IN THE LONDON SOUTH

EMPLOYMENT TRIBUNAL

CASE NUMBERS: 2300254/2011B

2375023/2011B

& Others

BETWEEN:

Ms A A Vaughan

Claimant

-and-

London Borough of Lewisham and Others

Respondent

PRE-HEARING REVIEW & RESPONSE TO COST APPLICATION

Written Submissions for Ms AA Vaughan

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1. I was employed by Lewisham Council. I was TUPE'd in from Careers Enterprise Limited on 1 April 2011. Careers Enterprise Limited was responsible for delivering the Connexions contract in Lewisham. Lewisham Council decided not to re-new its contract with Careers Enterprise Limited and the Connexions service closed on 18 March 2011. I began working for the Connexions service in March 2004, under London East Connexions Partnership. Prospects took over the contract for the Connexions service in 2006. VT Group PLC's subsidiary, Careers Enterprise Ltd (VT Enterprise) took over the Connexions contract in the first week of August 2008. Babcock International Group PLC took over the VT

Group PLC on July 8th 2010 and their subsidiary, Careers Enterprise Limited (BabcockEnterprise) took over the Connexions contract on this date.

2. The Tribunal's Order dated 28 March 2012 stated that the Respondents' cost application will be dealt with as part of the PHR. I have therefore dealt with my response to the application for the cost order as part of my written statements and submissions for the PHR. The Respondents' (LBL) however are refusing to accept that the cost order is an issue that is being dealt with as part of the PHR and have refused to include crucial evidence that I wish to rely on in the joint bundle. I was advised by the respondents' to prepare a separate bundle to include those pieces of evidence. The Tribunal was copied into correspondence regarding this issue.

3. I believe that the Respondents' breached the Tribunal's order dated 28 March 2012. The respondents' failed to disclose all their evidence to me by 4pm on 5 April 2012, including several pieces of evidence in the bundle after this date, (without informing me that they had done this and without my consent). In addition they advised me that I would not receive a complete copy of the bundle until 16 March 2012. The Tribunal was copied into all correspondence regarding this issue, (including the Respondents' response to my allegation that it had breached the Tribunal's order).

4. On 15 and 25 August 2011 I made amendment applications. The Respondents have not objected to the applications. Paris Smith, acting for Careers Enterprise Ltd and Babcock Education and Skills have objected to an addition at the end of

paragraph 90, this is just background information and I make no claims in relation to this.

5. On 30 September 2011 the respondent (Marina Waters) made a strike out application and indicated that she intends to make a cost order if the case goes to a full hearing, alleging that I had made false allegations against her. On 1 October 2011 I wrote to the Tribunal (copying in the respondents'), objecting to respondents strike out application and set out my reasons why. The supporting evidence relating to this is included in the bundle.

6. The Tribunal wrote to parties on 17 November 2011, setting out the issues to be considered:

    a) Whether to grant the applications by the Claimant dated 15 and 25 August 2011 for leave to amend the claim, and make any consequent case management orders including granting leave to amend the responses;
    b) Whether to dismiss Careers Enterprise Limited from the proceedings;
    c) Whether to dismiss Babcock Education & Skills Limited from the proceedings;
    d) Whether to dismiss the Claimant's claim in relation to an alleged failure to inform and consult;
    e) Whether to dismiss the Claimant's claim in relation to an alleged failure to provide employee liability information;
    f) Whether to dismiss the claim against Marina Waters;

g) To consider management of this claim generally including whether to stay this claim or to combine the whole or part of it with other claims brought by the Claimant.

7. Issues d) and e) are not claims that I have made. I made this clear in my letter to the Tribunal dated 26 September 2011, which was acknowledged by LBL, who also highlighted this fact in its letter to the Tribunal dated 28 October 2011. Theses matters have been included in my pleadings purely as background information.

8. The issues that I believe should be considered are:

a) Should the ET grant my amendment application for claim number 2375023/2011B;
b) Whether to dismiss Careers Enterprise Limited from the proceedings for claim number 2375023/2011B;
c) Whether to dismiss Babcock Education & Skills Limited from the proceedings for claim number 2375023/2011B;
d) Whether to strike out my claim against Marina Waters for claim number 2375023/2011B;
e) To consider management of this claim generally including whether to stay this claim or to combine the whole or part of it with other claims brought by the Claimant
f) Should the ET grant the respondents' application for a cost order in relation to claim number 2318353\2010 & others

g) Whether to put the Claimant to proof of her disability and its effects, (as indicated by the Respondents' in its CMD agenda dated 12 April 2012)

Issues

The tribunal will have to decide the following issues:

Amendment applications

9. Should the ET grant my amendment application for claim number 2375023/2011B

Striking out my claim against Marina Waters

10. Should the ET grant Marina Waters' application to strike out my claim against her?

Dismissing respondents' from proceedings

11. Whether to dismiss Careers Enterprise Ltd and Babcock Education and Skills Ltd from proceedings for claim number 2375023/2011B?

