficulties he may face with his claim. This was with a view to the claimant taking legal advice, which, if it was to be taken, the tribunal suggested should be taken at an early stage rather than just before the resumption of the hearing"* (see paragraph 32).

(viii) Following an adjournment of some 7 months, the hearing recommenced for its eighth day on 21 November 2022. At this stage the victimisation and automatic unfair dismissal claims were still live and the Tribunal questioned Mr Downey (who then represented Mr Huntley) about the viability of those claims, and repeated earlier observations concerning the claim of discrimination arising from disability (see paragraph 36).

(ix) On the tenth day (23 November 2022) the Tribunal heard from Mr Wright who had dealt with Mr Huntley's grievances. The Tribunal again raised with Mr Downey its concern about the link between the handling of the grievance and matters arising from Mr Huntley's disability. It urged Mr Downey to consider the point carefully head of closing submissions (see paragraph 42).

(x) On the eleventh day (24 November 2022) the Tribunal completed the hearing of the Respondent's evidence. It granted time to Mr Downey to discuss the claims with Mr Huntley. This resulted Mr Huntley reducing the claims he made to the effective claims which the Tribunal then adjudicated upon. In relation to this, the Tribunal said this (paragraph 47):

> *"This late reduction in the scope of the claimant's claims was welcome, but the respondent was right to question why it had not been done earlier, and there seemed to us to remain many obvious problems with the way in which the claimant put his disability discrimination claims."*

(xi) Later in its judgment, delivered on 25 November 2022, the Tribunal held as follows (at paragraph 105):

> *"A theme of this case and the hearing has been the very great difficulties the claimant has had with his original claims in relation to protected disclosures (now all withdrawn) and disability discrimination. Despite the legal advice that the claimant appears to have had along the way, and encouragement given by the tribunal during the hearing, he appears to have given very little thought to how those claims are framed and what might be necessary to prove them (or in the case of the disability discrimination claims, from what material we may have concluded that there was disability discrimination). Even in the limited form eventually pursued by Mr Downey each disability discrimination claim appears to us to have obvious and fundamental flaws."*

The Costs Application and the Tribunal's Decision

10. At the end of the hearing on 25 November 2022, the Respondent indicated that it intended to apply for costs against Mr Huntley. During the hearing of this Appeal, I was provided with the Respondent's written application. The application was made on the basis that (i) it had been unreasonable for Mr Huntley to continue with his claims for discrimination arising from disability, reasonable adjustments, victimisation, automatic unfair dismissal and unfair dismissal after the April 2022 dates of the hearing; and (ii) that at that point those claims enjoyed no reasonable prospects of success. £7,500 was sought, corresponding to counsel's fees for attending the 5 days of hearing in November 2022. The Respondent's position was that Mr Huntley ought to have realised that those claims enjoyed no reasonable prospects of success after the April 2022 dates of the hearing in light of indications given to him by the Tribunal

and a costs warning letter sent by the Respondent.

11. The relevant part of the costs warning letter, dated 26 July 2022, is set out in the Respondent's written application. The letter was written on a 'without prejudice save as to costs' basis; materially it stated:

> *"The Respondent will settle your expenses claim of £13.60, which was conceded at the hearing on 20th April 2022.*
> *Costs have already been wasted defending the whistleblowing detriment claims, which the Judge told you would not succeed and were finished, and which have therefore been removed from the List of Issues.*
> *You will recall that at the end of the adjourned hearing, the judge pointed out to you the serious problems that you have with the automatic unfair dismissal claim for whistleblowing. He commented that there is no evidence that Joanne Barry's decision was influenced by any of your protected disclosures and that you should reflect on whether there is a good case to extend this claim into a further five day hearing. He also alerted you to the panel's concern about your disability discrimination claims being out of time. He pointed out the problems you face linking your treatment with anything arising from your disability or with any of your protected acts for the purposes of your section 15 and victimisation claims. The Judge also pointed out the problems that you have with the ordinary unfair dismissal claim and in particular the problem you face contesting the evidence of Russell Bergman, and the Judge commented that you accepted you were in trouble if Mr Bergman's evidence is true.*
> *All of this gives the Respondent good reason to [believe] that your claims have very little prospect of success and that there is a significant risk of costs being awarded against you if these claims were to fail after such indications ad you have been given by the Judge.*
> *Therefore, if you withdraw all your claims in their entirety, the Respondent will agree not to pursue you for costs…"*

12. Mr Huntley did not reply until a chasing letter was sent on 20 October 2022. On 28 October 2022, Mr Huntley refused to withdraw his remaining claims but said he was prepared to entertain *"realistic settlement proposals"*.

13. The costs application was heard by the Tribunal on 27 November 2023 by CVP. The Tribunal allowed the Respondent's application and made a costs order in the sum of £7,500 against Mr Huntley.

14. The Tribunal commenced its reasons by explaining what was applied for, and the basis on which the application for costs was advanced:

> *"2. The respondent applies for a costs award of £7,500 against the claimant. This is its counsel's fees for the five days of the hearing in November 2022.*

3. The application was made on the basis that the claimant continuing with the claim in the November hearing was unreasonable conduct of proceedings under rule 76(1) and that his claims had no reasonable prospects of success. On the latter point, the respondent's position is that even if the claimant had not realised this before he should have done following indications given by the tribunal during the course of the April hearing, which were followed up by it with a costs warning letter."

