# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D Aubrey

**Respondent:** Chief Constable of Northumbria Police

**HELD AT:** Leeds **ON:** 18 and 19 December 2018
20 December 2018 in chambers

**BEFORE:** Employment Judge Forrest
Ms S Scott
Dr D Bright

**REPRESENTATION:**

**Claimant:** Ms D Romney, QC
**Respondent:** Mr A Moon, QC with Mr A Rothwell

# DECISION ON COSTS

Ms Aubrey shall pay the respondent the sum of £15000 in respect of costs incurred in bringing claims of sex discrimination and of harassment relating to sex; claims which had no reasonable prospect of success; were brought unreasonably; and were conducted unreasonably, by continuing with them to the end of the hearing.

# REASONS

1. At the hearing of the Respondent's application for costs, the Respondent was represented by Mr A Moon QC; the Claimant by Ms D Romney QC. Ms Aubrey gave evidence to us; so did Mr Gee, a consultant psychiatrist, instructed by the claimant.

2. The Respondent had helpfully prepared three bundles of document for the hearing, together with a bundle of authorities. In addition, on the morning of the hearing we accepted, from the Claimant, a revised version of her statement, omitting the reference to the content of legal advice; we did not accept from the

Respondents a set of documents downloaded from a property website relating to the valuation of the Claimant's house, and to rental valuations in the area: there was no explanation for why these had been submitted so late in the day.

**The Legal framework**

3. Rule 76 sets out when a Tribunal has the power to make a costs order:

> 76 (1) A Tribunal may make a costs 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 has no reasonable prospect of success.

Rule 78 sets out the amount of a costs order:

> 78 (1) a costs order may –
> (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000 in respect of the costs of the receiving party;
> (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; …
> ….
> (e) if the paying party and the receiving party agree as to the amount payable, be made in that amount
> (3) for the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Rule 84 covers ability to pay:

> 84. In deciding whether to make a costs … order, and if so, in what amount, the Tribunal may have regard to the paying party's … ability to pay.

4. The representatives reminded us of the general principles applicable in their written representations: that costs are the exception, not the rule; that they are designed to compensate the receiving party for costs unreasonably incurred, not to punish the paying party for bringing an unreasonable case, or for conducting it unreasonably. We should follow a 3 stage process: first, to decide whether the threshold in Rule 76 had been crossed, that is, whether a party had acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of all or part of the case. (In this case, the respondent relied on unreasonable conduct in bringing the case, and in the way it was conducted.) Secondly, we should then consider as an exercise of discretion whether that conduct merited a costs order; it was not automatic that because we

had the power, we should exercise it. Thirdly, if we decided to make a costs order, we should consider the appropriate amount of costs incurred by the respondent in defending the unreasonable claims. If this was less than £20,000, we could make a summary award, making the assessment ourselves in broad terms and ordering the claimant to pay it; in any case, we could if appropriate order a detailed costs assessment to be made, in either the County Court or by an Employment Judge; in that event we should indicate what the assessment should cover; for example, by indicating an overall percentage, or by identifying the issues or claims where the unreasonable conduct had occurred, and ordering an assessment of all costs incurred in defending those claims or issues. In fixing the amount of an order, we could, but are not obliged to, consider the Claimant's ability to pay.

5. Lord Justice Mummery had set out the general principle to follow at this third stage, in his judgement in Yerrakelva v Barnsley MBC [2012] ICR 420, at page 428:

> The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

**The issues**

6. At the start of the hearing, the Tribunal shared with the parties a preliminary, tentative view they had formed, based on their views at the end of the 15 day hearing, 18 months ago, and confirmed after reading the Respondent's and Claimant's written submissions for this hearing: that the respondent was likely to face difficulties in persuading us that the claims of unfair dismissal and disability discrimination had had no reasonable prospect of success, or had been conducted unreasonably.

