IN THE EAT **Appeal No: UKEATPA/0861/12/SM**

BETWEEN

Ms AA Vaughan

Appellant

-and-

London Borough of Lewisham, Babcock Education and Skills Limited and Others

Respondent

25 October 2012

SKELETON ARGUMENTS FOR THE APPELLANT

References in the format -

[Cx.x] is to [page. para] in the Core bundle.

[Sx.x] is to [page. para] in the Supplementary bundle.

[Ax.x] is to [page] in the Authorities bundle.

Introduction

1. The appellant was employed by the London Borough of Lewisham (LBL). The appellant was TUPE'd in from Careers Enterprise Limited (CEL) on 1 April 2011. The appellant issued eight claims in the London South Employment Tribunal, against the London Borough of Lewisham, Babcock Education and Skills Ltd and several individual respondents. The first three were consolidated, for, race discrimination, disability discrimination and PIDA detriment **[C62 – C205 & C274 – C327]**. Part of the third claim, (claim number 2300254/2011B), was 'stayed' and that claim is due to be heard next year.

2. This is an appeal on the judgment of the employment tribunal promulgated on 23 April 2012, the extreme cost order for £92,010. 37 **[C1 – C6]**. This appeal has been consolidated with case number UKEAT PA/0401/12/SM- the appeal on the decision of the ET dated 2 March 2012, dismissing all of her discrimination and PIDA detriment claims. The appellant alerts the EAT to the fact that High Court proceedings in relation to the cost order has already been commenced by the Respondents', **[S469 – S470]** and a hearing date has been sent for the week commencing **18 March 2013**. The appellant hopes that the EAT will be able to dispose of this case before that date.

The Procedural History

3. The history of the action are as follows:

a) The appellant issued three claims in the London South Employment Tribunal, which were consolidated, for, race discrimination, disability discrimination and PIDA detriment. The appellant alleged that she was discriminated against for making protected disclosures and discriminated against and/or victimised and harassed on the grounds of her race or ethnic origin, and/or her disability. The appellant's first claim was lodged at the Employment Tribunal on 19 April 2010, the second was lodged on 2 July 2010 and the third was lodged on 31 December 2010.

b) **On 4 November 2010** a PHR was held, no deposit order was made.

c) **On 1 April 2011**, the appellant's employment was transferred from CEL to LBL.

d) **On 4 April 2011** the appellant's wrote to the tribunal to request a substitution of the first respondent to LBL.

e) **On 4 May 2011** a telephone CMD was held. LBL was ordered by the employment tribunal to 'step into the shoes' of the appellant's previous employer CEL and the liability for the appellant's tribunal claims transferred to LBL.

f) **On 16 & 17 June 2011** a PHR was held, no deposit order was made **[C692]**.

g) **On 25 July 2011** the Tribunal issued an Order in relation to the main hearing preparation **[C692]**.

h) **On 10 August 2011**, the appellant was suspended from work on full pay, one day after submitting an Equality form questionnaire. This suspension lasted 7 Months, whilst her employer allegedly fabricated and falsified evidence against her in her absence. The appellant lodged a disability discrimination/PIDA detriment claim at the ET soon after **[C356 & C448]**.

i) **On 14 October 2011**, the appellant learnt that the respondents' had removed some of her supporting evidence from the trial bundle. The appellant wrote to the tribunal to complain about this and requested that she be allowed to submit

the supporting evidence post-December 2010, including evidence dated up until her employment transferred to Lewisham Council on 1 April 2011. This request was refused. She appealed this decision at the EAT and on 5 January 2012, 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 supporting evidence **[C705.para 6]**.

j) **8 November 2011**, the respondents' threaten costs **[S24]**. The appellant lodges another disability discrimination/PIDA detriment claim at the end of this month after allegedly being subjected to continuing discrimination.

k) The appellant represented herself in a 20 day hearing, which took place from **9 January – 2 February 2012**. On the first day, (which took the form of a CMD), the respondents' try to challenge the admissibility of the supporting evidence. The ET panel then retired to chambers to read evidence over the course of a week.

l) The appellant presented the ET with more than 2500 pages of documentary evidence, **[C704.para 3]**, 5 questionnaires and responses **[C567 - C691]**, over 300 pages of witness testimony **[C705.paras 7 & 8]** and nearly 400 pages of written submissions **[C740.para 122]**. The appellant cross-examined the respondents' for over 25 hours. The respondents' perjured themselves under oath **[C758, S106 - S112 & S117 - S135]**.

m) **On 1 February 2012** parties submitted their closing written submissions. The respondents' Barrister (Mr Palmer of Littleton Chambers) was due to make oral submissions on the same day, but declined to do so after receiving the appellant's written submissions and requested that proceedings be adjourned until the following day to allow him enough time to respond to the appellant's written submissions.

n) **On 2 February 2012** parties returned to the tribunal. Mr Palmer's oral submissions only lasted 30 minutes and he did not directly respond to the appellant's written submissions, except to assert that Deborah Francis was the Managing Director of CEL. There was no challenge by the Respondent or the Tribunal in relation to the appellant's accurate recording of what occurred during the course of the hearing or the issues, (which the appellant had set out in her written submissions dated 1 February 2012).

o) **On 7 February 2012**, the Tribunal wrote to parties advising them that there was a lack of time in chambers on 8 February 2012 and that the panel would reconvene on 19 0 20 April 2012- the date that had been set for the provisional remedy hearing and/or CMD. Parties were therefore advised not to attend the hearing on 19 and 20 April 2012.

p) **On 8 February 2012**, the Tribunal wrote to parties advising them that they should attend the hearing on 19 and 20 April 2012.