15. The Tribunal then continued to discuss a number of factors it considered relevant, and dealt with a number of submissions made on Mr Huntley's behalf:

"4. The respondent's written application sets out what it had in mind, typically taken from our written reasons. These include that "we felt bound to point out to [the claimant] the many difficulties that there appeared to be with his case following the conclusion of his evidence". As to his position that something may turn up in cross-examination to support his claim of automatic unfair dismissal, "we cautioned him to consider carefully whether this was a proper basis on which to proceed". We went on to explain the difficulties we saw in elements of his disability discrimination claim. This was not just done on one occasion but was done on the last two days of the April hearing.

5. We note that the respondent pointed these matters out to the claimant in a costs warning letter following the hearing. Some if not all of this correspondence was copied to a solicitor the claimant had been seeking advice from.

6. By the November hearing the claimant had the benefit of representation by Mr Downey, on a direct access basis. His claim did not improve in cross examination of the respondent's witnesses. The link he was hoping for was not revealed. Our full judgment makes clear that there were fundamental difficulties with the claimant's case which did not improve during the November hearing.

7. In his reply to the costs application Mr Downey made what we consider to be a number of bad points. It is no answer to a costs submission of no reasonable prospect of success or unreasonable conduct of a claim to say that the respondent ought to have applied to strike out the claim on that basis. Mr Downey's suggestion that that could be done part way through the hearing is almost unknown in the tribunal, and we would not want to encourage a party to do this in order to protect their position on costs.

8. Other elements of Mr Downey's submissions were to the effect that the claimant was entitled to his day in court – particularly as regards his unfair dismissal claim. We accept Mr Downey's position that the respondent has the burden of showing the reason for dismissal, but we do not think that that gives every claimant the right to pursue their unfair dismissal claim to a conclusion. While the reason for dismissal has been in dispute there was nothing that the claimant could draw on to contradict the reason that had consistently been given by the respondent for his dismissal. The reasons for our judgment point out the other difficulties with the claimant's unfair dismissal claim.

9. Mr Downey sought to emphasise the claimant's status as a litigant in person, with limited access to legal advice. However, the claimant has had access to legal advice during this period, albeit not always consistently or fully. The claimant had advice at the start of his case. He was in touch with his solicitor during the exchanges after the April hearing, and he had representation from Mr Downey in the November hearing. There would have been limits to the instructions Mr Downey had or his role

as representative, but the claimant had far greater access to legal advice than many others have.

10. A final point on this question of legal advice is that we do not believe that any of our final judgment depended on detailed or technical areas of law. In reality it is mostly simple matters of logic – what caused what and how that can be demonstrated.

11. Mr Downey made no submissions on the claimant's means, apparently on the basis that the claimant did have the means to meet an award made by the tribunal."

16. Finally, the Tribunal stated its conclusions as follows:

"12. We accept [the Respondent's counsel's] submission that the claimant's case had no reasonable prospect of success. We think this should have been clear to the claimant at the very latest by the start of the November hearing, and probably much earlier after the April hearing. It was unreasonable conduct for the claimant to continue with his claim in the face of the points made by the tribunal and the respondent's costs warning letter.

13. We have considered whether we should make an award of costs, and decided that we should. The claimant should not have continued with his case into the November hearing. For him to do so has put the respondent to unnecessary costs. The amounts claimed as counsel's fees are not unreasonable in a case of his nature, and given that there seems no doubt on the claimant's ability to pay we will make the full award sought: £7,500."

The Grounds of Appeal

17. Five grounds of appeal are advanced. A sixth ground (perversity) was not permitted to proceed by the Judge considering the sift. The five live grounds are as follows:

i. Ground 1: That the Tribunal failed to explain adequately, or at all, the basis on which it had concluded that all of the Claimant's claims had no reasonable prospects of success ("the Reasons Challenge").

ii. Ground 2: The Tribunal failed to consider firstly whether the threshold for making a costs order had been established, before considering whether, in the exercise of discretion, costs should be awarded ("the Approach Challenge").

iii. Ground 3: The Tribunal wrongly construed Rule 76(1)(b) of the Rules as permitting a Tribunal to make a costs order in circumstances other than where the claim or response had no

reasonable prospect of success from the outset based on the contents of the claim or response ("the Construction Argument").

iv. Ground 4: The Tribunal failed to take into account a material factor, namely the Respondent's failure to apply for a strike out of the claims ("the No Strike Out Point").

v. Ground 5: Finally, the Tribunal failed properly to exercise its discretion by failing to make findings on, or weigh into the balance, the following: (a) the fact Mr Huntley was a litigant in person and unrepresented in April 2022; (b) the absence of an application by the Respondent to strike out or seek a deposit order; and (c) that evidence was required of the Respondent to establish the reason for Mr Huntley's dismissal (given that dismissal was admitted) and so all the circumstances were before the Tribunal before fairness was assessed ("the Exercise of Discretion Argument").

18. I shall deal with each ground in turn. It is convenient to deal with the Construction Argument (ground 3) within my discussion of the legal principles to be applied. The remaining grounds are then dealt with subsequently.