7. Mr Moon agreed, and told us that the application was pursued only in respect of the costs incurred in defending the claims of sex discrimination and harassment related to sex, victimisation and public interest disclosure; moreover, he confirmed that the Respondent had no intention of bankrupting the Claimant; and that costs were sought on the standard rather than indemnity basis. In his closing submissions, and after exploring the claimant's means in evidence, he made it clear that any order for costs could, in effect, be capped at £250,000, an amount chosen in part to avoid any question of bankruptcy for the Claimant, since it could be realised from her capital alone (including sale of her house), while leaving her still with savings of some £40,000, (even after repaying her debt to Mr Hopkins); and leaving the Claimant's pension and income untouched (save

for the cost of renting somewhere to live, which would now have to be incurred.) As a proportion of the total £660,000 claimed in their costs application, the amount incurred in defending these 4 unreasonable claims might well be more than £250,000, but the Respondent was prepared to limit the claim to a quarter of a million pounds.

8. Both representatives made extensive submissions, amplified in oral submissions to us; and we were referred to a large number of authorities. Of these, much the most helpful was Lord Justice Mummery's judgement in Yerrakalva [2012] ICR 420, above, where, as well as setting out the guiding principle for us to follow in paragraph 41, he expressed reservations on the value of authorities in costs cases save on matters of principle.

**CONSIDERATION**

9. We started by considering the sex discrimination claim. We take as an example the first incident complained of by Ms Aubrey, both chronologically and in her ET1: paragraph 48(a) of the Grounds of Complaint; it is issue no 3 of the 38 in the agreed List of Issues, preceded only by two technical issues relating to time limits:

> 3.1 Not being considered in or around April 2013 for the role of legal advisor to the PCC.

10. The claim as pleaded was simply wrong, as Ms Aubrey knew at the time: she knew she had been considered for the role since Mrs Sim (the then Chief Constable) explained to her why she had not been appointed: the simple and cogent reason was that in the event of a dispute over the limit of jurisdiction as between the Chief Constable and the [newly appointed] Police and Crime Commissioner, (and disputes were inevitable), Mrs Sim wanted her best solicitor advising her; and (by inference) the PCC would have to make do with her second best, Mr Heron, Ms Aubrey's Deputy. Anyone else would have taken it as a compliment; Ms Aubrey took it as an insult; and believed it was sex discrimination.

11. That was always likely to be a difficult claim in context to substantiate. While there was a difference in gender between herself and Mr Heron, there was no background, no discriminatory pattern in the case (see our findings at paragraphs 15 to 24, based largely on Ms Aubrey's own evidence); moreover, the Chief Constable at the time was a close personal friend; and a woman; and so was the other principal person concerned in the appointment, the Police and Crime Commissioner; (that does not of course prevent either from discriminating against women, but it does mean that any lingering, residual masculine culture in the police force (which Ms Aubrey referred to) was unlikely to influence either). Ms Aubrey never even attempted to explain quite why she believed Mrs Sim should turn against her, because of her sex, on this occasion. The claim was misconceived, had no reasonable prospect of success, even without considering the force of the respondent's explanation.

12. Similarly, with the other claims, Issues 3.2 to 3.4. The comparators offered came nowhere being true comparators, within section 23 Equality Act (see paragraphs 187 to 194). Above all, there was no evidence on the issue of causation to suggest that Ms Aubrey's sex was ever, to any extent, a reason why these "detriments" were done to her (paragraphs 195 to 198); nothing from which we could draw an inference.

13. We made similar findings about the complaints of sexual harassment ("unwanted conduct related to [her sex]". There was not a scrap of evidence of any sort that any of the 9 matters complained of "related to her sex"; neither overtly, nor covertly; no evidence of pattern or from which an inference could be drawn; nothing that called for an answer, nothing that got close to tipping the burden of proof in section 136. That was true before the hearing; and as Ms Romney accepted in her closing submissions, (when she withdrew the harassment claims) no evidence had emerged during 15 days of witness' evidence. Indeed, in her submissions to us at this hearing, Ms Romney told us that she might as well have withdrawn the sex discrimination claims.

