EMPLOYMENT TRIBUNALS

Claimant: Mr L Jones

Respondent: The Chief Constable of Greater Manchester Police

Heard at: Manchester Employment Tribunal

On: 3 November 2023 (in chambers on 15 December 2023)

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: Self represented
Respondent: Mr E Stenson (Counsel)

JUDGMENT ON A COSTS APPLICATION

The judgment of the Tribunal is that:

1. The respondent's application for a costs order against the claimant fails.

REASONS

Introduction

1. By a claim form presented on 11 April 2022, the claimant brought complaints against the respondent of disability discrimination and detrimental treatment on the ground of making protected disclosures. The final hearing of the case was listed to take place over 5 days on 27-31 March 2023. The claimant withdrew his claim by an email sent at 21:54 on the evening of Friday 24 March 2023, the working day before the final hearing was due to start.

2. By a letter dated 12 May 2023 the respondent applied for a costs order against the claimant in the sum of £20,000. It did so on the basis that the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably by bringing or conducting the proceedings up to the evening of the last working day before the final hearing and subsequently withdrawing his claim.

3. The claimant was represented by Laura Thompson of Slater & Gordon ("Ms Thompson") throughout the Employment Tribunal proceedings until 24 March 2023. In the costs proceedings the claimant represented himself. The respondent was represented at this costs hearing by Mr Stenson of counsel.

4. On 3 November 2023 I heard the respondent's application for costs against the claimant. For reasons I explain below, I decided to reserve my decision. I was due to consider the matter in chambers on 21 December 2023.

5. I also directed that the parties might (but were not required to) provide written submissions by 8 December 2023 and replies to the other party's submissions by 15 December 2023. Unfortunately, the chambers hearing on 21 December 2023 was moved forward to 15 December 2023 due to demands on judicial resources. I considered the matter in chambers on that date but did not have before me the respondent's Further Submissions dated 15 December (received at 15:44 that day) nor the claimant's email in response sent at 20:53 that day. That is in no way the fault of the parties but it meant I was not able to conclude deliberations on the 15 December. I apologise to the parties for the subsequent delay in finalising this judgment.

The hearing

Preliminary matters

The documents in the case

6. Before hearing evidence and submissions we had to sort out some preliminary issues about the documents for the hearing. The respondent had prepared a 133 page bundle for the costs hearing. The claimant had not received it. He had been unable to open the link sent by the respondent's solicitor. The respondent's counsel did not have pages 127-133. The claimant had sent in his own 62 page bundle for the hearing. He had sent that to the Tribunal on Monday 30 October 2023. In this judgment I refer to the 133 page hearing bundle prepared by the respondent as "the Bundle" and to the claimant's bundle as "Claimant's Bundle". The respondent also provided a further additional bundle of 48 pages which I refer to as the "Additional Bundle".

7. The Claimant's Bundle included correspondence between the claimant and Ms Thompson. I explained to the claimant that because they contained legal advice those documents were privileged so the respondent and the Tribunal would not usually be allowed to read them. The claimant confirmed he was happy to waive privilege so those documents could be read by me and the respondent. The bundles also included Without Prejudice correspondence between Ms Thompson and the respondent's solicitors relating to the settlement negotiations. Both parties were willing to waive any privilege so I could read those documents.

Decision to proceed with the hearing

8. On 30 October 20203 the claimant sent the Tribunal a 5 page document setting out his objections to the costs application ("the Objection" at pp.115-119 of the Bundle). He confirmed he was aware of the costs application but only from 2 August 2023 when he was alerted to it by the respondent's solicitor and found it in his spam folder.

9. The claimant said he had not been sent the notice of this hearing. On checking the Tribunal file it appears that notice was sent to Leigh Day. That meant the claimant only had notice of the hearing at the end of the previous week.

10. The respondent had accepted in the main Tribunal proceedings that the claimant was a disabled person by reason of Degeneration of the Spine, Chronic Pain and Chronic Fatigue Syndrome. In the Objection the claimant explained the mental health issues he was experiencing. The Claimant's Bundle including supporting medical evidence. I considered whether it was in accordance with the overriding objective to continue with the hearing given the limited notice the claimant had had of it. The claimant was clear that he wished to do so. The claimant indicated that he found putting his arguments in writing easier that doing so orally.

11. By that point, the time that had been taken up by preliminary matters meant it was likely that I would need to reserve my decision. I decided it was in accordance with the overriding objective to proceed with the hearing if I reserved my decision. That would give the parties the opportunity to make written submissions and mitigate the disadvantage to the claimant of not having had much notice of the hearing.