The Law

The Rules

19. Rule 76(1) of the Rules (so far as material) is in the following form:

> *"A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or response had no reasonable prospect of success;…"*

The Staged Approach

20. Inherent in this wording is a staged process for the consideration by a Tribunal of a costs application. This is now well understood and was neatly described by His Honour Judge Auerbach in **Radia v Jefferies International [2020] IRLR 431** at §61 (emphasis in the original):

> *"61. It is well established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of r 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with r 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to the ability to pay."*

21. It follows there are three stages:

i. First, the Tribunal must consider whether one of the costs thresholds set by the Rules have been crossed. If not, that is an end of the matter.

ii. Second, if a relevant threshold has been crossed, then the Tribunal must consider whether, as a matter of discretion, the Tribunal should in principle make a costs order. This second stage is required because a costs order is not automatic. When so considering, the Tribunal must taking into account all the legally relevant circumstances, which may include the paying party's ability to pay.

iii. Third, if the Tribunal has decided in principle to make a costs order, it must then consider what amount to order (or whether to order the whole or a specified part of the costs with the amount to be determined by detailed assessment). This too involves the exercise of discretion, and consideration of factors such as the connection between the relevant threshold event(s) and the costs sought, whether it is appropriate to award the costs on the standard or indemnity basis, and the reasonableness of the costs. Again the Tribunal may consider the paying party's ability to pay.

The Overlap between No Reasonable Prospects and Unreasonable Conduct

22. Applications for costs are often made on the basis that the claim or response had no reasonable prospects of success, or, in the alternative, that it was unreasonable for the relevant party to continue to pursue their case. Those two potential bases for awarding costs are conceptually distinct, but the issues for consideration (at stages one and two) can overlap, as the authorities make clear. In **Radia,** HHJ Auerbach explained as follows (paragraphs 62-64):

> *"62. At the first stage, accordingly, it is sufficient if either Rule 76(1)(a) (through at least one sub-route) or Rule 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.*
>
> *63. In this regard, the remarks in earlier authorities, about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure, are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.*
>
> *64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?*

23. Similarly in **Opalkova v Acquire Care Ltd (Unreported, EA-2020-000345-RN)**, HHJ James Tayler (considering the matter in the context of a respondent's response) observed (paragraph 25):

> *"…The question of whether a response had reasonable prospects of success is objective and is the threshold for making a preparation time order under Rule 76(1)(b) ET Rules, even if the respondent was not aware, and should not reasonably have been aware, that the response had no reasonable prospect of success. However, the lack of understanding of the merits of the response would be relevant, along with other matters, to the discretionary question of whether a preparation time order should be made. The questions of whether the respondent knew that the response had no reasonable prospects of success, or should reasonably have known, are relevant to the threshold question for a*

preparation time order on the basis that defending, or maintaining the defence, to the claim was unreasonable conduct for the purposes of Rule 76(1)(a) ET Rules; after which the discretion to make a preparation time order has to be applied considering all relevant factors. Whichever of the two provisions is applied it is hard to see that the result will be different. However, the matter must be analysed properly."

24. In **Opalkova**, the EAT considered the meaning of the terms "claim" and "response" in Rule 76(1)(b) of the Rules[1], viz in the context of assessing whether either enjoy no reasonable prospect of success. HHJ Tayler had regard to Rule 1 of the Rules, which defines "claim" as "any proceedings before an Employment Tribunal making a complaint", and "complaint" as meaning "anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal". He concluded that each separate statutory cause of action is a complaint and a "claim" within the meaning of the Rule: see paragraphs 14-16. Equally, the response to each of the claims brought by the claim is a "response" for the purposes of Rule 76(1)(b): see paragraph 17.

25. In **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**, the Court of Appeal held that the wording of what became Rule 76(1) was "*clear enough to be applied without the need to add layers of interpretation"* (paragraph 40). In the context of a case advanced on the basis of unreasonable conduct, Mummery LJ said this (paragraph 41):

"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been 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 … from my judgment in McPeherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

[1] Rule 76 of the Rules was applicable when the Tribunal in this case made its decision. The more recent Employment Tribunal Procedure Rules 2024 employ similar wording in Rule 74. One notable addition is that new Rule 74(2)(b) also refers to a "reply" when describing the threshold that *"any claim, response or reply had no reasonable prospect of success"*.

Ground 3: The Construction Argument – when should prospects of success be assessed?

26. One of the issues raised in this appeal concerns when the Tribunal should assess the prospects of success of a claim for the purposes of a costs application. On behalf of Mr Huntley, it was argued that where the relevant threshold relied on is a lack of reasonable prospects of success, on a proper construction of Rule 76(1)(b), a Tribunal is not permitted to make a costs order unless the claim or response lacked such a prospect from the outset. Put another way, the time for assessing whether a claim or response "had no reasonable prospect of success" can only ever be the outset of the proceedings. It was submitted that the Tribunal ought to have applied the same principles as apply to striking out a claim during a hearing as set out in **Williams v Real Care Agency Ltd [2013] ICR D27** and **Timbo v Greenwich Council for Racial Equality [2013] ICR D7**.