14. All there was, for both categories of claim, at its highest, was a difference of sex; there was not even a difference of treatment since none of the comparators stood up. As for the harassment claims, most failed on the facts; of those that got through 7.2, 7.3 and 7.9, we found that it was not reasonable in the circumstances, having regard to Ms Aubrey's perception, for the behaviour complained of to have the purpose or effect of violating Ms Aubrey's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

15. These claims simply never got off the ground; they never had any reasonable prospect of success; and in pursuing them, right to the bitter end of a 15 day hearing, the case was conducted unreasonably.

16. These claims clearly cross the threshold for a costs award. Should we make an award? We have a discretion to do so, and in exercising that, we remind ourselves that costs are the exception, not the rule; that it does not follow that because the threshold is passed, costs should follow.

17. But here the threshold is not just passed; the claims sail over it by a country mile. It takes no more than a moment to see that there was never any proper basis for pursuing the claims.

18. Moreover, they are damaging claims, likely to attract considerable publicity; however insubstantial they were, the respondents were bound to take them seriously; the reputational damage alone, given that it was the current Chief Constable who was centrally implicated, meant they had to be taken seriously. (Indeed, there was an application to name Mr Ashman, personally, as a second respondent very shortly before the hearing began; rejected because it was made so late in the day.)

19. We are persuaded it is appropriate to make a costs award in respect of the sex discrimination and sexual harassment claims.

**Claims of Victimisation, Public Interest Disclosure.**

20. These claims had several features in common with the sex discrimination claims, and it is tempting to run them together. We pointed out in paragraph 164 that there was an "underlying case, running through all the claims, whatever their individual features: that from early April 2013, the respondent formed a clear intention, one way or another, to get [Ms Aubrey} out of the organisation, through resignation, dismissal or, it might have been, ill health. Her case has throughout been put on two levels: firstly, that there is a clear case of, for example, sex discrimination or unfair dismissal; but that, in any event, the respondent's defence is undermined by that underlying intention. The prime movers involved, in what must have been a conspiracy of some form or another, were Mrs Sim, at least at the start; supported and orchestrated by her deputy Mr Ashman; with the loyal support of his subordinate officers, Ms Lawson and Mr Byrne; Mr McArdle may also have played a supporting role".

21. The victimisation and PID claims overlap considerably with the sex discrimination and harassment claims: many of the detriments claimed are the same; and the same "conspirators" feature prominently, ganging up to confound Ms Aubrey.

22. But there is a key difference: the victimisation and PID claims do at least have a factual basis, even if similarly weak on causation. Taking the victimisation claims first, Ms Aubrey had earlier made complaints under the Equality Act; she had done protected acts: see paragraphs 207 to 211. She had earlier complained about equal pay; when she referred to a glass ceiling and the failure to promote her, she had complained of indirect discrimination; she had seen a solicitor and might bring proceedings under the Act; she was making a complaint of a contravention of the Equality Act.

23. When we considered the 13 acts of detriment relied on; we found only two (10.4, 10.7) constituted detriments, (though another three, 10.11, .12 and .13 could also be seen as detriments), but all failed on the ground of causation. The complaints under the Equality Act had no influence whatsoever on the decision to impose the detriments. We do not resile at all from the trenchant manner in which we expressed that finding: "very little likelihood .. any influence whatsoever", "vanishingly unlikely", "simply did not feature"; "no connection"; "nothing to do with it"; "nowhere near supplying a credible explanation".

24. Similarly, with the PID claims. We found that Ms Aubrey had made two disclosures that were qualifying (disclosures of information, made in good faith, which tended in her reasonable belief to show that her employer was in breach of a legal obligation: section 43B); and protected under section 43C, since made to her employer. The two protected disclosures were: disclosures made to Mrs Sim in the paper she sent her about the PCC, and the conflicts that could arise; and her disclosure to Mr Ashman that her employer was committing a fundamental

breach of contract towards her, based on Mrs Sim's suggestion that she leave if she didn't like her treatment.