Evidence and submissions

12. I retired to read Mr Stenson's written skeleton argument and the key documents in the bundles including the Objection. I then heard sworn oral evidence from the claimant. We used the Objection as his witness statement. He was cross examined by Mr Stenson and answered my questions.

13. I heard oral submissions from Mr Stenson, from the claimant and from Mr Stenson in reply. I then reserved my decision. I ordered that the respondent by 24 November 2023 provide a breakdown of the costs being claimed. I gave the directions about written submissions I have referred to.

The Relevant Law

Costs in the Tribunal

14. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

15. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

16. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

> **"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."**

17. In this case, the respondent relies on rule 76(1)(a).

18. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

19. Rule 84 concerns ability to pay and reads as follows:

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

20. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

21. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

22. An award of costs is compensatory and not punitive so there should be an examination of what loss has been incurred by the receiving party.

23. "Vexatious" was defined by Lord Bingham in **Attorney General v Barker [2000] 1 FLR 759** and cited with approval by the Court of Appeal in **Scott v Russell [2013] EWCA Civ 1432** in relation to costs awarded by a Tribunal:

> "The hallmark of vexatious proceedings 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…"

24. In determining whether to make an order on the ground that a party has conducted proceedings unreasonably, a Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**. However, this does not mean that the circumstances of a case have to be separated into sections such as 'nature',

'gravity' and 'effect', with each section being analysed separately. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had. This process does not entail a detailed or minute assessment. Instead the Tribunal should adopt a broad-brush approach, against the background of all the relevant circumstances: **Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA**.

25. In assessing the conduct of a party, it is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented. An employment tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative: **AQ Ltd v Holden 2012 IRLR 648, EAT**. That does not mean that that lay people are immune from orders for costs: a litigant in person can be found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

26. Whether or not a party was acting on legal advice is a relevant but not a decisive factor. It is something that this tribunal can take into account in deciding whether the party's conduct is unreasonable: **Clarke t/a Marine Chart Services v Davenport and Bull EAT 1120/96**.

27. It is not unreasonable conduct per se for a claimant to withdraw a claim before it proceeds to a final hearing: **McPherson v BNP Paribas**. The critical question is whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable. The same applies where there is a late withdrawal of a claim. It is not necessarily unreasonable conduct to withdraw a claim at a late stage in proceedings.

Case law on **Henderson v Henderson** and res judicata

28. The respondent's application relies in part on the submission that the claimant's conduct was vexatious, disruptive and/or unreasonable because the claimant sought to reserve the right to pursue a personal injury claim in the county court. The respondent says that bringing such a claim would be an abuse of process when such a claim could have been brought in the Employment Tribunal. Both parties referred me to authorities on this point in their submissions.

29. Most of the cases were decided before the Employment Tribunal Rules 2013. Those rules apply to the claimant's case. Rule 52 provides that:

> **52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—**
>
> **(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or**
>
> **(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.**

30. The primary authority relied on by Mr Stenson for the respondent was **Sheriff v Klyne Tugs (Lowestoft) Ltd 1999 ICR 1170**. In that case the Court of Appeal held it to be an abuse of process for a claimant to bring a county court claim for personal injuries suffered during the course of the employment because that claim could have been brought in the Employment Tribunal as part of his discrimination claim (which had been settled by a compromise agreement).

31. **Sheriff** applied the principle in **Henderson v Henderson [1843-60] All E.R. Rep. 378** that all parties should bring their whole case to court in a single set of proceedings. A claim that seeks to advance a cause of action against a party that could have been brought in earlier proceedings may be found to be an abuse of process and be struck out without there being a hearing on the merits. There is an exception to the **Henderson** principle where there are "special circumstances". Those special circumstances must afford an adequate explanation of why the claim being brought was not made in the earlier proceedings.

32. In **Johnson v Gore-Wood [2002] 2 AC 1** Lord Bingham set out the correct approach to **Henderson** cases: "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

33. Mr Stenson referred in his Reply to **Akay v Newcastle University [2020] EWHC 1669** in which **Sheriff** is cited with approval. **Akay** was an unsuccessful appeal against a decision by the county court to strike out a claim for damages for personal injury. The claimant in that case had brought earlier proceedings in the Employment Tribunal including complaints of unfair dismissal, direct age discrimination, harassment and victimisation. The claimant did not claim damages for personal injury in the Employment Tribunal. The harassment complaints were struck out at a preliminary stage. The unfair dismissal and direct discrimination complaints were settled through mediation. The High Court upheld the decision that it was an abuse of process to bring the personal injury claim in the county court when it could have been brought as part of the Employment Tribunal claim. It found that in reaching the decision to strike out the county court judge had applied the "broad, merits based judgment" required by **Johnson v Gore-Wood**, taking into account the facts of the case including why the claimant had not brought a personal injury claim as part of his Employment Tribunal case.