27. In support of that position Ms Millin, who appeared for Mr Huntley, relied on observations from **Radia** about how an Employment Tribunal should approach an application seeking the entire costs of the litigation, made on the basis that the case had no reasonable prospects of success from the outset. In particular, I was referred to paragraphs 65-69 of the judgment:

> *"65. I should say something further about how the Employment Tribunal should approach an application seeking the whole costs of the litigation, on the basis that the claim "had no reasonable prospects of success" from the outset. It should first, at stage 1, consider whether that was, objectively, the position, when the claim was begun. If so, then at stage 2 the Tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering these questions, the Tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation.*
>
> *66. This point needs to be considered in a little more detail. It may be observed that the test of "no reasonable prospect of success" appears in both Rule 76(1)(b), and in the strike-out Rule (Rule 37(1)(a)). But the task carried out by the Tribunal under each of these provisions is different. When considering a strike-out application, the Tribunal must decide whether the complaint or argument in question "has" - at the very same time when it decides that application - no reasonable prospect, based on the information available to the Tribunal at that point. Such applications are often considered at an early stage in the litigation, without the benefit of sight of any evidence; and the Tribunal's task is to assess the prospects of the claim succeeding if or when it comes to trial in the future. Those prospects are usually considered, therefore, on the basis of the case asserted, taken at its highest, although the Tribunal can also take account, for example, of key documents that may be before it at that point.*

> *67. Where the Tribunal is considering a costs application at the end of, or after, a trial, it has to decide whether the claims "had" no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start, and considering how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may, and should, take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time.*
>
> *68. The foregoing is, in my judgment, in principle the correct approach to take. Read with care, and in light of the particular facts of that case, I do not read the observations of Slade J in Swissport Limited v Exley [2017] ICR 1288 at paragraphs 62 - 68 any differently. The Tribunal may draw on the evidence that it has read and heard at the full hearing, provided that it does so to inform its view of the prospects at the earlier time, based on what was known, or could reasonably have been known, back then.*
>
> *69. Further, the mere fact that there were factual disputes, which could only be resolved by hearing evidence, and fact finding, arising from the final Hearing, does not necessarily mean that the Tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, nor that it cannot conclude that the complainant could or should have appreciated this from the outset. That still depends on what they knew, or ought to have known, were the true facts, and what view they could reasonably have taken of the prospects of the claims, in light of those facts. See Vaughan (above), in particular at paragraph 14(4)."*

28. HHJ Auerbach contrasted the wording of Rule 37(1)(a) (providing that a claim or response may be struck out because it "has no reasonable prospect of success") and Rule 76(1)(b) (describing the threshold for an award of costs where any claim or response "had no reasonable prospect of success"). As has been seen, the Judge made the point that in the case of a strike out application, the word "has" indicates that the Tribunal should decide whether the complaint or argument in question has no reasonable prospects at the time when it decides the application, based on information available at that point. By contrast, when applying Rule 76(1)(b), the Tribunal must decide whether the claims "had" no reasonable prospect of success judged on information known or reasonably available "at the start"; and the Tribunal must maintain a focus on the question of how things would have looked "when the claim began". Ms Millin therefore submits that the time for the assessment of prospects must always be at the outset of the litigation.

29. I do not accept Ms Millin's submission or that the passages in **Radia** mandate this result. HHJ Auerbach's observations from paragraph 65 onwards were expressly directed to those applications "seeking the whole costs of the litigation, on the basis that the claim 'had no reasonable prospects of success' from the outset". It is therefore unsurprising that the learned Judge's observations in **Radia** deployed language specific to applications advanced on that basis. Where the whole costs of the litigation are sought on the basis the claim had no reasonable prospect of success it is clearly important to enquire whether that was so at a point prior to any of those costs being incurred, i.e. at the very outset of proceedings. Thus it is unsurprising to find references in **Radia** to relevant time for the assessment as being "at the start" and "at the time when the claim began". However in my judgment HHJ Auerbach was not precluding an application for costs under Rule 76(1)(b) being advanced on a different basis, viz in respect of part of the costs of proceedings. The language of Rule 76(1)(b) remains "had", and thus the Tribunal is still assessing whether the claim or response had (judged at a point in the past, rather than when the application is being determined) no reasonable prospect of success, but in my judgment it does not follow that that point in the past must be the outset of the proceedings.

30. I see nothing as a matter of construction of Rule 76(1)(b), or as a matter of principle, to prevent an application for costs being made on the basis that, from a particular point in time subsequent to the outset of the litigation, a claim or response had no reasonable prospect of success (even if it might have enjoyed such prospects at an earlier point in time). Indeed, as a matter of principle, there is good reason to construe the Rule in this way. Doing so encourages litigants at all stages of the litigation to review their prospects of success and ensure that they are only pursuing claims and defences that have a reasonable prospect of success. This helps achieve the overriding objective.

31. During the course of her submissions, I referred Ms Millin to HHJ Tayler's decision in **Opalkova**. In that case, the learned judge's analysis of Rule 76 included the question of the time at which it is to be assessed whether the claim or response had no reasonable prospects of success (see paragraph 13). Judge Tayler said this (at paragraph 20):

> *"It is possible that a claim or response when served had reasonable prospects of success, but that a development, such as new evidence coming to light, meant that the claim or response ceased to have*

reasonable prospects of success. It is at that time that the claim "had" no reasonable prospects for the purposes of Rule 76(1)(b) ET Rules."

32. Judge Tayler went on to refine the questions of relevance identified by Judge Auerbach in **Radia** as follows (paragraph 24, with my emphasis):

"Accordingly, there are three key questions. First, objectively analysed when the response was submitted did it have no reasonable prospects of success; ***or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success****? Second,* ***at the stage that the response had no reasonable prospects of success*** *did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospect of success?"*

33. HHJ Tayler's conclusions accord with my own that it is permissible to assess the prospect of success of a claim or response at a time point later than the outset of proceedings. There remains the distinction with the test for strike out in that the language of Rule 76(1)(b) is in the past tense: "had". When considering the cost rule, the Tribunal is looking back to the relevant point in time when it is said that the claim or response no longer enjoyed a reasonable prospect of success and asking whether *at that point* that was so.