The management of the claims

12. Should the Tribunal stay claim number 2375023/2011B and others or combine the whole or part of it with other claims brought by the Claimant

Cost Order

13. Should the ET grant the respondents' application for a cost order in relation to claim number 2318353\2010 & others

Proving Disability

14. Whether to put the Claimant to proof of her disability and its effects, (as indicated by the Respondents' in its CMD agenda dated 12 April 2012)

Submissions

Should the ET grant my amendment application for claim number 2375023/2011B?

15. The tribunal has the power under rule 10 (q) of the procedure rules to permit amendment of a claim or response. I acknowledge that the closer we get to the hearing, the harder it will be to amend my claim, and therefore I made my applications the same month that I lodge my claim. A tribunal claim can be amended at any time; I just need the tribunal's permission. (ET Regs 2004 sch 1 rr10 (2) (q) 11 (1). The Respondents have not objected to my amendment applications. My applications are in line with the 'overriding objective' of the procedural rules to enable the tribunal to deal with cases justly.

16. 'In deciding whether to allow an amendment, the ET must take account of all the circumstances and balance the hardship and injustice of refusing the amendment against that of allowing it, '(Selkent Bus Co. Ltd v Moore [1996] IRLR 661, EAT. Transport and General Workers Union v Safeway Stores Ltd UK EAT/0092/07).

'Where the amendment is to add new facts and grounds, the ET must decide if the new claim is in time and, if not, whether the amendment should be allowed. If the claim arises out of the same facts as the original claim but simply adds factual details or attaches a new legal label, the ET should very readily allow the amendment even outside the time limit.' (Selkent Bus Co. Ltd v Moore [1996] IRLR 661, EAT. Transport and General Workers Union v Safeway Stores Ltd UK EAT/0092/07). 'It is always a matter for the tribunals' discretion.' (Selkent Bus Co. Ltd v Moore [1996] IRLR 661, EAT. Transport and General Workers Union v Safeway Stores Ltd UK EAT/0092/07). Other factors would be why the new claim was not originally included, how late in the day the amendment is now sought; whether the Respondent would be surprised by the new allegation or prejudiced by its late addition and, as already mentioned, the balance of hardship to each party.

Striking out my claim against Marina Waters

17. Where a Tribunal is dealing with an application to strike out under rule 18(7)(c) it is first necessary to determine whether the party responding to such an application is guilty of conduct amounting to a deliberate and persistent disregard of the required procedural steps and/or orders of the Tribunal. If so, whether, secondly, a fair trial is possible.

18. The Marina Waters' claims that I have made false allegations against her. In the Tribunal's letter to parties dated 16 December 2011 it emphasized that the issues to be decided are ones of law rather than fact. Discrimination cases are fact-sensitive and as such, the matter should proceed to a full hearing for

determination. It is important to note that Marina Waters' ET3 and a statement she provided to LBL and LBL's own equality form response are contradictory regarding the basis of my claim against her. This evidence alone supports my allegation that she lied to me during my OH consultation with her on 20 July 2011. Tanya Davis accompanied me to my consultation with Marina Waters' and has will be providing witness testimony supporting my claims against Marina Waters. She has submitted a witness statement for the PHR confirming this.

19. There is no evidence at all that I have conducted proceedings in a scandalous, unreasonable, vexatious, abusive and disruptive way. As I previously mentioned, the Tribunal's letter to parties dated 16 December 2011 it emphasized that the issues to be decided are ones of law rather than fact. Discrimination cases are fact-sensitive and as such, the matter should proceed to a full hearing for determination. The Marina Waters' application is therefore misconceived.