q) **On 11 February 2012**, the appellant e-mailed the Tribunal expressing her confusion over the Tribunal's conflicting correspondence regarding the hearing on 19 and 20 April 2012.

r) **On 14 February 2012**, the Tribunal wrote to parties advising them that it had made an error and that its e-mail of 8 February 2012 was the correct version. The appellant found the irregularities set out in the points above most concerning.

s) **On 28 February 2012**, the Tribunal wrote to parties advising them that that the judgment will be delayed and sent out by the middle of March 2012.

t) **On 2 March 2012**, the Tribunal wrote to parties dismissing all the appellant's claims under race and disability discrimination and PIDA detriment **[C703]**.

u) **On 3 March 2012**, the appellant wrote to the Tribunal to seek a review of its decision on in light of the respondents' perjured evidence and because the interests of justice requires such a review. The appellant also made procedural applications **[C758]**, including an application for 'fresh evidence', relating to the respondents' perjured evidence. The appellant also made request for the postponement of the PHR/CMD due to take place on 19 and 20 April 2012 and the recusal of Judge Balogun who had indicated that she would be sitting at the PHR and the full hearing for the appellant's next case.

v) **On 5 March 2012**, the Appellant follows up her applications dated 3 March 2012 with an e-mail to the Tribunal.

w) **On 7 March 2012** the Respondents' e-mailed the ET objecting to the appellant's application for a review of the ET's decision and her application for 'fresh evidence'. The respondents' do not deny the appellant's perjury allegations **[S104]**. The Appellant responds to Respondents' objection to appellant's request for a review of the judgment (and application for 'fresh evidence') **[S106]**; and

x) **On 10 March 2012**, the Appellant's e-mails to Tribunal requesting to submit further information in relation to her application for 'fresh evidence') and further clarification about the respondents' perjured evidence **[S109]**.

y) **On 12 March 2012** the appellant lodges her Notice of Appeal **[C762]**.

z) **On 14 March 2012** the ET rejects the appellant's applications for a review of its decision, her request to submit 'fresh evidence' and the postponement of the PHR. It informs her that her recusal application has been referred to the Regional Employment Judge **[C815]**. The Appellant responds to the ET advising it that it has failed to address the issue of the Respondents' perjured evidence and asks if it will be referring the matter.

aa) **On 15 March 2012** the Regional Judge rejects the appellant's recusal application **[C817]**. Judge Balogun also informs the appellant that the Tribunal will not be referring the matter of the respondents' perjured evidence to the police **[S136]**.

bb) **On 20 March 2012** the Respondents' e-mail the ET making an application for a cost order against the Appellant **[C819]**.

cc) **On 21 March 2012** the Appellant e-mails the ET objecting to the Respondents' application for a cost order **[S137]**.

dd) **On 5 April 2012** the Appellant receives notification from the first Respondent that she is to be dismissed on 13 April 2012 **[S303]**. The appellant lodges another disability discrimination/PIDA detriment claim.

ee) **On 11 April 2012** the Appellant is signed off sick by her GP for 4 weeks with 'Depression & Anxiety' **[S332]**.

ff) **On 12 April 2012** the Appellant submits her evidence in relation to the Respondents' application for a cost order **[S334]**.

gg) **On 13 April 2012** the appellant was allegedly unlawfully dismissed by the first respondent- London Borough of Lewisham- she lodges an unfair dismissal claim at the Employment Tribunal.

hh) **On 19 and 20 April 2012**, the parties attend a PHR/CMD. The appellant's claim against Marina Waters is struck out and she is ordered to pay some of the first respondents' costs. The Respondents' make an oral application for all of the Appellant's claims to be consolidated and the Appellant is informed by the judge that it is her provisional view that they should be **[C1]**.

ii) **On 20 April 2012**, the appellant e-mails the ET requesting permission to submit recordings **[C828]**.

jj) **On 21 April 2012**, the appellant e-mails the ET requesting that it review its decision on the cost order **[C829]**.

kk) **On 23 April 2012**, the Respondents' write to the ET regarding its objection to the Appellant's application for the ET to review of its decision on the cost order.

ll) **On 24 April 2012** the appellant makes an application to the ET requesting permission to submit evidence dated post-November 2011 in relation to claim number 2300254/2010B **[C833]** and rejects the individual respondents' (Marina Waters) cost application **[C838]**.

mm) **On 24 April 2012** the ET sends parties the order on the PHR/CMD. The ET makes a cost order against the appellant in excess of £92,000, **[C1]**.

nn) **On 25 April 2012** the Appellant's sends the ET her amended review application in relation to the cost order **[C840]**.

oo) **On 26 April 2012** the Respondents' e-mail the ET its objection to the Appellant's application to submit recordings **[S447]** and the Appellant e-mails the ET requesting a PHR & sends a follow up e-mail to the ET clarifying further issues which will need to be determined at the PHR **[S451]**.

pp) **On 27 April 2012** the Appellant sends the ET her second recusal application **[C845]**

qq) **On 18 May 2012** the EAT sends its decision on the appellant's 'Notice of Appeal', rejecting it on papers **[C847]**.

rr) **On 19 May 2012** the appellant's requests an oral hearing.

ss) **On 22 May 2012** the EAT sends its E80 Rule 3(7) letter to Appellant **[C849]** and the appellant e-mail's the EAT regarding her availability. The appellant lodges another disability discrimination/PIDA detriment claim after allegedly being subjected to post-employment discrimination.

tt) **On 23 May 2012**, the Appellant's e-mails the ET regarding the delay in responding to her recusal application dated 27 April 2012 and her application regarding a review of its decision on the cost order, dated 25 April 2012 **[S460]**.