34. Mr Stenson also referred me to **Manda v UBS AG [2016] 6 WLUK 375,** a decision of HHJ Hand in the Central London County Court**.** The claimant in that case filed proceedings for damages for personal injury in the county court arising from bullying and harassment. He had brought an Employment Tribunal claim complaining of constructive unfair dismissal, disability discrimination and race discrimination. The disability discrimination claims were struck out and the claimant withdrew the other claims on the second day of the Tribunal hearing. They were dismissed on withdrawal. There was no reservation under rule 52 of the Employment Tribunal Rules 2013. HHJ Hand struck out the county court claim as being res judicata because in his view it was a case where a point had been raised

unsuccessfully in earlier proceedings. He accepted that was a somewhat strict decision given the point had never been decided on the merits. In his judgment, HHJ Hand reviewed a number of previous cases and authorities but said he did not accept that whether or not an action should be struck out can proceed by analogy with decided cases. Instead, he said that every case now falls to be decided by applying the analysis in **Virgin Atlantic**. The question is whether the factual matrix established by the evidence in a particular case places the action in question within any of the categories deal with by Lord Sumption in **Virgin Atlantic** and, if so, whether any of the exceptional circumstances apply.

35. Mr Stenson submitted that the claimant's case was analogous to **Lennon v Birmingham CC [2001] IRLR 826** in which a claim of discrimination brought in the Employment Tribunal was dismissed on withdrawal and the claimant's subsequent county court claim struck out because it repeated the same allegations. **Lennon** was not a **Henderson** case, because the claimant had brought all her claims in the Employment Tribunal. Instead, it was a case where the claimant was estopped from bringing the claims in the county court because the court took the view that the order dismissing the claims on withdrawal meant they had already been adjudicated on.

36. In his written submissions dated 8 December 2023 the claimant relied on **Srivatsa v Secretary of State for Health & Anor [2018] I.C.R. 1660 CA.** In that case the claimant had brought complaints of unlawful discrimination, breach of contract, protected disclosure detriment, constructive unfair dismissal and arrears of pay in the Employment Tribunal. The claim was withdrawn before hearing. The respondent applied for costs at which point the claimant sought to reactivate his claim. He was told there was no such thing as an unconditional withdrawal. He explained he had withdrawn because of economic reasons and the plethora of procedural issues he faced. The claimant then issued High Court proceedings for breach of contract and tortious conspiracy. At that point his Employment Tribunal claim had been withdrawn but not dismissed. The underlying facts pleaded were to all intents the same as those relied in his Employment Tribunal claim. The High Court proceedings were struck out because res judicata applied.

37. That decision was overturned by the Court of Appeal. It held that there had been no decision by the EAT that a withdrawal of proceedings by the claimant had amounted to an abandonment of the underlying complaints for all purposes and in all fora and so there was no issue estoppel preventing the claimant from issuing High Court proceedings. When withdrawing from the Employment Tribunal proceedings, the claimant had not indicated a concession that his claim would fail on the merits and the High Court proceedings could continue.

38. In reaching its decision, the Court of Appeal reviewed the authorities. Discussing **Lennon** it said that "the law has moved on" and discussed **Sajid v Sussex Muslim Society [2001] EWCA Civ 1684, [2002] IRLR 113** in which a "less formalistic" approach than that in **Lennon** was taken. The claimant in that case had withdrawn his Employment Tribunal contract claim because he was claiming more than the maximum £25,000 the Employment Tribunal can award. It was held that he was not precluded from pursuing the breach of contract claim in the High Court. On the facts, far from abandoning his claim for breach of contract, Dr Sajid was seeking to preserve his full rights because of the limited nature of the jurisdiction of the employment tribunal over such claims. The order dismissing his claim on withdrawal was made for the purposes of avoiding duality or multiplicity of proceedings. The

purpose of the dismissal order was to enable his claim to be pursued and determined in a court which had the jurisdiction which the employment tribunal lacked. In **Srivatsa** the Court of Appeal concluded that what mattered was Dr Srivatsa's intention at the time when he withdrew his claim. The mere fact that someone writes to the ET asking for a claim to be withdrawn without explaining why sheds no real light on the question whether he conceded that his claim would fail on the merits. The mere fact of withdrawal is in substance a discontinuance which implies no such concession.

Findings and decisions

39. The basis for the costs application were set out in the respondent‘s letter dated 12 May 2023. It alleged that the claimant’s conduct of the Tribunal proceedings had been vexatious, abusive, disruptive and unreasonable in respect of three things:

a. The nature and extent of the claim;

b. Without prejudice negotiations; and

c. The withdrawal of his claim.