34. In the course of her argument, Ms Millin referred to **Williams** and **Timbo**. These cases concern the Tribunal's power to strike out a claim during the course of a hearing. In **Williams**, the claimant's claim of unfair dismissal was struck out for want of reasonable prospect of success before the claimant's cross-examination had been completed and before she had called her witnesses. An appeal was allowed by this Tribunal presided over by Langstaff P. In his judgment, the President accepted that the strike out power could be exercised at any time, but held that it must be exercised in accordance with reason, relevance principle and justice. At §§19-21, he said this:

"19. The power, as we have already indicated, is one which by the design of the rules is intended to have its principal use at a pre-hearing stage. It is easy to understand why that is. The power, properly used, is an aid, as we see it, to justice. It permits a Tribunal to look at the particular factual allegations made in an ET1; having done so, it may see that the facts could not on any view give rise to an entitlement to the relief claim. In such a case it would not be inappropriate to give notice that the claim might be struck out. Such a process permits the Claimant to say that there are further facts, if that be the case, that might cast a different light upon matters, but otherwise it saves time, it saves the resources of the Tribunal, it saves costs, and it deals with matters in a manner proportionate to the importance to the parties, for the case to be struck out there and then without, on this scenario, going to the unnecessary, expensive, and, for a Respondent, if it be the claim that be struck out, disturbing, process of appearing

before a Tribunal.

20. None of that reasoning is likely to apply when an application is made in the middle of a hearing; quite the reverse is likely to occur. Time will be taken not by hearing the evidence, which is what the Tribunal's principal function is, but in hearing an application that it is unnecessary to hear any more evidence. That application will inevitably be contested. A Tribunal is invited to determine a case not on all the evidence but on part of the evidence. It is invited to have sufficient certainty of the correctness of its own view as to decide that it needs to hear no more, despite universal forensic experience that matters that seem very plain at one stage in a hearing might have a very different complexion at the end. The purpose of a strike-out may nonetheless be appropriate if, for instance, one of the other grounds for striking out is appropriate. Thus if, for instance, one party by its conduct during the course of a hearing makes it very difficult or impossible for the hearing to continue, then the exercise of the power to strike out that party from pursuing or defending the claim is obvious, but the same does not, in our view, apply where what is in issue is not any part of the conduct of the case, the conduct of the parties before the Tribunal, or anything that might in other courts give rise to a contempt application or an abuse application, but is solely related to the force of the evidence and whether, on the evidence, it is possible for the Claimant or, as it may be, the Respondent to succeed.

21. In this case the Claimant was part way through giving her answers in cross-examination. Although ultimately it is for a Tribunal to judge, we see no reason why in a case of this nature the simpler and undoubtedly better course would not have been simply to allow the cross-examination to proceed and the Claimant then to call what witnesses she wished so that the Tribunal had the full picture. Just as it is emphasised that some claims are generally not appropriate to strike out, such as those claims that raise serious issues of discrimination even at an initial stage, so it must be recognised that it would be very exceptional indeed, to the point of the instances of it being vanishingly small, that a claim could ever legitimately be struck out mid-hearing on the grounds of evidential insubstantiability. Not to allow the appeal here might be seen as indicating a view that it is open to a Tribunal to strike out a claim at any stage of the proceedings mid-hearing upon the ground that there is no reasonable prospect of success. Only to posit that possibility is to envisage a scenario in which litigants may forever be looking for an opportunity to indicate that their case is so exceptional that the power should in this case be used. It runs a real risk that Tribunals will have their attention diverted from deciding the facts as they are to having to determine the facts as they might be. It runs counter to the overriding objective that it is the purpose of rule 18(7) to serve, because it is likely to cost time, cost money, cost resources and cause inconvenience to the parties that simply getting on and hearing the case avoids, and, perhaps most importantly, it risks the sense that litigants might have that they have been wrongly shut out from telling their story in a public forum because the court at some stage mid-hearing refuses to hear any more. It is no part of justice, blind as it must be, also to be deaf to a selective part of the evidence."

35. This approach was followed in **Timbo** in a case where the Tribunal characterised the application as being of no case to answer.

36. Ms Millin submitted that these cases support her position that the time for assessing whether a claim "had no reasonable prospect of success" for the purpose of Rule 76(1)(b) must be the outset of the proceedings. I do not agree. The concerns identified by this Tribunal in **Williams** and **Timbo** are directed to the appropriateness of striking out a case during a final hearing rather than determining it on its merits at the conclusion of, and in light of, all the evidence. That is a very different situation from the adjudication of a costs application after the merits of a case have been decided. As I have explained, the

language of the costs rule permits the assessment of the prospects of success at a prior point in time which may be subsequent to the outset of proceedings. Nothing in **Williams** or **Timbo** casts doubt on that conclusion.

37. In the present case, unlike the position in **Radia**, the Respondent did not seek the entire costs of defending the claims. It made a more restricted application, limited to the costs of the November 2022 segment of the final hearing. The Tribunal acceded to that application. For the foregoing reasons, I do not consider that this amounts to an error in the construction of Rule 76(1)(b). It was open to the Tribunal to determine that at a point in the life of the claims, subsequent to the outset of proceedings, the relevant claims did not enjoy reasonable prospects of success and to award costs from that point onwards.