25. The detriments complained of were the same as for victimisation, save for one extra detriment, which we dismissed.

26. As with PID, we found the real issue was causation: could the respondent show that the disclosures were not a significant or effective cause (not the only or main cause) of the detriments. We dismissed the suggestion of a causal link in similarly trenchant terms: it was "fanciful"; the public interest disclosures "played no part at all in Ms Aubrey's treatment".

27. But, and this a second clear difference from the sex discrimination claims, these claims did not rely solely on Ms Aubrey's belief. There was significant corroborating independent evidence. Firstly, there is the entry in Mr Ashman's log for 17 April 2013, the high point of Ms Aubrey's case. We set it out at paragraph 213, and because of its potential significance as lending support to her claims, analysed it closely and returned to it repeatedly. In it he referred to Ms Aubrey's recent actions as "extremely worrying. She has been declared fit by the Force Medical Advisor and yet has made thinly veiled threats to the Organisation". The "thinly veiled threats" included her protected acts and her public interest disclosures. We found they did not influence his subsequent actions to her at all (or the "Organisation's"); but we can see why his entry gave support for Ms Aubrey's case.

28. Secondly, and very surprisingly, Ms Aubrey's case on these claims received support from Mrs Sim, the very Chief Constable who had cut her off from contact and then approved her dismissal. Mrs Sim's evidence to us included, paragraph 124:

> She had, she now believed, been fed a false and inaccurate picture about Ms Aubrey's conduct. She now believed that she had herself been the subject of a campaign of misinformation, to keep the true and relatively innocuous nature of the alleged disclosures by Ms Aubrey from her. This had been done, at Mr Ashman's principal instigation, so as to ensure Ms Aubrey's dismissal from the Force.

29. That is powerful evidence, spelling out the underlying conspiracy relied on by Ms Aubrey, and from an authoritative and (in normal circumstances) credible witness. We did not accept her evidence; but the claimant and those advising her must be entitled to place at least some weight on it, when we consider the reasonableness of her actions in pursuing the claims.

30. Mrs Sim did not stand alone: Ms Berne also provided corroboration for Mr Ashman's alleged determination to drive her out; again, we did not accept that evidence, but it did mean that Ms Aubrey had two, very senior, employees, supporting her central contention.

31. Lastly, there was the coincidence of timing. Most of the claimed detriments occurred soon after Ms Aubrey's thinly veiled threats. Previously, she had been held in high regard; now she was cut off from the chief, her deputy promoted (as she saw it) over her head, criticised and chastised by her new line manager. What was driving such a downfall, if not her thinly veiled threats, her protected disclosures and complaints of discrimination?

32. Our finding was very different: the coincidence of timing had nothing to do with any disclosures, and everything to do with the sudden change in Ms Aubrey's behaviour (driven, it now seems likely, by her incipient illness) which caused her to send her late night email on 6 April, saying she was "not fit to work and could make a mistake which could have serious consequences for the Force"; and subsequently her behaviour in ignoring clear and sensible instructions not to send late night texts, not to contact Ms Sims out of hours, and so on: in short her "bizarre" behaviour (including her thinly veiled threats, none of which had substance), which so concerned Mr Ashman.

33. But those strong findings of ours came after we had examined the evidence. Mr Moon urged us to find that no close examination of the evidence was required to see that they were baseless: that it was, or should have been, apparent if not from the outset, at least once documents and witness statements had been exchanged. We disagree. The onus of proof, after all, is placed on the respondent to prove that the public interest disclosures were not caused by the disclosures. There was an evidential basis here – Mr Ashman's Log entry, if not much else - that did call for an explanation from the respondent.