Dismissing respondents' from proceedings

20. Careers Enterprise Ltd and Babcock Education and Skills Ltd also wish to be dismissed from proceedings. It is my understanding that the section 108 of the Equality Act specifically prohibits post-employment discrimination and harassment. CEL and BED engaged in 'continuing acts' up until 31 March 2011 and on and after my transfer to LBL on 1 April 2011, when the liability for my ET claim against them also transferred. With regards to my former employer's agent Babcock Education and Skills Limited (BED), it is also unlawful for a person to instruct, cause or induce a person to commit an act of discrimination or harassment in the context of relationships which have come to an end. At the

time of lodging my claim, I believed that my former employer instructed, caused or induced BED to unlawfully discriminate against me and/or BED unlawfully aided my former employer to unlawfully discriminate against me. I believed this because LBL set out in its ET3 that it received no information from them regarding my disability. Therefore I believed that this was an act of discrimination and harassment, (as set out in my pleadings for this claim).

21. On 5 April 2011 I received evidence from CEl's and BED's representatives to the contrary. The respondents' had previously failed to disclose this information. Now that I have been provided with this evidence, I will agree to dismissing CEL and BED from the proceedings for claim number 2375023/2011B. However, I believe that LBL's, CEL's and BED's actions in relation to suppressing this evidence for over a year, (when they were aware that I was suffering over this issue), is an act of discrimination.

The management of the claims

22. I have no objection to the claims being consolidated.

Cost Order

Matters or Events Leading to the Action

23. The respondent's application for a cost order is scandalous and vexatious. It is the Respondents' case that my claims have been misconceived from the outset, however, when it applied for a cost order in June 2011 it had the opportunity to rely on this ground but it did not. The Employment Tribunal is entitled to have

regard to this fact, as it is clear evidence that the respondents' did not believe that my claims were misconceived. In any event, that cost order application was not granted.

24. The matters or the events leading to the action can be traced back to 2010 when the proceedings of this employment case started. I have had to conduct my case all by myself, even though I am not legally trained and have no experience in how to conduct at a hearing, and it has been especially difficult for me as a litigant in person with a mental health condition (depression) that I have been battling throughout the course of these proceedings. There are events more critical than others in leading to the action.

Appeal at EAT

25. A notable action against my case was to remove my evidence post-December 2010 from trial bundle. I complained about the respondents' action to the ET but it refused to order the respondents' to put the evidence back in. I was also prevented from referring to any incidents' post-December 2010 in my witness statement. I appealed this decision at the EAT. I attended the EAT on 5 January 2012 for a Rule 3(10) hearing. Judge Serota warned Mr Dobbin, that he believed that I had an arguable point with regards to this issue and that he was inclined to order a full appeal hearing if Mr Dobbin did not agree to put the evidence back in the trial bundle. Mr Dobbin then stated that he was happy for the evidence to go back in. The EAT (with the respondents' consent), directed that some of the supporting evidence (dated up until 7 February 2011), be put back into the trial bundle.

26. I had to fight for <u>two months</u> to get the removed evidence placed back into the trial bundle. This was an extremely traumatic experience for me and I also incurred enormous costs. Once again, I did not have experience in and knowledge of the appeal process and I represented myself. It is important to note that I never made any application for costs against the respondents' even though I could have made a cost application to the EAT.

27. It is important to note that the respondents' are continuing with this type of conduct, by stating in their CMD agenda that I should not be permitted to include any evidence post-November 2011 in the trial bundle, even though it is clear that I will need to rely on this as background and supporting evidence:

a) All the witness statements etc related to the un-stayed part of claim number **2300254/2011B** are clearly highly material to the stayed element of the claim which will be heard. Some of this evidence is dated post-November 2011. Background evidence is permissible; and

   Particularly in relation to my claims set out in my pleadings that the respondents':

b) Were trying to get rid of me, (paragraph 80) of claim number 2375023/2011B, which they subsequently succeeded in doing on 13 April 2012, as a result of fabricating/falsifying evidence against me, (which my supporting evidence post-November 2011 proves); and

c) Unreasonably protracted my suspension, as set out in claim number 2390531/2011; and

d) Failed to make 'reasonable adjustments' (keeping in force a PCP/regime), as set out in both claims

28. The evidence post-November 2011 also sheds light on the respondents' motivation and proves that there was a culture of discrimination:

a) The respondents' (Deborah Francis, Beverley Bannister & Benjamin Craig) perjured themselves on the witness stand in January 2012, this will go to the heart of the issue of credibility; and

b) The respondents' disclosed an e-mail to me on **5 April 2012** which reveals correspondence between CEL's representatives and LBL on 31 March & 1 April 2011, which evidence's the fact that LBL (HR) were aware of my disability, but have maintained all along- (even up until my dismissal this month), that they did not have sufficient information and as such LBL was still questioning my disability status at its SOSR hearing. It is important to note that in evidence dated post-November 2011 there is e-mail correspondence between myself and HR, which evidences the fact that HR were in possession of my full medical records well before that point; and

c) That LBL would have had access to my full medical records **since 1 April 2012**; and would have been particularly focused on it during **December 2011** and

January 2012, when there was a dispute over its inclusion in the trial bundle for the hearing in January 2012.