uu) **On 28 May 2012** the ET sends parties its decision rejecting the appellant's application for a review of the decision on the cost order **[C851]** and the appellant sends the ET a forward e-mail regarding her request for a PHR & the respondents' threat of cost orders **[S463]**.

vv) **On 29 May 2012**, the ET sends parties its decision rejecting the respondents', (Marina Waters') application for a cost order **[C838]**.

ww) **On 30 May 2012**, the Appellant's e-mails the regional judge clarifying her grounds for her recusal application **[S464]**

xx) **On 20 June 2012**, the ET sends the appellant its decision rejecting the appellant's 2nd recusal application **[C853]**. On the same day the appellant e-mails the ET her review application **[C855]**.

yy) **On 22 June 2012** the ET sent the appellant a letter advising her that the refusal on her recusal application is an order not a judgment & the review process for her review application on her recusal application is therefore inapplicable **[S468]**

zz) **On 20 July 2012** at 23.15, the Appellant e-mails the EAT requesting that it ask the High Court to 'stay' proceedings in relation to the detailed assessment **[C858]**, she also e-mails the ET requesting that it do the same **[S470]**, and copies in the EAT.

aaa) **On 23 July 2012**, the EAT sends the appellant it's decision on the appellant's 'Notice of Appeal' on the ET's cost order - The rejection on papers **[C859]**.

bbb) **On 26 July 2012** at 23.07, the Appellant e-mails the EAT expressing dissatisfaction with the decision to reject her appeal on papers & requests an

oral hearing **[C861]**. Once again, she requests that the EAT 'stay' proceedings in relation to the detailed assessment. The Appellant also sends the ET a forward e-mail, attaching her e-mail to the EAT & requests once again that the ET ask the High Court to 'stay' proceedings in relation to the detailed assessment **[S471]**.

The Present Appeal

4. In producing this document, the appellant has aimed at assisting the EAT as much as possible and will be proud to make sure that every single relevant aspect of the case is brought to the careful attention of the EAT.

5. The grounds of the appellant's appeal are set out in **[C7.paras 56 a - e]** of her notice of appeal which the appellant lodged on 30 May 2012. The basis of her appeal is set out in her notice of appeal.

General principles

6. This is a case where the Tribunal exercised its discretion contrary to principle, in disregard of relevant factors and the decisions are just plain wrong, as set out in the case of ***McPherson v BNP Paribas*** [2004] IRLR 558, paragraph 26 **[A22]**. In that case it was held that the appeal court should read the reasoning of the tribunal as a whole, see paragraph 36.

7. As to the correction of an error of law committed by a judge who is exercising a judicial discretion, the law is equally clear. The leading case is ***G v G*** [1985] 1 WLR 647, which contains references to the well known judgment of Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 at 345 **[A16.para 9]**. For an appeal to succeed, the exercise of discretion which is challenged must, in Asquith LJ's words:

   'Exceed the generous ambit within which reasonable disagreement is possible'.

8. The Employment Tribunal misapplied the law and/or misdirected itself in deciding to grant the respondents' application for cost order. The appellant believes that the decision of the Tribunal is legally flawed. The Tribunal exercised its discretionary powers of case management under rule 10 of the Employment Tribunal (Constitution and Procedure) Regulations 2004, which the appellant's believes are challengeable, on what may loosely be called "Wednesbury" grounds. The appellant believes that the tribunal has exercised the discretion under a mistake of law or disregard of principle, under a misapprehension as to the facts, where it took into account irrelevant matters and failed to take into account relevant matters. The Tribunal's discretion was not properly exercised

9. *Perverse findings of fact*: The Tribunal failed to make findings of fact on all the principal submissions made and it is submitted that omitting to set out the legal principles and key submissions has led to a consequent error of law and incorrect and incomplete finding of fact. The legal points must be considered in the context of the entirety of the proceedings.

10. In its reasons, the ET also concluded that the appellant had made her allegations and had provided no evidence **[C4.para 9]**. This finding was also perverse, as demonstrated by the fact that the appellant had submitted extensive evidence and written submissions, see **[C704.para 3]**, **[C567 - C691]**, **[C705.paras 7 & 8]** and **[C740.para 122]**.

11. The appellant is not satisfied that the Tribunal properly carried out its fact finding role so as to fully explain its judgment and conclusions. The appellant therefore regards the fact finding and conclusions as perverse. They were not conclusions within the province of a fact-finder based on the evidence the Tribunal had heard and the submissions made by the appellant, as set out of the appellant's Notice of Appeal.

12. *Too much weight*: The ET's exercise of discretion was erroneous in law, giving too much weight to supposed costs that Lewisham Council would have to bear, the appellant's alleged ability to have no problem finding work in the same field and at the same level in the future.

13. *Insufficient weight*: To the fact that the ET had failed on more than one occasion to make a deposit order and warn her that her claims had 'no reasonable prospect of success'/misconceived from the outset, (and that the Respondents' had also failed to specifically do so), the unreasonable refusal of the appellant's initiatives to settle the case, the Respondents' approach to the settlement discussions (carried out in 'bad faith' and as a means to intimidate/threaten the appellant). The employment tribunal erred in law by failing to take into account

the legal argument, as set out in the appellant's written representations dated 16 April 2012 **[S382 – S425]**, her e-mails dated 21 and 25 April 2012 **[C29 & C840]** - review of decision on cost order, regarding the issues and applying it to this case.