40. I deal with each of those in turn below. For each I have recorded any relevant findings of fact, the parties’ submissions and my decision as to whether the conduct was vexatious, abusive, disruptive or unreasonable.

Background facts

41. The claimant was a police officer from 4 May 1993 and was employed as a dog handler from 1997. He was involved in a road traffic collision whilst on duty in 2007. Following this accident, the claimant says he developed the impairments on which he relied as relevant disabilities: degeneration of the spine; chronic pain and chronic fatigue syndrome (ME).

42. By way of an overarching timeline, the claim was issued on 11 April 2022. The only case management preliminary hearing took place 11 October 2022. At that preliminary hearing the final hearing was listed to take place on 27-31 March 2023. The hearing did not go ahead because the claimant withdrew his claim on 24 March 2023, i.e. the last working day before the final hearing was due to start. He had been represented by solicitors and counsel until the evening of 24 March 2023 when they came off the record. They were funded by the Police Federation so their continued involvement needed Police Federation authority.

43. The issues in the case were identified at the case management preliminary hearing before Employment Judge Slater. The List of Issues annexed to her case management order from that preliminary hearing included time limit issues (paras 1-4) and the issue of whether the claimant was a disabled person by reason of 3 impairments (paras 5-7).

44. Paras 8-10 set out the issues in the direct disability discrimination complaint under s.13 of the Equality Act 2010. The claimant said he had been treated less favourably because of disability by being required to undertake an assessment and selection process prior to recruitment into the Dog Training Unit (DTU). Para 10

confirmed that the claimant was relying on 4 actual comparators or, in the alternative, a hypothetical comparator. The named comparators were J Knight, J Harris, P Barrett and D Ryle. As I explain below, they were not the comparators relied on by the claimant.

45. Paras 11-14 set out the issues arising from the complaint of discrimination arising from disability under s.15 of the Equality Act 2010. The relevant unfavourable treatment was the same as the less favourable treatment alleged in the direct discrimination complaint. That requirement to undergo an assessment and selection process also formed the basis for an indirect disability discrimination complaint under s.19 of the Equality Act 2010 (para 15-18) and a complaint of a failure to make reasonable adjustments under s.21 of the Equality Act 2010 (para 19-23).

46. The issues arising from the complaint of being subjected to a detriment for making protected disclosures were dealt with at paras 24-28. The detriments relied on were not being provided with a role in the DTU and being redeployed into the Organisations Communications Branch.

47. At order 8.1(d) Employment Judge Slater that not less than 5 days before the start of the final hearing the respondent must provide the claimant with a draft updated List of Issues based on the List of Issues annexed to her case management order.

48. At para 61(c) of the particulars of claim the claimant said he sought compensation for financial loss, compensation for injury to feelings and compensation for personal injury. The List of Issues did not set out the issues relevant to remedy. However, at paragraph 25 of her case management order Employment Judge Slater recorded under “Remedy” that the claimant “does not claim personal injury”.

49. On 22 November 2022 the respondent wrote to the claimant to confirm that his period of absence commencing on 27 November 2021 would be recorded as psychological injury on duty. That letter, which was in the Claimant’s Bundle, indicated the decision had been taken by the Head of HR Operations under delegated authority from the Chief Constable based on Occupational Health, medical reports and Fairness at Work documentation.

50. The claimant was ordered to provide a Schedule of Loss by 25 October 2022. It is not entirely clear, but it seems there was a delay in doing so until December 2022 because medical evidence was being sought. The Schedule of Loss as served on the respondent was not in any of the bundles before me. The respondent’s costs application refers to the total sum claimed as £21,000. There was a draft Schedule of Loss in the Claimant’s Bundle. The total sum claimed was £23,000 including a figure of £2,000 for personal injury. The figure for personal injury was said to be provisional subject to receipt of medical evidence. It seems to me reasonable to assume that the Schedule of Loss served on the respondent did not include a claim for personal injury, reducing the total amount claimed to £21,000.

51. That is also consistent with the letter Ms Thompson wrote to the claimant to advise that the personal injury claim should be removed from the employment claim. She advised that there might be difficulties in establishing that the claimant’s personal injury (anxiety, insomnia and depression) was caused by the discrimination

being alleged in the Employment Tribunal claim. She advised that if the claimant brought the personal injury claim as part of the Employment Tribunal claim he risked its value being limited if the full extent of his injury was not properly quantified and further evidence came to light. She also advised that a separate claim of personal injury would have better prospects of success. The letter was in the Claimant's Bundle and was undated. The claimant in the Objection confirmed it was received on 20 December 2022 (the claimant refers to 2023 but that must be a typo).