29. The respondents' legal representatives submissions dated **January and February 2012** also evidence the fact that the respondents' conceded that I am disabled.

The perjured evidence of the Respondents' during proceedings

30. The respondents' perjured themselves during the proceedings. I also wrote to the ET about this matter. I believe that the perjured evidence vitiated the Tribunal's general conclusions as well as the decision to dismiss all the appellant's claims. The respondents' Counsel also supported the respondents' perjured evidence.

The Respondents' approach to the settlement discussions was carried out in 'bad faith' and as a means to intimidate/threaten the Claimant

31. Mr Dobbin wrote to me on 22 November 2011, with a settlement offer, which I rejected because amongst other things, there was a clause in it regarding LBL wishing to reserve its right to make a safeguarding referral, '*(save for any claim relating to any breach of statutory duty and/or any claim relating to safeguarding)*'. It is important to note that the previously drafted contracts did not include this clause. When I challenged LBL's legal representatives about this, the response was as follows: '*I have removed the words "save for any claim relating to any breach of statutory duty and/or claim relating to safeguarding". However the London Borough of Lewisham cannot contract out of its obligation to make a*

safeguarding referral should it become aware of facts or circumstances which would require a referral. However I have included a new clause 11 which is confirmation that the London Borough of Lewisham isn't aware of any such facts or circumstances, which should hopefully give the claimant the comfort she requires in this regard. The wording of clause 11 is currently being checked by Lewisham, and is subject to their approval'.

32. The Respondents' approach to the settlement discussions were carried out in 'bad faith' and as a means to intimidate/threaten me.

33. On 22 November 2011 Mr. Dobbin also wrote to me again warning that the respondents' would apply for costs if she still refused to settle the case. I agreed to settle, but the Respondents' still decided to progress to a full hearing and incur costs which far exceeded the amount that she had agreed to settle for.

34. The respondents' have indicated that my claims were misconceived from the outset: (a) misconceived and/or unreasonable within the meaning of Rule 40(3) and Regulation 2 of the 2004 Regulations, but it is clear that my case was not. It cannot be said, by any stretch of the imagination, that my claims had no reasonable prospect of success, in the sense that they were doomed to fail from the outset, when the facts sought to be established by me were totally consistent with the undisputed contemporaneous documentation.

35. A finding of unreasonableness requires consideration of a thought process as a motivation of the person(s) responsible for conducting the litigation. I put my case

in an intelligible manner and provided a detailed schedule of claims. On two separate occasions I even sought further information and written answers in order to help me assess the merits of my claims, however the respondents' refused to comply with my requests and the ET refused both my applications. My claims were fact sensitive and liability in this case depended solely upon what a Tribunal made of the evidence. It was therefore not unreasonable of me to pursue such a claim all the way to a full hearing. There was also a public interest in my case being aired.

36. The Employment Tribunal will first need to decide if my claims were misconceived and second, if I ought to have understood this from the outset. It is important to note that a Tribunal may also indicate to a party during the hearing that they are at risk of costs. This did not happen, and rightly so. In ***Cartiers Superfoods v Laws*** [1978] IRLR 315 **[A1]**, the EAT held that it is right for a Tribunal to enquire what the party in question knew or ought to have known about the strength of their case. The fact that a party loses before a Tribunal does not mean that their case was misconceived, unreasonable or vexatious.

37. The term 'misconceived' is defined as including 'having no reasonable prospect of success', although this definition is not exhaustive we can presume that 'misconceived' applies if the applicant cannot make their case out in law. I clearly did. The pre-hearing assessment system was introduced in October 1980 in order to discourage hopeless cases. There were <u>two PHR's</u> which took place prior to the full hearing. The Employment Tribunal clearly undertook an objective assessment of the prospects of success for my case and did not conclude that it was misconceived. In addition, at no time before, during those two proceedings,

or prior to the respondents' application for a cost order was I given a warning that I risked an award of costs by pursuing my application and that their contention was that my claims had 'no reasonable prospects of success'. The starting point in considering whether the misconceived/unreasonable ground has been made out will be here.