34. In the light of that was the claimant unreasonable in bringing the claims, or in pursuing them. Did they have no reasonable prospect of success? When we factor in the external corroboration for the claims provided by Mrs Sim and Ms Berne, we cannot say the claims had no reasonable prospect of success; or that the claimant was unreasonable in bringing or conducting them. The threshold is not made out in respect of these claims.

35. Briefly, if we are thought wrong on that, and because this case may go further, we have considered the second, discretionary stage. Would we have made a costs order? Our finding would have to be that the threshold was passed, but not nearly as clearly as in the case of the sex discrimination claims. We would have had to give some weight to the claimant's mental illness, throughout both the period of the events in question, and continuing through her dismissal and appeal hearings; and continuing, on Dr Gee's evidence, through the Tribunal hearing and until today. Her focus and concentration (and therefore her memory of events) are affected; she is inclined to put a negative spin on events. No costs warning was given. We had already decided to make an award in respect of the sex discrimination claims. Moreover, costs are exceptional. It is likely we would have declined, in the exercise of discretion, to make a further award.

**Ability to Pay**

36. In considering what amount Ms Aubrey should be ordered to pay, the Tribunal decided that it would be appropriate to take Ms Aubrey's ability to pay into account. The claimant had provided us with two witness statements, and supporting documents; with a statement from Mr Paul Hopkins. Considering these and Ms Aubrey's oral evidence, we find:

37. Ms Aubrey has capital assets worth in total about £336,000: a house, mortgage free, worth £250,000; a cash ISA savings account, currently worth about £50,000; a Halifax Investment ISA worth £20,000; Premium Bonds worth £15,000; 2 small shareholdings in Santander and Halifax worth some £1,500.

38. In the future, she will receive a pension and lump sum from the police. The current estimate of the amounts payable in May 2028 are a lump sum of £42,000 and an annual pension of £22,488. While she may be eligible to apply for earlier payment, there are likely to be large reductions involved.

39. She owes Mr Hopkins £40,000 in respect of money he has loaned her to pay legal fees in these proceedings; she has complained to the Legal Services Ombudsman about her former solicitors and is asking for her fees to be returned, and that they be ordered to pay any costs awarded against her. If successful in this, she would repay Mr Hopkins from the money recovered.

40. Ms Aubrey currently has no income. We did not explore in any detail her eligibility for state benefits. As a single person, she may be eligible for Universal Credit, (which would replace her eligibility for Employment Support or Job Seekers Allowance); the basic weekly allowance for a single adult is £73 pw, to which various supplements may be added.

41. Since leaving her employment as a solicitor with the respondent, she has worked with Forresters, as a paralegal and criminal solicitor, from April 2014 to May 2017. Her monthly income rose from £16,000 till, by 2017, she was earning £24,000 gross, a monthly net income of over £1,600. In May, she fell sick with a recurrence of symptoms associated with her depressive illness; she continued to do a little occasional therapeutic work until September, receiving statutory sick pay. She then resigned and was employed for 3 months by Mr Hopkins, a self-employed information consultant, to assist with his business administration, at a salary of £1,300 a month. She was unclear of the balance in her current account; it is under £1000.

42. Her current household expenditure, which includes Mr Hopkins, is some £22,000 a year; discounting Mr Hopkins' contribution, her expenditure is some £1,000 a month. This reflects a modest standard of living, vastly reduced from her previous income.

**Future earnings capacity**

43. In the short term, while her illness remains acute, Ms Aubrey has no earnings capacity. The medical evidence before us was largely from Dr Gee. (The Respondent had instructed their own psychiatrist to prepare a report but chose not to put it in evidence.) Dr Gee estimated that, with treatment (probably cognitive behaviour therapy) she was likely to be able to return to some form of work, probably initially part time, within 12 months at best; and, depending on the outcome of this costs application and the size of any award and its consequences for her, up to 3 to 5 years, and at worst, never. Adverse consequences for Ms Aubrey, depending on the size of the award, could include bankruptcy, being disbarred as a solicitor, losing her house, losing her occupation. Any of these could have a serious, long term adverse effect, impacting her mental health and ability to return to work. Cumulatively, they might mean she could never return to work.