52. I find that the claimant's decision to bring a personal injury claim separate from the Employment Tribunal claim was made in the last week or so of December 2022 based on Ms Thompson's advice. The decision was arguably implicitly communicated by excluding any claim for personal injury from the schedule of loss served on the respondent. However, that would not clarify whether the claimant's position was that there was no claim for personal injury at all or that there was no claim being brought as part of the Employment Tribunal proceedings. It does not appear from the documents before me that the intention to reserve the right to bring the claim elsewhere was expressly communicated to the respondent until the settlement negotiations which I deal with below.

53. The claimant did take steps to try and progress the separate personal injury claim. On 5 January 2023 he contacted Ms Thompson's colleague to provide an outline of his personal injury claim. The claimant's email to her of 13 January 2023 in the Claimant's Bundle reports he had had no response. There was no indication that further steps have been taken to progress the personal injury claim. There is no letter before action or proposed particulars of that claim setting out the basis on which that personal injury claim was brought.

Ground 1: The nature and extent of the claim

Relevant facts

54. The respondent said the claimant and his representative had numerous opportunities to confirm the nature and extent of the claim but failed to do so. More specifically, it was said that the claimant had failed to confirm whether he relied on any additional protected disclosures for his whistleblowing detriment complaint and had altered his position in relation to the comparators relied on for his direct disability discrimination complaint.

55. Para (18) of Employment Judge Slater's case management order recorded that Ms Thompson was unable to get instructions from the claimant in relation to the alleged protected disclosures relied on. Para 24 of the List of Issues identified the 3 protected disclosures which Ms Thompson was able to confirm the claimant relied on but left space for further disclosures to be added.

56. E J Slater went on to say at para (18) of her case management order that claimant should notify the Tribunal and the respondent within 14 days of the case management order being sent to the parties if there were any further disclosures to be added. She did not order the claimant to provide those further details or confirm there were no further disclosures relied on.

57. On 3 November 2022 Ms Proctor nee Watts (the respondent's solicitor)("Ms Proctor") wrote to Ms Thompson pointing out what para 18 said. She said that in the

absence of any information in that regard she assumed that there were no additional protected disclosures but asked Ms Thompson to confirm. On 30 November 2022, Ms Proctor wrote again saying that in the absence of a response she would proceed on the basis that there were no further protected disclosures. There is no suggestion that the claimant sought to add further disclosures to his claim beyond those identified by E J Slater in the List of Issues.

58. Para 10 of the List of Issues named 4 actual comparators for the direct disability discrimination complaint namely Jason Knight, Jenny Harris, Paul Barrett and David Ryle. On 19 February 2023 in a detailed email from the claimant to his solicitors providing comments on the draft hearing bundle he had been sent to review, the claimant confirmed those were not his comparators. He instead named 5 comparators. He had included the names and details of those 5 comparators in his document commenting on the grounds of resistance which he emailed to Ms Thompson on 1 August 2022, i.e. in advance of the preliminary hearing. 2 of those are identified as comparators at para 39 of the particulars of claim, namely Nish Meisuria and Wesley Donnelly). 2 of the other comparators (Ian Dale and Raymond Duxbury) are named in the particulars of claim but not identified as comparators for the direct discrimination claim. The fifth comparator, Christine Jones, does not appear to be named at all in the particulars of claim. The claimant pointed out the error again on 7 March 2023 in an email to his solicitors. I accept the claimant's version of events, which is that he had not seen the case management order and List of Issues until he saw it as part of the hearing bundle in February 2023.

59. At 10:27 on 13 March 2023, in the context of an exchange of emails about witness statements, Mr Thompson emailed Ms Proctor to note that the comparators in the claim form were not listed in addition to the comparators added at the preliminary hearing. She said "please note the comparators in the claim form have not been withdrawn".

60. Ms Proctor responded at 14:03 to set out the respondent's position which was that the comparators were those named in the List of Issues, that Ms Thompson had not particularised which comparators in the claim form were being referred to and that there was no explanation as to why it had been left so late to say that further comparators were to be relied on. Ms Proctor stated that if the claimant wanted to rely on further comparators the respondent objected and if an application in that regard were to be pursued she reserved the respondent's position on costs.

61. On 14 March Ms Thompson replied expressing surprise at the respondent's position and the absence of any attempt to clarify the comparators prior to exchange of witness statements. She suggested that there was time to resolve matters before the final hearing and confirmed she would be willing to agree a date for a supplemental witness statement to be filed dealing with the comparators in the claim form.

62. It is not clear what happened next. There was no application from either party on the Tribunal file. There was no further reference to comparators in the correspondence between the parties in any of the bundles before me at the hearing. There was no suggestion that the final hearing would not have gone ahead because of this issue, e.g. by way of an application to postpone. It seems probable to me that, as is not entirely uncommon, the matter would have been addressed at the start of the final hearing had it proceeded.