38. It follows that ground 3 must be dismissed.

The Application of the Legal Principles

39. I turn, then, to the remaining grounds of appeal (albeit not in the order presented).

Ground 2: The Tribunal's Approach

40. Under Ground 2, Ms Millin submits that the Tribunal failed to follow the two-stage approach described in **Radia** above; namely first, to consider whether the threshold for making a costs order is established, before then turning to whether in the exercise of its discretion the Tribunal should make an order.

41. I agree that it was necessary for the Tribunal to adopt this approach, but I do not accept that this Tribunal failed to do so.

42. I have set out above the Tribunal's reasons for making a costs order. They are structured as follows. After setting out the costs applied for, and the basis of the application (paragraphs 2-3), the Tribunal went on to discuss a number of matters it considered relevant:

(i) the indications given to Mr Huntley during the April 2022 part of the hearing that there were problems with his claims (paragraph 4);

(ii) the costs warning letter the Respondent subsequently sent (paragraph 5);

(iii) the fact Mr Huntley went from being a litigant in person to achieving representation by the time of the November 2022 hearing, but that the claim did not improve in cross-examination (paragraph 6);

(iv) a submission that the Respondent had not applied to strike out the claim (paragraph 7);

(v) a submission that Mr Huntley was entitled to his day in Court (paragraph 8);

(vi) Mr Huntley's status as a litigant in person and his access to legal advice (paragraph 9);

(vii) whether the final judgment depended on technical areas of law as opposed to matters of logic (paragraph 10); and

(viii) the extent to which Mr Huntley's means were put in issue on the application (paragraph 11).

43. Following that discussion, at paragraph 12, the Tribunal accepted the Respondent's submission that Mr Huntley's case had no reasonable prospect of success, and that it was unreasonable conduct for Mr Huntley to continue with his claim in the face of the points made by the tribunal and the Respondent's cost warning letter. Having reached those determinations, the Tribunal then indicated that it considered whether it should make an award of costs and decided that it should (paragraph 13).

44. In my judgment the required two-stage approach is sufficiently evident from the sequence of paragraphs 12 to 13. In paragraph 12 the threshold questions are addressed and decided upon. In paragraph 13, the question of the exercise of discretion is determined. Whilst I have some sympathy with Mr Huntley's argument on the basis considerations are discussed as part of a narrative, rather than being raised where relevant under the correct stage of the analysis, it is well established that reasons given by Tribunals must be approached fairly. Of the many judicial dicta on this point, I refer to Lord Hope's words in **Hewage v Grampian Health Board** [2012] ICR 1054 paragraph 26:

"It is well established, and has been said many times, that one ought not to take too technical a view

of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."

45. Read in this way, I am satisfied that the Tribunal did in fact first consider the threshold question, before separately considering as a matter of discretion whether to make an award of costs.

46. As a further sub-argument within this ground, Ms Millin argued that the Tribunal wrongly placed the burden of showing the threshold criteria were not crossed upon Mr Huntley. I am not satisfied that this is made out on a fair reading of the Tribunal's reasons. In my judgment, there is no indication in the reasons that the Tribunal regarded Mr Huntley as bearing the burden of disproving that the threshold criteria were met. In any event, the reasons show that the Tribunal decided the point on the substantive merits, not by considering where the burden of proof lay. I see no error of law in respect of this complaint.

Ground 4: The No Strike Out Point

47. Under Ground 4, Ms Millin argued that the Tribunal erred in law by failing to take into account that the Respondent had not applied to strike out Mr Huntley's claims for having no reasonable prospect of success. In support of this ground, reliance is placed on **AQ Ltd v Holden [2012] IRLR 648.**

48. In **AQ Ltd**, the employer had applied for costs against the claimant at the conclusion of the Tribunal proceedings. That application was refused. Amongst other factors, the Tribunal referred to the fact that AQ Ltd had not applied to strike out the claims on an interlocutory basis. AQ Ltd appealed. One of the grounds of appeal was that the Tribunal erred by taking into account an allegedly irrelevant factor (the failure to apply for a Preliminary Hearing to strike out the claim). HHJ Richardson, giving the judgment of the Appeal Tribunal, rejected that submission, stating (at paragraph 34):

"We do not consider that it was irrelevant for the tribunal to take into account the absence of an application on behalf of AQ for a pre-hearing review. If the claim had truly been misconceived or vexatious there could have been an application to strike out (or a deposit order). The matter was not in any sense decisive of the application for costs; but it was not irrelevant."

49. Accordingly, the Tribunal had not erred in law by taking this factor into account.

50. The argument in the present case is the other way around: that it was an error of law for the Tribunal to omit to take into account the failure to apply for a strike out.

51. As HHJ Richardson held in **AQ Ltd**, the fact that an applicant for costs did not seek to strike out a claim on the basis of it having no reasonable prospect of success is in no way determinative of an application for costs made on the basis that the claim had no reasonable prospect of success. There are many potential reasons for this, of which I mention a few. First, as a matter of principle, whether a claim had no reasonable prospect of success for the purpose of Rule 76(1)(b) is a matter to be objectively assessed by the Tribunal: see **Radia** paragraph 62. The prior actions of the applicant, based on its subjective assessment of that question, cannot determine the result. Secondly, the failure of a party to apply to strike out a claim does not necessarily mean that there were no grounds for doing so, or that a claim necessarily enjoyed reasonable prospects of success. A litigant might not make the application for a number of reasons. By way of example, the litigant might be ignorant of the ability to do so; the litigant might be reluctant to risk the costs of a further hearing; or in a particular case a litigant might consider the point unsuitable for an interlocutory determination given the information that would be taken into account at that stage: see the discussion in **Radia** at paragraphs 66-67.