14. *The judgment lacked sufficient reasons to show why the tribunal reached the decision it did*: The decision was fundamentally wrong and irrational. The tribunal failed to record the findings of fact in relation to the appellant's case challenging the cost application, this should have been at the very heart of the decision of the Employment Tribunal, but it was completely absent.

15. The fact that there was hardly any reference made to it was of great significance and perverse. Careful findings of fact should have been made; however, no such findings of fact were included within the decision.

<u>Perjured Evidence of the Respondents' and Making up Evidence against the Appellant During Proceedings</u>

16. The Tribunal's assessments of the appellant in its judgment were vitiated by underlying findings and conclusions which were unjustified. The Employment Tribunal reached a decision that had not been open to it on the facts. In the appellant's view, it has demonstrated perversity and an error of law, particularly in light of the fact that the Tribunal contradicted itself with regards to the issue of whom was managing Director- at **[C738.para 110 & C748. para 151]** of the judgment dated 2 March 2012. The respondents' Barrister also contradicted himself in relation to this issue. Mr Palmer's assert in his closing written

submissions that Deborah Francis was the Managing Director of Careers and Employability, (a small section of CEL), **[S.103b. para 10]**. He then contradicted himself by applying to Deborah Francis the title of Managing Director of the entire company that I worked for - CEL **[S103.para 34]**. The appellant also wrote to the ET about this matter.

17. The appellant believes 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 in relation to the question of Deborah Francis' alleged status as Managing Director of CEL at the relevant time.

18. Sue Ely also lied under oath- as set out in the appellant's written submissions to the ET dated 1 February 2012 **[S102. para 449]**. Sue Ely initially stated that CEL would not be able to apply its own policy and procedures to HR staff because they would have their own policies and procedures and they have different terms and conditions. However, after questioning from Judge Balogun regarding the logic of this, she retracted this assertion and stated that CEL policies applied to non-CEL staff. It is important to note that this contradicts the assertion that Benjamin Craig made in relation to his evidence- that 'CEL managers did not have control over HR staff' **[S102. para 449]**.

19. In relation to the internal grievance process which was conducted by CEL and BED, it is a fact that even if those investigating the appellant's grievances and appeals did have control, CEL policies and procedures could not be applied to non-CEL staff because non-CEL staff had their own separate policies and

procedures, which could only be implemented and applied by their employer. This line of questioning was evidenced in the appellant's written submissions to the ET. Sue Ely perjured herself in relation to this issue, as is demonstrated by the respondents' response to the equality form questionnaire **[C682. para 8.1c]** and the appellant's ET witness statement dated 2 December 2011 **[S34. para 431a]**, which clearly evidences the fact that CEL could not apply its policies and procedures to non-CEL staff. It is important to point out that the Respondents' grounds of resistance state that CEL had control over HR advisers **[C273. para para 9]**.

20. It is clear that the appellants' former employer CEL had no control over non-CEL staff. CEL could not apply the Equalities and Diversity Policy to non-CEL staff. It is clear that the entire grievance procedure was just a sham and was never intended to provide the appellant with any redress, as was set also out in her ET written submissions. It follows that if the appellants' former employer did not have any control over non-CEL staff, then the grievance procedure was fundamentally flawed. Anthony Marshall had no control over BED's HR staff (Adam Buckby, Ruth Johnson and Paul Kelly) or CEL managers Beverley Bannister and Benjamin Craig, yet he investigated the appellant's grievance. Amanda Duckett had no control over non-CEL employees, yet she investigated the appellants' grievances and appeals. Deborah Francis was not a CEL employee, and had no control over Anthony Marshall, yet she investigated the appellants' appeal.

21. As explained at paragraph 31 of her skeleton argument for case number UKEAT PA/0401/12/SM, (which has been consolidated with this case), the appellants'

CEL could not apply the Equalities and Diversity Policy to non-CEL staff. The Tribunal erred in law in failing to condemn the investigation.

22. The appellant submits that the Tribunal did not pay attention to the appellant's extensive documentary evidence or the oral evidence and placed its decision to dismiss the appellant's claims upon the respondents' false, contradictory, inconsistent and perjured evidence a weight which it could not possibly bear. The appellant raised these issues in her PHR written representations dated 16 April 2012 **[S382 – S425]**. This is also demonstrated in the appellant's Notice of Appeal dated 12 March 2012, (which the EAT is also dealing with) and the related evidence that the appellant sent to the Tribunal in relation to this.

23. The Tribunal did not make essential findings of fact for the purpose of considering the perjured evidence and the effects that this had on costs. The Employment Tribunal failed take this into account and it failed to examine the overall effect of the way in which the respondents' behaved in relation to this issue.

24. The Tribunal failed to take into account the authorities set out below in relation to this point, which shows the importance of this issue and the appellant therefore respectfully requests that the EAT examines the evidence and the findings of the Tribunal in some detail:

25. ***Robson v Inland Revenue Commissioners*** [1998] IRLR 186 EAT **[A27]**, at pages 5 and 7 of the authority and as set out in paragraphs 96 & 98 of the Appellants' Notice of Appeal dated 12 March 2012: This demonstrates that the

perjured evidence of the Respondents' is sufficient on its own for the case to be decided in the appellant's favour. It was shown the Tribunal erred in law by preferring the evidence of the Respondents on the basis of a reason which should not have given any weight nor taken into account at all, let alone used as a basis to make a cost order against her.

26. The ET was wilfully misled by the Respondents'. The evidence used by the respondents' to make an application for a cost order against the appellant was unlawfully obtained against the European Convention or improperly interpreted by ignoring its background and specific conditions, and so they have very low credibility or are not valid for use under the proceedings. Further improper, unreasonable and dishonest use of them also violated the court's directions and rules as well as the law.