Discussion and conclusion

63. I do not find that the claimant or his representative acted unreasonably by failing to explicitly confirm that there were no further protected disclosures relied on. There was no order that the claimant must confirm that. There was no attempt to add further disclosures at any point after the preliminary hearing.

64. I do find that the claimant's representative acted unreasonably when it comes to clarifying the comparators relied on by the claimant. I do not find the claimant acted unreasonably. He had clarified the comparators relied on by the latest in his detailed email to his solicitors on 1 August 2022. That was before the preliminary hearing at which the wrong comparators are identified in the List of Issues. However, I find the claimant's representative acted unreasonably in not identifying the correct comparators at that preliminary hearing or (if they did so) not writing to the Tribunal and the respondent once the case management order was received to point out that the comparators named in the List of Issues were incorrect or, at least, incomplete. Instead, the representative did not raise the issue until two weeks before the final hearing, having been prompted to do so by the claimant.

65. Because I have found there was unreasonable conduct by the claimant's representative in this regard, I have to consider whether I should exercise my discretion to make a make a costs order. In deciding whether to do so I take into account the nature, gravity and effect of the unreasonable conduct. As I have noted above, there was no suggestion that the failure to clarify the comparators had resulted in the final hearing not proceeding. The claimant's representative suggested a solution by way of filing supplementary evidence. There is no suggestion in the respondent's costs schedule that costs were incurred in preparing any supplementary witness statements and there were no applications arising from the failure to clarify the comparators. There was no further reference to the issue after the exchange of emails on 13 and 14 March 2023.

66. A costs award is compensatory not punitive. It does not seem to me that the respondent suffered any loss because of the failure to clarify comparators. I accept that the position might have been different had the hearing proceeded and issues about comparators had to be resolved at the hearing. As it stands, however, I find the effect of the unreasonable behaviour was minimal if any and did not result in costs to the respondent.

67. In those circumstances, I have decided that it is not appropriate to exercise my discretion to award costs because of the claimant's representative's unreasonable conduct in relation to clarifying the comparators in the case.

<u>Ground 2: Without prejudice negotiations</u>

68. Meaningful negotiations to settle the claimant's Employment Tribunal claim started late in the day and were ultimately unsuccessful because the parties could not agree the terms of the COT3 settlement. I find the main stumbling block was that the claimant wanted to ensure that the settlement terms did not prevent him from pursuing his personal injury claim. Mr Stenson's submission was that **Sheriff** meant that it would be an abuse of process for the claimant to withdraw his personal injury claim in the Employment Tribunal and reserve the right to bring it in the county court. Seeking to do so was, he submitted, vexatious because it was conduct with no

discernible basis in law. The desire to pursue that claim also "infected" the claimant's approach to the settlement negotiations.

Relevant facts

69. Based on the documents before me, settlement negotiations began at the latest on 16 February 2023 when the claimant's representatives put forward a settlement figure. There was then a significant delay on the part of the respondent in providing instructions to Ms Proctor. It had not done so by 13 March 2023, the date by which the parties had agreed (at the respondent's suggestion) to exchange witness statements.

70. On the evening of 13 March 2023, having still not heard from the respondent in relation to the initial offer, the claimant made a revised, reduced offer of settlement. The respondent did not respond until 21 March 2023. It rejected the offer and made a counter-offer of £11,000 "on standard COT3 terms". Ms Thompson confirmed she would respond the following day and checked whether "standard COT3 terms" included a Non-disclosure agreement. Ms Proctor agreed to take instructions on that.

71. On 21 March 2023 at 11:01 Ms Thompson advised the claimant that the offer was a good offer and advised it should be accepted. The draft COT3 had not been sent through at that point. On 22 March 2023 Ms Thompson confirmed to Ms Proctor that the claimant accepted the offer of £11,000 but indicated he would not sign a non-disclosure agreement. I find that the primary concern he had in relation to that was that it would hamper his ability to give evidence as a witness in relation to claims by colleagues and in particular a colleague who had agreed to give evidence in support of his case who he says was being victimised as a result.

72. The draft COT3 (sent 17:12 on 22 March 2023) did include a confidentiality clause but the respondent also included "permitted disclosures" and reciprocal confidentiality clauses binding on the respondent. The claimant's representative sent a revised draft COT3 at 14:00 on 23 March 2023. The amendments sought were to clauses 4 and 7 which related to the claims settled by the agreement (clause 4) and warranties about any other claims of which the claimant was aware (clause 7). There were further exchanges of the draft COT3 over the next 2 days. I find that the claimant and his representative were trying to ensure that the COT3 did not hamper his ability to bring a personal injury claim in the county court.