52. Nonetheless, I respectfully agree with Judge Richardson that the failure to apply for a strike out is a point of *potential* relevance, depending on the circumstances of the case. In **AQ** the relevance was described in terms of the stage one enquiry: whether the claim "had truly been misconceived[2]", but it seems to me the relevance could also extend to the discretion at stage two.

53. In the present case, the Tribunal (at paragraph 7 of its reasons) referred to the submission that the Respondent ought to have applied to strike out the claim for having no reasonable prospect of success.

[2] "Misconceived" being language found in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 and understood to bear the same meaning as "no reasonable prospect of success": see **Radia** paragraph 63.

The Tribunal described this submission as one of a number of "bad points" and stated it was no answer to an application for costs made on the basis that there had been no reasonable prospect of success, or unreasonable conduct. The generic language employed by the Tribunal in the first part of paragraph 7 might suggest that it considered the failure to apply for a strike out could *never* be a relevant consideration. If that was indeed what was meant, it would be incorrect. However, I have reached the conclusion that this is not a fair reading of the Tribunal's decision. In the first part of paragraph 7, the Tribunal was considering whether the failure to apply to strike out was an "answer" to the costs application. I do not consider the Tribunal's answer in the negative as going further than saying that the point did not determine the issue, and in this sense it is consistent with **AQ**. The Tribunal then went on to consider a suggestion as to how an application to strike out could have been brought in this case, namely part-way through the liability hearing (given that the application was put on the basis that the lack of any prospects of success ought to have been apparent to the Claimant by no later than the end of the April 2022 hearing). The Tribunal clearly did not consider that a viable proposal[3]. Read fairly, and as a whole, in my view the Tribunal was not eschewing any relevance as a matter of principle; it considered the submission and was unable to attach any significant weight to that factor given the way the application for costs was advanced in this particular case.

54. For these reasons, I reject and dismiss Ground 4.

Ground 5: The Exercise of Discretion Argument

55. Ground 5 is that the Tribunal failed to make findings on, and failed to weigh in the balance when exercising its discretion, the following matters: (a) the fact Mr Huntley was a litigant in person and unrepresented on the April 2022 dates of the hearing; (b) the absence of any application to strike out the claims, or for a deposit order; and (c) that as the dismissal was admitted, the Respondent still had to give evidence to establish the reason for dismissal and so that the Tribunal had all the circumstances before it when considering the overall fairness of the dismissal.

[3] It did not refer to **Williams** or **Timbo**, but it might have had those authorities in mind.

56. As I have explained, I have already concluded that the Tribunal did adopt the required staged approach to this costs application and did exercise its discretion after concluding the threshold was met. Whilst it would have been better for the Tribunal to have set out the relevant considerations when exercising its discretion, the judgement must be read fairly and without undue technicality. It is tolerably clear to me that the Tribunal took into account the matters set out in the earlier paragraphs of the decision when exercising its discretion and stating the result, which it did in paragraph 13.

57. Turning to the first factor relied upon under this ground, I am entirely satisfied that the Tribunal had well in mind Mr Huntley's status as a litigant in person, and the advice he had access to at various points. This is expressly recited at paragraph 9 of the reasons. The conclusions set out there were, in my view, open to the Tribunal to reach.

58. The next factor is the absence of any application to strike out the claims, or for a deposit order. As I have explained above (see ground 4) I have concluded that the Tribunal did consider the fact the Respondent did not apply for a strike out of Mr Huntley's claims and set out why that was not a factor of any significant weight (see paragraph 7). Whilst the Tribunal did not refer to a potential application for a deposit order, the failure to make that application must, logically, have even less relevance than a strike out application because such applications require a lower bar ("little reasonable prospects of success") than is required for either strike out or a costs order under Rule 76(1)(b). I see no error of law in the Tribunal omitting to refer to the failure to apply for a deposit order given what was said in paragraph 7.

59. The final point made is that the Tribunal failed to take into account that as the dismissal was admitted, it was still necessary for the Respondent to give evidence to establish the reason for dismissal and so that the Tribunal had all the circumstances before it when considering the overall fairness of the dismissal. However, the Tribunal did consider this at paragraph 8 of the reasons. It expressly accepted that the Respondent had the burden of showing the reason for dismissal, but held that this did not give

every claimant the right to pursue an unfair dismissal claim to a conclusion. The Tribunal then weighed into the balance that in this case there was nothing that Mr Huntley could draw upon to contradict the reason for dismissal which the Respondent had consistently given. I see no error of approach in this regard.

60. It follows that I find ground 5 is not made out.

Ground 1: Reasons

61. Finally, I turn to Ground 1. Under this ground, Mr Huntley's case is that the Tribunal failed to explain adequately the basis upon which it had concluded that the relevant claims had no reasonable prospect of success. Although beyond the terms of the Grounds of Appeal, Ms Millin extended her criticism to a failure by the Tribunal to explain why it was unreasonable to continue to pursue the claims after the adjournment of the hearing part-heard in April 2022. Ms Millin argued that the reasons given by the Tribunal do not disclose whether the Tribunal considered the thresholds were met in respect of all the claims brought by the Claimant, or whether its conclusions were limited to the claims that were live at the end of the hearing, or whether it was some intermediary position.