44. Our view of her future capacity to work, always subject to her mental health prospects set out above, is that she is likely to be able to obtain administrative work (for example the sort of work she has done for Mr Hopkins); and probably better paid legal work; earning the sorts of salary she was receiving from Forresters. Ms Aubrey is now 56; her ability to earn more than £24,000 is likely to depend on how quickly she is able to return to work. If she can return to work in a year or so, she might have a reasonable expectation of an initial salary of £20 to £24,000, rising to £30 to £35,000 a year as an assistant solicitor by the time she considers retirement in 10 years or so. If her return to work is delayed by over a year or more (with consequent deskilling), she may be fortunate to earn in the £15 to £25,000 range.

45. That forecast takes into account, amongst other factors, that Ms Aubrey has no skills or experience outside the legal, or administrative market; as she has discovered, it is not easy to get opportunities to retrain in a different area at her age; the legal market has been depressed for several years, particularly at the lower levels; and in criminal law, her area of expertise. She is most unlikely, for reasons of age and having to start at the bottom again, ever to return to anything approaching her former income levels. Positive factors include her very considerable legal experience and knowledge (if in a limited area); her senior experience in public sector leadership and administration; and her personal qualities of resilience and tenacity (always assuming a return to mental health).

**Size of Award**

46. Our decision above that the victimisation and PID claims were not unreasonably pursued, has significant consequences for the size of award we should make. Awards are made to compensate the respondent for the additional costs it has incurred in defending the unreasonable claims: the sex discrimination and sexual harassment claims. Some of the extensive preparation time was incurred for these claims; and some of the hearing time. They were in practice closely entwined with the other “conspiracy claims”, PID and victimisation: the vast

majority of time and effort would have been incurred anyway. Crucially, they required examination of the Respondent's, and in particular Mr Ashman's, motivation: was there an underlying motive, as the claimant alleged, which infected all the respondent's various defences?

47. For example, the clearest piece of evidence in support of the underlying "conspiracy" theory, which required close examination of the detailed events of April and May, was Mr Ashman's "thinly veiled threats" memo; the sex discrimination claims added nothing to that. The one clearly distinct piece of evidence the sex discrimination claims called for was the comparator details: that required unnecessary disclosure and hearing time. But we are not required precisely to apportion wasted time to unreasonable behaviour; we have to take a holistic view.

48. Mr Moon urges us to fix a percentage attributable, broadly, to the unreasonable claims and leave it to the County Court to allocate the costs. If we have to fix a percentage, it would be very low, in single figures, less than 5%. Precisely because the sex discrimination claims were so insubstantial, (they had no factual basis to investigate,) they took little hearing time: some time to see if there was a macho culture, or a sexist pattern, and rather less on the comparators. The vast majority of the list of incidents complained of featured in the victimisation and PID claims and so would have had to be investigated fully anyway; and those incidents (like the appointment of Mr Heron) which predated the complaints of discrimination and the Public Interest Disclosures, would still have featured as part of the unfair dismissal complaint, part of the campaign to get Ms Aubrey out. Doing the best we can, we would suggest the claims of sex discrimination and sexual harassment relating to sex accounted for some 3% of the total costs incurred by the respondent.

49. That is our summary impression; and, given that, it is unnecessary and disproportionate to put the parties to the delay and expense of a detailed assessment. And, despite Mr Moon's assurances of the county court's expertise, there will be few documents clearly attributable to sex discrimination. (On one point, we disagree with Mr Moon: he had prepared a detailed breakdown of the decision and List of Issues, as a reflection, broadly, of the amount of time the sex discrimination issues had taken. We accept they took a disproportionate amount of our decision, and our consideration time; there were a lot of points in aggregate to consider; but they were so insubstantial, so lacking in any factual content, that they took up much less of the hearing.)