73. At 21:15 on 23 March 2023, Ms Thompson sent COT3 draft v5 back to the respondent. That made it clear that the claimant was willing to compromise any employment claims including the fairness at work complaint but wished to reserve his position in terms of any claim for personal injury. In later correspondence she confirmed that the claimant was willing to withdraw his formal complaint against the respondent with regards to breaches of statutory time limits in relation to a subject access request.

74. At 10:04 on Friday 24 March, i.e. the last working day before the hearing, Ms Proctor sent v6 of the COT3. She said her client was willing to agree exclusion of personal injury claims unrelated to the matters claimed in the current Employment Tribunal claim but re-inserted the warranty that the claimant was not aware of any such claims as at the date of the agreement.

75. There was then an exchange about the terms of the draft, specifically warranty 7(b) and clauses 4(b)and (e). At 11:58 Ms Thompson wrote to Mr Proctor quoting counsel's advice to the claimant that counsel could not advise the claimant to agree to the warranty at 7(b) because it was not correct-the claimant's position was that he was aware of facts relating to this claim which may give rise to a PI claim. At 13:15 Ms Proctor confirmed that the respondent agreed to amend the warranty to confirm that it related to matters unrelated to the claim.

76. The last sticking point was clause 4(b). At 14:38 Ms Thompson said that the respondent had not agreed to remove 4(b) so the agreement would settle any related PI claim, i.e. a claim for psychological injury relating to matters in the case. If 4(b) were removed, settlement would be possible. There were further exchanges before Ms Thompson at 16:06 on 24 March sent an ultimatum which was that 4(b) needed to be removed or the claimant would make an application to adjourn at 16:30 "for the discussions to take place which could have taken place weeks ago".

77. I accept the claimant's case that by the afternoon of 24 March 2023 he was experiencing a relapse or "crash" in his mental health and was severely depressed. He emailed Ms Thompson at 15:22 on 24 March 2023. That email was in the Claimant's Bundle. He asked her to "Just leave it now Laura" explaining that he was "tired with it and can feel myself relapsing". He thanked Ms Thompson and counsel for their efforts and asked them to email the Employment Tribunal and copy him in. I accept the claimant's case that his intention at that point was that Ms Thompson should write to the Employment Tribunal to withdraw his claim.

78. At 20.15 on 24 March Ms Thompson notified the claimant that she and counsel were no longer on record. She notified the Employment Tribunal of that by email confirming that the claimant would write to the Employment Tribunal to withdraw his claim.

79. At 21:53 the claimant sent an email to the Employment Tribunal withdrawing his claim. He explained that his withdrawal was "not to say that details outlined in these claims did not occur, but that I am no longer in a position to bring these claims before the court." He said he would like to reserve his right to bring a personal injury claim before the County Court or High Court "for Psychological Injury, which I sustained as a consequence of the details outlined in these claims". He confirmed that he did not accept the settlement payment offered nor did he wish to be bound by the terms of the COT3. He confirmed he did not wish to adjourn the hearing.

80. The Tribunal wrote to confirm that the proceedings were at an end. It did not issue a judgment dismissing the claim on withdrawal.

Discussion and conclusions

81. The parties' submissions focussed to a significant extent on the case-law relating to res judicata and the **Henderson** principle. The respondent relied in particular on **Sheriff**, **Manda** and **Akay**. The claimant relied on **Srivatsa**. I mean no disrespect to Mr Stenson or the claimant by not engaging in a detailed analysis of that case-law. The reason for that is that I am not deciding whether, if the claimant did bring a personal injury claim in the county court or High Court, it would be an abuse of process. For one thing, no such claim has been issued so the scope, issues and cause of action in that claim are not known to me. Instead, I am deciding

whether the claimant acted vexatiously and/or unreasonably in seeking to reserve the right to deal with the personal injury claim separately from the Employment Tribunal claim.

82. I do not accept that the claimant began the Employment Tribunal proceedings having it in mind to bring separate proceedings in the county court. I find that only happened when he was advised to do so by those representing him in December 2022. I do not accept that the claimant's action in bringing the Employment Tribunal proceedings can correctly be characterised as vexatious in the sense set out in **Barker**.