27. A person will be in contempt of court if he presents a deliberately false statement of case, witness statement (under CPR part 31). The court can also dismiss a claim or defence if there has been a deliberate destruction or falsification of evidence. In ***Arrow Nominees Inc v Blackledge*** [2000] C.P. Rep. 59 **[A5. paras 34 – 62 and 74 – 79]**, the Court of Appeal allowed the appeal on the basis that the respondent's production of fraudulent documents led to a substantial risk of injustice, had been such that he should have been deprived of the right to pursue his case, and made it impossible for the parties to be placed on an equal footing, that it had added significantly to the costs of the proceedings, and that it had occupied a great deal of the court's time to the detriment of other litigants.

28. It is submitted that the respondents' committed an abuse of the ET's process in consequence of giving false testimony. This was extraordinary audacity on the part of the respondents' to confound the judicial process, mislead the ET and then apply for a cost order off the back of such conduct. This is particularly disturbing as the conduct complained of by the appellant did affect the outcome of the case and resulted in an extreme order by the ET against her **[C1 – C6]** & **[S469 – S470]**.

29. It is submitted that the Respondents' conduct and the ET's failure to take this into account, inhibited the ability of the ET to dispose fairly of the Respondents' application for a cost order. The appellant relies upon the Court of Appeal's decision in Arrow Nominees for the proposition that the ET's decision on the cost order should be overturned. It is submitted that the Respondents' should not be rewarded, when it is clear that they did not 'play by the rules', they deceived the ET and strived to undermine the judicial process.

30. In relation to the cost order, the fairness of proceedings had been put in jeopardy and the Respondents' subverted the ET's process, which led to the adverse costs order. In the appellant's view, the Respondents' dishonest conduct is a compelling reason so as to satisfy the granting of the appellants' appeal on the cost order. The fairness of proceedings was compromised as a consequence of the misconduct of the Respondents' and the judgment was obtained by fraud.

31. It is clear that the allegations in Lewisham Council's termination letter have been refuted by the appellant in her appeal letter to Lewisham Council and her subsequent application to the ET to submit covert recordings. It follows that

Lewisham Council would not be able defend their ground of the termination as claimed in their ET3. The appellant alleges that the respondents' (a public body) have unfairly dismissed her. It is clear that the appellant's reputation has been damaged by the dismissal and that she has been publicly defamed and slandered.

32. Page 4, paragraph 14 of the ET's judgment dated 23 April 2012 is an irrelevant matter that should not have been taken into account. In light of these factors, the appellant believes that it is plain that the respondents' should not be awarded costs in light unreasonable conduct engineered during the proceedings. The decision of the ET will clearly will affect the future beyond the current legal case, in the form of the severe impact that this will have on her future career prospects and her health.

33. Since her alleged unfair dismissal, the appellant has since has suffered a relapse of her condition (depression), been signed off by her GP as 'unfit for work', had the dosage of her anti-depressants increased and has begun further counselling **[C332 & 437]**. The ET was also aware that the appellant had been signed of sick. It is clear that the ET's decision on the cost order will saddle the appellant with a crippling debt for years to come, which she is unlikely to be able to pay off and which will undoubtedly exacerbate her fragile mental health and prevent her from being able to make a successful recovery.

Relevant Law

34. The jurisdiction of this Court is limited to the correction of error of law, as explained in ***Melon* v *Hector Powe Ltd*** 1980 SC 188 and ***Meek* v *Birmingham City Council*** [1987] IRLR 250. In the opinion of Lord President Emslie at 198:

"It hardly requires to be mentioned that an appeal lies from a decision of the industrial tribunal to the Employment Appeal Tribunal, and from a decision of that Tribunal, to this Court, only upon a question of law. This being so I am happy to say that the parties are not in dispute as to the extent to which the appellate tribunal, or this Court, is entitled to interfere with a decision of first instance, and to substitute their own decision for that arrived at by the industrial tribunal. The law is clear that where it cannot be shown that the tribunal of original jurisdiction has either misdirected itself in law, entertained the wrong issue, or proceeded upon a misapprehension or misconstruction of the evidence, or taken into account matters which were irrelevant to its decision, or has reached a decision so extravagant that no reasonable tribunal properly directing itself on the law could have arrived at, then its decision is not open to successful attack. It is of no consequence that the appellate tribunal or court would itself have reached a different conclusion on the evidence. If there is evidence to support the decision of the tribunal of first instance then in the absence of misdirection in law - which includes the tribunal's selection of the wrong question to answer - that is an end of the matter."

35. Although Employment tribunals have a discretion as regards the award of costs, which discretion should not readily be interfered with, in **Beynon and others v Scadden and others** [1999] IRLR 700 **[A8]** at paragraph 15 Lindsay J summarised the proper approach:

"The proper test for the employment tribunal was not whether its order accorded with this authority or that but, ultimately, to borrow the phrase from Morritt LJ, whether it was just to have exercised as it did the power conferred upon it by the rule. We must remember, too, that the test for us is different to that which was appropriate to the employment tribunal. We must not consider whether we would have ordered as the chairman did but instead ask ourselves whether the employment tribunal took into account matter which it should not have done, or failed to take into account that which it should have done or whether in some other way it came to a conclusion to which no employment tribunal, properly directing itself, could have arrived."