38. In ***Her Majesty's Attorney General v Mr S Deman*** [2006] UKEAT/0113/06 **[A2]**, the judgment of Underhill J in paragraphs 168, 174-175, demonstrates how an objective assessment of the prospects of success for a case should be undertaken. While the words "vexatious" and "misconceived" and "unreasonable" are different they all require the assessment of a person's conduct in proceedings before the Employment Tribunal. My conduct did not involve an improper purpose and I was never accused by the respondents' as having made any claims in bad faith. It is important to note that the ET also held at paragraph 28 of its judgment that it was in no doubt that I had genuine belief in truth against my claims against the respondents'. There was nothing to suggest that I proceeded with my claim in the "clear knowledge" that it allegedly had no merit nor a prospect of financial reward.

39. I am not an expert in the law, I have been unrepresented throughout and so to penalise me by granting the respondents' cost application, particularly when there is no evidence that the Respondents' had ever warned me that they believed my claims to be misconceived, would be unfair and unjust. The respondents' critique of the way that I have allegedly conducted the legal proceedings would lead the reader to believe that I am a solicitor or lawyer. The

Tribunal should be mindful that the Respondents' had greater resources at its disposal. However, I tried so hard to present my case in a clear way and I was commended by judges who sat on the PHR's for producing such a helpful schedule of claims. I also submitted detailed ET1's, witness statements and written submissions. Judge Balogun also commented on my 'great attention to detail' in relation to 'preparing and presenting' my case (at paragraph 27 of the Judgment).

40. Further to this, under Rule 7, a party whose case has been deemed to have no 'reasonable prospect of success', can be ordered to pay a deposit as a condition of being permitted to continue to participate in proceedings. The Tribunal should not make a cost order because I was not required to pay a deposit, therefore the following does not apply:

'A costs order can be made pursuant to Rule 47 of the Employment Tribunal Rules 2004 where a litigant has pursued a claim in the face of a deposit order and where that claim has failed on grounds that "were substantially the same as the grounds recorded in that document for considering that the contentions of the party had little reasonable prospect of success'.

41. Making and considering settlement offers are 'part and parcel' of any litigation proceedings. Throughout the Respondents' failed to point out any alleged 'lack of merit' in my case in the other side's either at the numerous CMD's or PHR's or in open correspondence. There were no deposit orders made. Instead, from the start the Respondents made settlement offers, which have progressively increased throughout the proceedings, from £10,000, to £30,000, to £40,000 and then £60,000. There were also global settlement offers of £75,000 and £95,000. The Respondents' application is therefore too much of a pendulum swing to be

credible. It is also important to note that after its offer of £30,000, the Respondents' never offered to pay for me to seek legal advice, (as they had previously done in earlier negotiations). In ***Power v Panasonic (UK) Ltd*** [2004] UKEAT/0439/04/RN **[A3]**, the EAT stressed that the rule in ***Calderbank v Calderbank*** [1976] Fam 93, has no place in the Employment Tribunal jurisdiction and cited with approval ***Kopel v Safeway Stores Plc*** [2003] IRLR 753 **[A4]**, paragraphs 17 – 18.

42. In the light of these facts the Respondents' application is clearly unreasonable and vexatious. I would have to be guilty of some improper or unreasonable behavior/conduct of the proceedings during the hearing itself for there to be a sufficient ground for awarding costs. However, it would still be weak to use this alternative ground, as my actions made during the hearing were not unreasonable and/or unlawful in nature. However, I submit that the respondents' actions have been throughout.

43. The nature of the unreasonable conduct of the proceedings made by those other parties may include the following:

    a) Wasting valuable tribunal time on a matter which could have been dealt with easily: I requested a PHR in August 2010, to establish the correct respondent. I did not know that it was just a simple matter of 'relabeling the facts'. I only realized this for the first time on at the PHR, because Judge MacInnes asked my employer's solicitor if they had not considered that this was what I was trying to do. The solicitor's simple reply to that question was 'yes'; and

b) The Respondents' unreasonable refusal of my initiatives to settle the case; and

c) The Respondents' approach to the settlement discussions (carried out in 'bad faith' and as a means to intimidate/threaten me).The Respondents and their legal counsel, have consistently acted in a threatening and abusive manner, introducing scandal at every opportunity in order to frighten me from making just and rightful claims against them; and

d) The Respondents' perjured evidence: The Respondents repeatedly provided the Employment Courts with false testimony all of which has previously been exposed and has been again in this hearing. This is a vexatious and disruptive act designed to further pervert the course of justice. Not only have the actions of the Respondents been blatantly illegal but are also an abuse of process; and

Severe consequences of unreasonable conduct by those other parties

44. It is known that, as the results of the unreasonable conduct by those other parties, the ET made decisions to dismiss all my claims, (and with obvious errors of law) and the long and drawn out proceedings have had a devastating impact on my health.