83. I also do not accept that the claimant acted vexatiously in the sense that his approach of seeking to reserve his personal injury claim to be dealt with in another court had no discernible basis in law. I do not find that **Sheriff** means that any attempt on his part to bring personal injury proceedings in the county court was or is inevitably doomed as an abuse of process. Although I acknowledge that **Sheriff** was cited with approval in **Akay**, it seems to me that the outcome of cases involving the **Henderson** principle is not such a foregone conclusion as Mr Stenson's submissions seem to suggest. That seems to me clear from what was said in **Gore-Wood,** which stressed the need to apply a "broad, merits-based judgement". In **Akay** itself, the court found that in deciding to strike out the claim, the judge had applied the "broad, merits based judgment" required by **Johnson v Gore-Wood**, taking into account the facts of the case including why the claimant had not brought a personal injury claim as part of his Employment Tribunal case.

84. **Manda** warns of the danger of seeking to proceed by way of analogy with previous cases, underlining the need to look at the factual matrix of each case in deciding whether it is an abuse of process. There are, for example, differences between this case and Manda. There, an order dismissing the claim had been issued and there had been no attempt to reserve the right to bring a claim as the claimant did in this case.

85. The claimant relied on rule 52 of the Employment Tribunal Rules 2013 as expressly contemplating the approach which he had taken in this case. Mr Stenson in his Reply submitted (quoting para 32 of **Srivatsa**) that Employment Tribunal rules of procedure could not prescribe the consequences on a strike out application in the High Court. I accept that principle, but note that the paragraph quoted refers to the 2004 Employment Tribunal Rules which did not include the equivalent of the Rule 52 provisions about reserving the right to bring a claim. Mr Stenson also quoted **Manda** as authority for saying that Rule 52 only relates to a reservation of a right to bring further proceedings in the Employment Tribunal. Rule 52 does not expressly say that it is limited only to bringing further proceedings in the Employment Tribunal.

86. It seems to me that the extent and variety of outcomes in the case law cited to me (and those cases which are in turn cited in those authorities) simply go to illustrate the point that the approach taken by the claimant in seeking to reserve his rights in relation to his personal injury claim cannot be said to be one with no discernible basis in law. I am not saying that any future claim would not be struck out as an abuse of process. I acknowledge the similarities to **Sheriff**. However, the decision whether to strike out any personal injury claim the claimant might bring in another court would be one taken by a judge applying a "broad merits-based judgment" based on the facts of his case. That would take into account the reasons

why he withdrew his claim in the Employment Tribunal, the facts he had reserved his right to bring a future claim and the significance of there being no judgment issued dismissing his claim on withdrawal. I do not find the claimant's approach to be vexatious in the sense of having no discernible basis in law.

87. I also do not find that his approach of seeking to protect his right to bring a future personal injury claim in the COT3 negotiations can be characterised as unreasonable, particularly when it is apparent that it was based on the advice of his representative and counsel. I do not find this ground for making a costs order made out.

88. To the extent that the submission is that it was unreasonable conduct not to have raised the issues relating to reservation of the right to bring a personal injury claim earlier I find that the delay in the issue coming to light was due as much to the conduct of the respondent as the claimant. It was the respondent which took over a month to respond to the claimant's offer of settlement, thereby delaying the start of negotiations and, specifically, discussion of the COT3 terms. I do not find the delay was unreasonable conduct by the claimant or his representative or (if I am wrong about that) I would not have exercised my discretion to award costs given the respondent's significant contribution to the "last minute" nature of the negotiations which meant the parties ran out of time to resolve their issues.

Grounds 3: The withdrawal of his claim

Relevant facts

89. I have set out the facts leading to the claimant's withdrawal of his claim at paras 69-80 above.

Discussion and conclusion

90. The authorities are clear that it is not necessarily unreasonable conduct to withdraw a claim at a late stage in proceedings. In this case, the claimant's situation at the point when he withdrew his claim was that his representatives had notified him that they had ceased to act very late on the last working day before the final hearing was due to start. That was presumably on the instructions of the Police Federation who had previously confirmed that funding for the claimant's case extended to representation at the final hearing. The claimant's mental health as at 24 March 2024 was not good and his symptoms were being exacerbated by the continuation of the case. I accept that he would not have been in a position to represent himself at the hearing. That was particularly given that up to that point he would have been working on the assumption that he would be represented by counsel who would be undertaking cross examination of the respondent's witnesses and making submissions on his behalf rather than he having to do so. In those circumstances I do not find that the claimant's conduct was unreasonable so as to potentially justify making a costs order.

Conclusion

91. Having made my decision in relation to each of the 3 grounds above I also reviewed the claimant's conduct and that of his representative "in the round". Having done so I am satisfied that neither the commencement nor the conduct of

proceedings was unreasonable, viewed as a whole, such as to give rise to the power to make a costs order.

92. For the reasons set out above, the respondent's application that the claimant pays its costs of £20,000.00 fails.

Employment Judge McDonald
Date: 30 April 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
30 April 2024

FOR THE TRIBUNAL OFFICE