Statutory provisions

36. The Tribunal's power to award costs derives from Employment Tribunal Rules of Procedure (Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004). The key provisions for the purposes of this appeal are rules 40(2) and (3) and rule 41. These provide:

> ***"40(2) A tribunal or Employment Judge shall consider making a costs order against a paying party where, in the opinion of the tribunal or Employment Judge (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or Employment Judge may make a costs order against the paying party if it or he considers it appropriate to do so.***
>
> ***(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.***
>
> ***41. The amount of a costs or expenses order***
> ***(1) The amount of a costs order against the paying party shall be determined in any of the following ways –***
> ***(a) the tribunal may specify the sum which the paying party must pay to the receiving party, provided that sum does not exceed £10,000;***
> ***(b) the parties may agree on a sum to be paid by the paying party to the receiving party and if they do so the costs order shall be for the sum so agreed;***
> ***(c) the tribunal may 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 by way of a detailed assessment in a County Court in accordance with the Civil Procedure Rules 1998 or, in Scotland, as taxed according to such part of the table of fees prescribed for proceedings in the sheriff court as shall be directed by the order.***
> ***(2) The tribunal or Employment Judge may have regard to the paying party's ability to pay when considering whether it or he shall make a costs order or how much that order should be.***
> ***(3) For the avoidance of doubt, the amount of a costs order made under paragraphs (1)(b) or (c) may exceed £10,000."***

37. The recent decision of the Court of Appeal in ***Barnsley Metropolitan Borough Council v Yerrakalva*** [2012] IRLR 78 **[A6]** provides guidance as to the correct approach to be adopted in an appeal against a costs order. Mummery LJ said:

"7. As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion.

8. There is therefore a strong, soundly based disinclination in the appellate tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. I have noticed a recent tendency to seek permission more frequently. That trend is probably a consequence of the comparatively large amounts of legal costs now incurred in the ETs.

9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties.
...
41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. …
...
49. ... as orders for costs are based on and reflect broad brush first instance assessments, it is not the function of an appeal court to tinker with them. Legal microscopes and forensic toothpicks are not always the right tools for appellate judging."

38. The appellant refers the EAT to ***AQ Ltd v Holden*** [2012] UKEAT 0021_12_1604 **[A4.paras 37 & 40]**. In this case the claimant made an offer to settle prior to the hearing, the ET rejected dismissed the claimants' case, but also rejected the respondents' application for costs on the basis that a claim was vexatious, an employment tribunal was fully entitled to take into account the fact that the respondent took no steps during the proceedings to seek a PHR to canvass the point, apply for a strike out or a deposit order. In the case of AQ Ltd v Holden, the appeal from the respondents' was rejected by the EAT. The case supports the appellant's argument that a cost order should not have been made against her, as the circumstances of her case almost mirrors that of AQ Ltd v Holden.

39. In the case of AQ Ltd v Holden, paragraph 34, the EAT held:

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

40. The appellant believes that the Tribunal's exercise of discretion was flawed. It is in the appellant's view an error of law for an Employment Tribunal, when exercising discretion, to take into account a matter which should have been taken into account or should have been left out. That is common ground. Secondly, if that can be shown to have occurred, then the Employment Appeal Tribunal is at liberty to set aside the exercise of the discretion as being in error of law. Thirdly, if the discretion is thus set aside, the Employment Appeal Tribunal can either remit the matter for fresh or further consideration by the Employment Tribunal or, if the case is plain enough on the material before the Employment Appeal

Tribunal, the Employment Appeal Tribunal can itself exercise the discretion that would otherwise have fallen for exercise by the Tribunal.

41. ***Boyce v (1) Wyatt Engineering (2) S J Tapsell Ltd (3) Black & Veatch Ltd*** [2001] EWCA Civ 692 **[A9. paras 10, 15, 20 - 21, 29 -30, 32, 36 - 38]**. As was highlighted in this case, the Tribunal paid too much attention and/or alternatively gave too much weight to the respondents' evidence, the appellant also believes that this applies to her case, thus resulting in the granting of the respondents' unreasonable and vexatious application for a cost order. The Tribunal never adequately considered the fact that the appellant has been unrepresented and in grave ill-health throughout the proceedings. It also failed to adequately consider the appellant's unemployed status, disability, alleged unfair dismissal and the consequences of that on her future career prospects (and her related application to submit covert recording), or her evidence, submissions and application for a review of its decision (with her attached Notice of Appeal). The tribunal made a totally flawed decision. The employment tribunal erred in law by failing to follow binding authorities which the appellant set out in her submissions. The Employment Tribunal failed to have these in mind when considering the facts.

42. ***Piggott v Jackson*** [1992] ICR 85, 92D, per Lord Donaldson MR, as upheld by ***Symonds (T/A Symonds Solicitors) v Redmond-Ord*** [2011] UKEAT 0028/11/ZT **[A31 para 2]**. The Employment Tribunal made findings of fact which were unsupported by or contrary to the evidence. Those errors; failing to make full findings of fact and making findings which were unsupported by the evidence on which they relied, was integral to the Tribunal's reasoning and materially undermined what followed.

43. If it can be shown, that the ET departed from the evidence presented, it follows that the ET acted on some irrelevant consideration or for an improper motive - i.e. it was *Wednesbury* unreasonable (see ***Associated Picture Houses Ltd v Wednesbury Corporation*** (1948) 1 KB 223), and in breach of Article 6.1 and 14 ECHR. The ET departed from the oral and/or documentary evidence or the pleaded case and making findings, which were so wrong as to amount to Wednesbury unreasonableness and perversity, as set out in ***Yeboah v Crofton*** [2002] EWCA Civ 794 at paragraph 93 Mummery LJ explains what such a ground of appeal involves:

"*Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached*."

At paragraph 95, where he said:

"*Inevitably there will from time to time be cases in which an Employment Tribunal has unfortunately erred by misunderstanding the evidence, leading it to make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence. In such cases the appeal will usually succeed*."