62. The principles that govern the assessment of whether the Tribunal has complied with its duty to give adequate reasons were helpfully summarised by Cavanagh J in **Linda Frame v The Governing Body of the Llangiwg Primary School & Another (Unreported, UKEAT/0320/19/AT).** Following a full discussion of the relevant authorities (see paragraphs 40-48), the learned Judge summarised the position as follows (at paragraph 47):

"(1) The duty to give reasons is a duty to give sufficient reasons so that the parties can understand why they had won or lost and so that the Appellate Tribunal/Court can understand why the Judge had reached the decision which s/he had reached;

(2) The scope of the obligation to give reasons depends on the nature of the case;

(3) There is no duty on a Judge, in giving his or her reasons, to deal with every argument presented by counsel in support of his case;

(4) The Judge must identify and record those matters which were critical to his decision. It is no possible to provide a template for this process. It need not involve a lengthy judgment;

(5) The judgment must have a coherent structure. The judgment must explain how the Judge got from his or her findings of fact to his or her conclusions;

(6) When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which s/he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question; and

(7) It is not acceptable to use a fine-tooth comb to comb through a set of reasons for hints of error or fragments of mistake, and try to assemble them into a case for oversetting the decision. Nor is it appropriate to use a similar process to try to save a patently deficient decision."

63. The Tribunal's reasons for awarding costs in the present case are responsive to the application the Respondent advanced. The written application (at paragraph 21) identified the claims that the Respondent contended lacked reasonable prospects of success and which were unreasonable for Mr Huntley to continue to the November 2022 hearing dates. The relevant claims were the claims of discrimination arising from disability, failure to make reasonable adjustments, victimisation, automatic unfair dismissal and unfair dismissal. The judgement on costs concluded that "the claimant's case" did not have reasonable prospects of success (paragraph 12). In my judgment, read fairly, this is a reference to Mr Huntley's claims as identified in the costs application. The Tribunal also found (in the same paragraph) that it was unreasonable conduct of proceedings for Mr Huntley to continue with "his claim" in the face of the points made by the Tribunal and the Respondent's costs warning letter. Again the reference to "his claim" in this paragraph is, in my judgment, to be read as a reference to the claims as identified in the costs application.

64. Paragraph 12 of the reasons for the costs order indicates that the Tribunal accepted counsel for the Respondent's submission that the relevant claims lacked reasonable prospects of success. The Tribunal further accepted Mr Huntley had been unreasonable by continuing the relevant claims despite the warnings given by the Tribunal and the Respondent. The Tribunal gave further details of both matters in paragraphs 4 to 6 of its reasons which I have set out above. In those paragraphs, the Tribunal referred to the written application for costs and what it had said in its own liability judgment. It observed that Mr Huntley's case had not improved by the cross-examination of the Respondent's witnesses at the

November segment of the hearing and that the "fundamental difficulties" with the relevant claims did not abate.

65. In my view, it was permissible for this Tribunal to cross-refer to its earlier judgment, and the reasons advanced in the Respondent's written application, when complying with the duty to give reasons. When the costs judgment and those earlier documents are read together, and fairly, in my view there are sufficient reasons to explain why the Tribunal reached the view that after April 2022, and objectively assessed, the relevant claims enjoyed no reasonable prospects of success. It had identified the lack of any linkage between Mr Huntley's disability and the detriment relied upon for the purposes of the section 15 EqA claim (see liability judgment paragraphs 7b, 12, 26, 32, 42, and 102). In respect of the remaining disability claims, the Tribunal identified time issues (unsupported by evidence from the Claimant) and the "obvious and fundamental flaws" in the formulation of the claims (see liability judgment paragraphs 12, 26 and the findings at paragraphs 55-66, 77-79, 95, 104 and 105). The victimisation claim (which was subject of a late withdrawal at the November 2022 hearing) had not been viable and Mr Huntley had persisted in it even in the case of a detriment which pre-dated the first alleged protected act (see liability judgment paragraphs 12, 21 and 36). The automatic unfair dismissal claim had no direct evidence to support it, as Mr Huntley had acknowledged during the April hearing (see liability judgment paragraphs 16 and 25), and there was no other basis to suggest the dismissal was unfair (see liability judgment paragraphs 119-124).

66. Similarly, read in this way, there is in my judgment sufficient reasoning to explain why the Tribunal reached the view that continuing with these claims to the November 2022 hearing constituted unreasonable conduct of proceedings. In paragraph 12 of the costs reasons the Tribunal specifically referred to continuing "in the face of" the points made by the Tribunal and in the costs warning letter. These points are set out in the liability judgment and between paragraphs 4 to 6 of the costs reasons. The Tribunal therefore clearly considered what Mr Huntley knew about the relevant claims at the relevant time, including what the Tribunal had told him at the April hearing dates, as well as the contents of the costs warning letter. Further, the Tribunal referred to his ability to take legal advice.

67. For the above reasons, and whilst the Tribunal's reasoning could have been fuller, I conclude that there was no failure to comply with the duty to give reasons. Ground 1 therefore fails.

Disposal

68. For the reasons I have given, I dismiss this appeal.