45. All these events plus the unreasonable refusal of my initiatives to settle the case, (I made reasonable counter offers), resulted in unreasonable protraction of the proceedings and costs incurred by me, (not just the respondents'). This has also caused no proper resolution of the 'stayed' part of the employment case so far.

46. It is submitted that the respondents' defence during the proceedings has been wholly false, the true state of affairs being within that party's own knowledge, as is indicated by the nature of its language during settlement negotiations in relation to that case, resulting in significantly prolonged proceedings and commensurately increased costs for me. I conservatively estimate that all the Tribunal and Appeal hearings have cost me thousands of pounds in materials and transport alone. In relation to the recent appeal hearing in January this year I generously made no claim for the cost of my time, which in itself would be considerable.

47. If the Respondents' really believed that my case had no reasonable prospect of success they would have said as much during the settlement negotiations and their correspondence threatening costs, but they did not and their correspondence on 22 November 2011 represented a speculative costs threat, designed to do no more than frighten me, regardless of the actual merits of my case. The Respondents' failed to issue a cost warning as early as possible. The ET is entitled to conclude from this failure that even if my claim was misconceived, I was not given the opportunity to withdraw without costs consequences at an early stage, therefore being made aware of the likelihood of a cost award if I chose to ignore the warning.

48. In addition, if the Respondents' really believed that my case had no reasonable prospect of success they would not have made numerous offers to settle and engaged in unreasonable, vexatious and scandalous conduct, (including removing my supporting evidence from the bundle). This was a desperate

attempt by the respondents' to try to suppress it and ensure that it never came to light. This is not the actions of a confident party.

The Tribunal's Discretion

49. Where the 'gateway' to costs is satisfied by a finding of, for example, unreasonable conduct, the Employment Tribunal still has a discretion as to whether or not to award costs and in what amount (subject to the £10,000 limit). That discretion will be likely to be exercised having regard to:

    a) The effect of any unreasonable behaviour. Although the strict rules of causation do not apply to costs orders (and this is a difference between costs orders and wasted costs orders) in ***McPherson v. BNP Paribas*** [2004] IRLR 558 **[A5]**, Mummery LJ opined that Employment Tribunals should consider the *"nature, gravity and effect"* of any unreasonableness. In ***Barnsley Metropolitan Borough Council v. Yerrakalva*** [2011] EWCA Civ 1255 **[A6]**, Mummery LJ has taken a step back from that approach suggesting that it is an unnecessary 'gloss' on the legislation and has led Employment Tribunals into error. However, what is apparent from these decisions is that the discretion to order an amount of costs should be exercised judiciously and therefore should have some relation to the costs occasioned by any unreasonable conduct;
    b) the means of the paying party.

50. In addition to the above the ET will also need to look at the matter as a whole and having regard to the overriding objective, it should not exercise its discretion to award costs against me in this case. It should take into account the factors above and in considering the exercise of that discretion, including the fact that I was seriously unwell during most of the proceedings with severe depression, which has not been disputed. A party's ill health can certainly be a factor to be taken into account in the exercise of the discretion.

51. In ***McPherson v BNP Paribas*** [2004] ICR 1398 Mummery LJ summarised the general position as follows, in relation to the predecessor provision to rule 40.

"Although Employment Tribunals are under a duty to consider making an order for costs in the circumstances specified in Rule 14(1), in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is not only more restricted than the power of the ordinary courts under the Civil Procedure Rules, it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of Employment Tribunals."

52. It is important to note that the Tribunal's judgment in claim number 2318353/2010 and others is now the subject of an appeal at the EAT and that the hurdle to costs being awarded at the Employment Tribunal is high. Cost awards are unusual in the Employment Tribunal and are awarded in less than 1% of cases. Costs are only exceptionally ordered in an Employment Tribunal ***Lodwick v London Borough of Southwark*** [2004] IRLR 554, **[A7]**, at paragraphs 23-27.