44. The tribunal made a totally flawed decision. Authorities were overlooked and the tribunal adopted an incorrect approach. The ET's exercise of discretion was erroneous in law, and did not have due regard to the guidance laid down in:

a) ***Barnsley Metropolitan Borough Council v Yerrakalva*** [2012] IRLR 78 **[A6]**; and

b) ***Power v Panasonic (UK) Ltd*** [2004] UKEAT/0439/04/RN; and

c) ***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, paragraphs 17 – 18; and

d) ***Her Majesty's Attorney General v Mr S Deman*** [2006] UKEAT/0113/06, the judgment of Underhill J in paragraphs 168, 174-175; and

e) ***Cartiers Superfoods v Laws*** [1978] IRLR 315 **[A10. para 18]**; and

f) ***McPherson v BNP Paribas*** [2004] ICR 1398 **[A22]**: Mummery LJ's summarisation of the general position in relation to the predecessor provision to rule 40; and

g) ***Lodwick v London Borough of Southwark*** [2004] IRLR 554 **[A20]**, at paragraphs 23-27; and

h) ***Arrow Nominees Inc v Blackledge*** [2000] C.P. Rep. 59 **[A5]**: In relation to the respondent's production of falsified evidence which the appellant believes made it impossible for the parties to be placed on an equal footing, led to injustice and added significantly to the costs of the proceedings; and

i) ***Robson v Inland Revenue Commissioners*** [1998] IRLR 186 EAT **[A27]**, as set out in paragraphs 96 & 98 of the Appellants' Notice of Appeal dated 12 March 2012 **[S762]**; and

45. The EAT is entitled to treat the case in accordance with the all of the above authorities and with:

a) ***AQ Ltd v Holden*** [2012] UKEAT 0021_12_1604 **[A4]**

b) ***Associated Picture Houses Ltd v Wednesbury Corporation*** (1948) 1 KB 223), and in breach of Article 6.1 and 14 ECHR

c) ***Piggott v Jackson*** [1992] ICR 85, 92D, per Lord Donaldson MR, as upheld by ***Symonds (T/A Symonds Solicitors) v Redmond-Ord*** [2011] [2011] UKEAT 0028/11/ZT **[A31]**; and

d) ***Boyce v (1) Wyatt Engineering (2) S J Tapsell Ltd (3) Black & Veatch Ltd*** [2001] EWCA Civ 692 **[A9]**; and

e) **Beynon and others v Scadden and others** [1999] IRLR 700 **[A8]** at paragraph 15

The Tribunal's Error

Matters or Events Leading to the Cost Order

46. The EAT cannot correctly understand the action and the matters or events leading to the action without knowing the root of them, i.e. matters and events leading to the cost order following the appellant's alleged unfair dismissal from employment at Lewisham Council including the individual respondent (Marina Waters') refused cost application. Details of the appellant's unfair dismissal were included in the PHR trial bundle **[S303 – 324 & 380]**, (Lewisham Council's SOSR hearing outcome, the appellant's appeal and the appellant's application to submit recordings allegedly proving that the respondent LBL discriminated against her and unfairly dismissed her).

47. In relation to the first Respondents' application for a cost which was made on 20 March 2012, it is clear that it is scandalous and vexatious. Further matters and

events leading to the cost order are set out in the appellant's written representations for the PHR dated 16 April 2012 **[S382 - S425]**.

48. On **20 April 2012**, the appellant attended the PHR. She was accompanied by 4 people. She had a note taker. Judge Balogun did not record her decision on tape, but chose to simply read out her decision to parties. Judge Balogun accepted the fact that the appellant has insufficient means to pay costs, but went on to refer to ***Arrowsmith v Nottingham Trent University*** [2011] EWCA Civ 797 and the fact that costs do not need to be confined to parties ability to currently pay, because it may well be that their circumstances improve in the future.

49. In the reasons for the cost order Judge Balogun stated that the appellant is relatively young and has at least 15 years experience and that the appellant's intention, (when fully fit) will be to seek employment in her current field. Judge Balogun mentioned that up until recently the appellant was earning £30,000 a year and that there is no reason to believe that the appellant won't resume a career in her chosen field, at this level in the future. On the evidence this was a conclusion that the Tribunal was not entitled to reach, therefore this was perverse.

50. It is important to note that the appellant experienced lengthy periods of absence from work due to disability and that her employment with the respondents' lasted 8 years and that she has been unlawfully dismissed by them. It is on the appellant's work record that she has been dismissed for SOSR and that the above set of circumstances will affect her future employment prospects, not to

mention the stigma. Jobs in the appellant's current area of wok in the public sector are being cut and/or people are being asked to take pay cuts (the Tribunal also made reference to cuts in its judgment). This scenario does not suggest that there is the slightest possibility that the appellant will be able to resume a career in her chosen field, at this level in the future. The appellant advised the Tribunal on the witness stand that even if she were able to gain employment, it would be on a substantially reduced level of salary than what she was earning before.

Decision on the Cost Order

51. The Tribunal made an extreme cost order against the appellant. In its judgment the Tribunal made reference to the respondents' letter to the Appellant dated 8 November 2011 **[S24]**, and used this as a basis for making the award to award cost, as well as findings that it made during the course of the hearing, (which was clearly inappropriate and were both matters that the Tribunal should not have taken into account. The Respondents' alleged cost warning letter made no reference at all to the fact that it believed that her claims were weak or misconceives. In relation to the issue of costs it merely stated the following:

'***We believe that this offer is significantly in excess of any sum that you would be awarded by the Employment Tribunal, even if you were successful in your claims. This settlement offer shall remain open until 4pm on Friday 11 November 2011 and shall then be withdrawn. If you should fail to accept this settlement offer, then we are instructed that no further settlement offers will be made. The Respondents will continue to defend your claims and it would be their intention to apply for a costs order against you at the full hearing in January 2012***'.