50. Ms Romney suggests that a substantial discount of between one quarter and a third is usually allowed on taxation. That seems broadly consistent with the experience of judicial colleagues. That suggests we might be looking at a total, taxed, cost figure of, say, £470,000. 3% comes to just over £14000. If that is a little low, we round it up to £15000, a high award in terms of the range of amounts commonly awarded as costs; but in this case, one comfortably within Ms Aubrey's means, thanks to her prudence in saving.

51. It reflects the type of award we are used to making in our Tribunal jurisdiction to award sums of up to £20,000, and where the party has the ability to pay. £15,000 would be a high award of respondents' costs in preparing and defending a hopeless, unreasonable two day sex discrimination case. It would fit the bracket comfortably for costs awarded in a three or four day sex discrimination and unfair dismissal case, where we decided the discrimination claims were unreasonable and merited an award, but the unfair dismissal claim was arguable.

52. In conclusion, therefore, we order the claimant to pay the respondent the sum of £15,000 in compensation for the costs they incurred in defending the claims of sex discrimination and harassment relating to sex, which she unreasonably brought against them.

**Postscript**

53. As a postscript, and, again, lest the case should go further, we mention one interesting argument which we have not pursued. We accepted the position as outlined by the advocates, that once a Tribunal has decided to make a costs award, the amount to be ordered is determined by the principle of compensation. However, our power to order costs comes exclusively from the Employment Tribunals (Rules of Procedure) Regulations 2013: rules 74 to 84 set out a largely self-contained code for the award of costs, which differs markedly from the regime applying in the ordinary courts; most notably, of course in the threshold requirement of unreasonable conduct, rather than simply losing the case.

54. Rule 2 of those procedural rules sets out the Tribunal's overriding objective, to deal with cases fairly and justly. Having set out the factors included in the overriding objective, Rule 2 goes on to say:

> A Tribunal shall seek to give effect to the overriding objective in interpreting or exercising any power given to it by these rules.

55. Considering the factors included in the overriding objective, the parties were on an equal footing (a), at least as far as representation was concerned. Our decision to award costs on a summary assessment, rather than refer to a costs judge in the County Court, avoids delay (d) and saves expense (e); (we believe it is compatible with proper consideration of the issues). Given our finding that the amount wasted due to the unreasonable claims was (relatively) small, our summary assessment of £15000 is proportionate to the complexity and importance of the issues, even though the sums potentially involved are huge (b).

56. It is the broader question of dealing with a case fairly and justly that raises interesting issues. In a case like this where the compensation principle potentially exposes a party to costs of hundreds of thousands of pounds, is it just to follow the compensation principle alone, to the exclusion of other factors, such as the impact on the claimant of our award? Ms Romney urged us strongly to take that into account, since Dr Gee's unchallenged opinion was that an award of the size sought, running into the hundreds of thousands of pounds, could prolong

the claimant's mental illness by another 4 or 5 years; or even permanently prevent her returning to work or full health, ever again. Mr Moon argued that any impact on the claimant was entirely irrelevant; ability to pay was the only factor mentioned in the rules, and even that was discretionary. Is it just to award an amount which would remove the vast majority of the claimant's savings, accumulated over a 20 year career and a (relatively) modest lifestyle; where a spendthrift claimant, having regard to ability to pay, would have to pay very substantially less?

57. The authorities emphasise time and again the importance of the principle that costs are compensatory, not punitive; but that is almost always in the context where Tribunals have allowed their indignation at the parties' scandalous conduct to persuade them to impose an amount by way of sanction, not compensation. The Tribunal's objective, after all, is overriding; and none of the authorities appear to consider that point.

58. Fortunately, given our conclusion, we have not needed to grapple with these issues.

Employment Judge Forrest

Date: 15 January 2018