53. An Employment Tribunal must bear in mind the fact that there are thousands of unrepresented claimants who cannot afford to take legal advice, and who persevere with claims where the applicable law is hard to understand. They

should not be discouraged from asserting their rights by costs orders, which are the exception rather than the rule in Employment Tribunals.

54. I do not have the means to comply with an order to pay costs. My inability to pay is set out in my witness statement.

Proving Disability

55. The Respondents' assert that I should prove my disability and its effects, (as indicated by the Respondents' in its CMD agenda dated 12 April 2012), given the content of Dr Williams OH report. This application is clearly vexatious. It is important to note that I allege that Dr Williams unlawfully aided LBL in discriminating against me. I was accompanied to the consultation with him and the person who accompanied me to that consultation wrote to the Chief Executive (Barry Quirk), of LBL to complain about Dr William's conduct during that consultation. I also contacted the Barry Quirk to complain and took out a grievance. Myself and the person who accompanied me- Tanya Davis, (who is also here today to support me and has provided a PHR witness statement regarding this matter), alleged the following regarding Dr William's conduct:
    a) He was extremely insensitive, unprofessional and 'economical' with the truth.
    b) He made several false allegations/comments about my alleged conduct during the consultation- allegations/comments that had never been made before by any medical professional that has assessed me, (and I have been assessed by many); and
    c) He insisted that he did not have enough medical information, (even though I provided him with 19 separate pieces of medical documentation,

(which included previous OH reports, fit notes and assessments). It is important to note that LBL had failed to provide him with any of this information; and

d) He wrote a report containing false information and omitted important information, despite the fact that I informed him that LBL representatives were in possession of my 'full medical records', which consisted of; several GP sick notes indicating 'depression'; assessments from 3 different psychologists- two diagnosing severe depression in 2010 and one diagnosing symptoms of mild depression relating to work related stress, in August 2011- (and that I received 9 sessions of CBT in July/August 2011); and

e) Dr Williams proceeded to imply that I was not covered by disability legislation. He informed me that he was diagnosing 'adjustment disorder'. He wrote came to an unreasonable conclusion, despite the fact that I also informed him that my previous employer had conceded that I have been covered by disability legislation since November 2009; and

f) During the course of the consultation, Dr Williams attempted to get me to provide details about specific incidents of bullying, victimisation and harassment that I had been subjected to by my previous employer. I advised him that I did not want to do this because I found it extremely upsetting and it was like re-living the ordeal. He concluded that I was being difficult and that I was refusing to provide information. Contrary to this, I provided him with information on my current stressors and suggested reasonable adjustments that could be made. I also advised him on my current state of health; and

g) Dr Williams persistently insisted on making reference to the tribunal hearing that is due to take place in the New Year, stating on more than one occasion that he was *'here to help the tribunal*'. Shocked by this comment, I informed him that thought that he was here to help me. I noted that he seemed particularly keen on discussing legal proceedings with me, (even though I made it clear to him that I was uncomfortable with this); and

h) Dr Williams implied that the tribunal would not be convinced that I was covered by disability legislation. He also felt it necessary to inform me that he has masters in Law; and

i) After the consultation, Tanya Davis advised me that when I left the room to get make a photocopy of something; Dr William's proceeded to discuss details of my case with her, which was clearly inappropriate.

56. The other OH consultants that I have been assessed by never once asked me to go into any specific details about the previous incidents of bullying, victimisation and harassment that I have suffered during my previous employment. Even the OH consultants that had assessed me during my previous employment did not require me to do this. They merely focused on my current situation/state of health and concentrated their efforts on what could be done in the here and now, to try to support me at work.

57. I have been assessed by many OH Consultants, so I am aware of the standard that OH consultants work to. I believe that Dr William's conduct was unacceptable, falling far short of the behaviour expected from someone in the

medical profession. I was very offended by his line of questioning and his overall behaviour. The OH consultation lasted over three hours. In light of the numerous comments that were made by Dr Williams during the consultation, about the imminent tribunal case in January 2012, it was clear to me that Dr Williams was not objective or impartial. I believe that this is clear evidence of impropriety /inducement, which also constitutes harassment, victimisation and discrimination and a breach of my human rights. His behaviour caused me deep distress, anxiety and worry.

58. Dr William's, the respondents', (LBL, CEL and BED) and their legal representatives are fully aware that I am covered by disability legislation. The respondents' have conceded that this has been the case since November 2009, (in relation to claim number 2300254/2011B. This claim covers the period up until at least February 2011. The respondents', (LBL, CEL and BED- are in possession of my full medical records dated up until the end of August 2011, which includes evidence from the psychotherapist who treated me during July and August 2011- who diagnosed depression. It also evidences the fact that I had been seen by two Psychologists the previous year, who both diagnosed depression. My medical records also indicate that I saw two OH consultants in 2010 and 2011 and they both stated in their OH reports I am covered by disability legislation.

59. In May 2011, LBL's own OH consultant sent LBL an OH report, recommending 'reasonable adjustments' and warning LBL that I was in danger of a relapse of my condition. In July 2011 I was seen by Marina Waters'- she too recommended

‘reasonable adjustments’ and she reviewed the individual risk assessment, (which had been undertaken for my depression), by my previous employer CEL.

60. I was recently signed off sick with depression by my GP. LBL were advised of this on 11 April 2012, (a day before the respondents’ sent their CMD agenda to me). I sent the sick note to LBL on 13 April 2012. My full medical records indicate that I have been on medication for depression since 2010, (without a break in treatment). In light of the above, it is incomprehensible why LBL would make such an application. This is a perfect example of the type of discrimination that I have had to endure at the hands of the respondents’, particularly whilst in the employ of LBL and even after my unfair dismissal, (which I lodged an ET claim about on 13 April 2012).

61. It is important to note that in LBL’s pleadings for claim number **2375023/2011**, which was submitted in early September 2011, LBL admits that I am disabled **(paragraph 103)**. Claim number **2390531/2011** covers events up to November 2011; are the respondents’ suggesting that two months later I would suddenly not be covered by disability legislation anymore? If so, what is its rationale? LBL’s response to claim number **2375023/2011** states that it proposed and/or made ‘reasonable adjustments’ **(paragraphs 51, 60, 64, 76, 106c, 106d, 106j, 106n, 106p, 107 & 109)**. It makes reference to ‘addressing a disability situation’.

62. It is clear from the above, (including what is demonstrated by the medical evidence, which the Respondents’ are in possession of), that I am a disabled person under the Equality Act 2010, which is material to the question of whether I had an impairment during the material time. I have had an on-going mental

health condition that has been medically diagnosed, since November 2009, (which was when I first starting exhibiting the classic signs of depression). My condition is long-term and, if left uncontrolled through treatment, has a substantial effect on my ability to carry out day to day activities. Even with treatment, has a substantial effect on my ability to carry out day to day activities (as evidenced by my recent sickness absence).

63. I have had long periods of time off from work as a result of my depression and anxiety. The symptoms are severe and I have been prescribed numerous medications for this, which I have taken together: Temazepan - (sleeping pills) propanolol - (for anxiety and panic attacks) and anti-depressants. The symptoms I experience are headaches, dizziness, fainting, vomiting, panic attacks, difficulty sleeping and eating, difficulty in concentrating, always tearful and extreme fatigue. Therefore it can potentially affect many activities because of the overriding effect of extreme tiredness.

64. In March 2010 I developed stress related muscle spasms/weakness in my left arm. I was referred to receive pysiotherapy for this in June 2010. This is an on-going condition which is triggerred by stress. It affects my manual dexterity, and ability to lift, carry or move everyday objects.This condition was excarbated during my time at LBL. My condition has a more than trivial effect on my memory and ability to concentrate, manual dexterity and ability to lift, carry and move everyday objects), which is evidenced by the medical evidence, thus amounting to a disability within the meaning of the Equality Act 2010. It is therefore submitted that I should not be put to proof of my disability and its effects.

Conclusion

65. It is submitted that as a matter of law I am entitled to make claims against the Respondents and that the issue of whether as a matter of fact any such claims are substantiated should not be an issue for determination at this PHR. Issues of fact which should be the subject of full evidence and cross-examination and should be determined by a full Tribunal.

66. If the respondents' strike out application, cost application and requirement that I prove my disability are granted this would be a great injustice and be extremely prejudicial to me. The respondent's applications are clearly misconceived and vexatious. To my mind this interpretation of rule 13(2) accords with its natural meaning and furthers the overriding objective set out in reg 3 of the 2004 Regulations. It is part of the duty of employment tribunals to ensure, so far as practicable, that a case is dealt with expeditiously and fairly: reg 3(2). This duty cannot be performed without granting the claimant's amendment applications, refusing the respondents' applications and without allowing the claimant to present her discrimination claims at a full hearing to determine the merits of the case.

Ms Ayodele Adele Vaughan

Date: 16 April 2012