52. The Appellant did not act unreasonably, as she could not have engaged with the Respondent's costs warning letter, as the cost warning letter failed to set out the

contention that her claims were misconceived and it would be applying for a cost order on that basis, and the respondents had failed to give earlier warnings and/or seek a deposit order and/or a strike out application and PHR on this basis, which would have led them to an earlier assessment of the merits of the appellant's claims.

53. The respondents' actions leading up to the full hearing did not put her on alert that the respondents' would make an application for costs on the basis that her claims were misconceived from the outset and the letter dated 8 November 2011 failed to set out in any detail whatsoever why the appellants' application would not, in the view of the respondent's solicitors, succeed. The appellant was therefore unaware of the respondent's position.

54. The appellant refers the EAT to ***AQ Ltd v Holden*** [2012] UKEAT 0021_12_1604 **[A4]**, paragraph 37, in relation to the respondents cost warning the EAT held:

'The second is what Ms Twine describes as a costs warning in April 2010. This was not a costs warning in the conventional sense – rather advice to Mr Holden to seek legal advice and to consider his position. The Tribunal was entitled to disregard it.'

55. In the appellant's present case, the respondents' cost warning was not a cost warning on the basis of the respondents' contention that her claims were misconceived from the outset and that they would be making an award for costs on that basis. In fact the respondents' even make reference to the possibility of the appellant succeeding in her claims. It is clear that the Respondent failed to set out its contention that the appellant's claim had 'no reasonable prospect of success'/it was misconceived from the outset and issue a cost warning on this

basis as early as possible and as such, the Tribunal should have disregarded it for all the reasons that the appellant has highlighted.

56. In contrast, in response to the Tribunal's decision to refuse Marina Waters' application for a cost order **[S28]**, the Tribunal specifically makes reference to the same set of circumstances as being the basis of its refusal to grant her cost application **[C838]**. Marina Waters' alleged cost warning letter stated the following in relation to the issue of costs:

'I request a pre-hearing review to have the case against me struck out. In view of the legal costs I will incur I will also be making an application for my costs if this goes to a tribunal, as I believe there have been false allegations made against me, evidenced in section 88(r)'.

57. There was essentially no difference between both respondents' letters threatening cost, yet both applications resulted in two completely different outcomes. The judge treated the two applications inconsistently.

58. Despite this, the tribunal decided to grant the Respondents' application and stated that the cost award was not a punitive one, yet it went on to refer to the case presented by the appellant in relation to her allegations against the Respondents', stating that:

a) The claimant was aware of the Respondents' explanations for the events long before Tribunal proceedings, because responses were provided to the claimant through responses to her grievances in relation to those matters; and

b) The claimant did not at any point of the proceedings have adequate responses to why the non-discriminatory explanations of the respondents' were not acceptable; and

c) The Tribunal preferred the Respondents' evidence in relation to all the disputed facts; and

d) The Claimant's interpretation or perception of events was illogical or unreasonable; and

e) Many of the claimant's complaints occurred after one off encounters or communications with individuals; and

f) The claimant sought to '*tar everyone with the same brush on the basis of a mass conspiracy*'; and that to pursue such an allegation with no evidence is unreasonable;

59. Judge Balogun stated that the Tribunal believes that the appellant's claims were '*misconceived from the outset'*. It is clear that the Tribunal failed to properly take into account the appellant's witness statement and related evidence and her written submissions.

60. It is important to note that on 19 and 20 April 2012, the Tribunal failed to make a deposit order in relation to the 'stayed' part of claim number 2300254/2011 **[C1]**, even though the appellant raised the issue of a cost order with the judge on 20 April 2012 and the respondents' put forward written submissions asserting that the appellant's claims have no reasonable prospect of success in light of the fact that the 'un-stayed' part of the claim had been dismissed **[S440]**. The appellant highlighted the Tribunal's failure to make a deposit order, in her e-mail to the ET dated 27 April 2012 **[S452]**, setting out additional grounds for a review of the

decision on the cost order. It is clear from the order on the PHR/CMD that the Tribunal did not see this as an issue, **[C1, page 6, para 6]**.

61. If the Tribunal believed that the appellant's claims were misconceived from the outset, why did Judge Balogun not advise the appellant of this during the CMD on 9 January 2012, or after having read all the documentary evidence during the Tribunal's reading time, which lasted a whole week, **[C705. para 8]** or at anytime during the hearing itself? Why did Judge Salter, Judge Baron and Judge McInnis' not advise the appellant of this during the many CMD's and PHR's? Why did the respondents' never set out this contention until after the hearing?

62. If the appellant's claims really were misconceived from the outset, the Respondents' would have stated this at the outset. When the Respondents' applied for a cost order in April 2011, which was heard in June 2011 **[C693]** and **[S155 - S161]** it had the opportunity to rely on this ground but it did not. This evidence was presented to the Tribunal by the appellant's in her bundle. The EAT is entitled to have regard to this fact, as it is clear evidence that the respondents' did not believe that the appellant's claims were misconceived from the outset. In any event, that cost order made on that occasion was not granted.

<u>The Conduct of Those Acting on Behalf of the Respondent Party</u>

63. In this case, it's quite clear that Respondents' legal Representatives (Paris Smith Solicitors) have engaged in unreasonable, oppressive and vexatious conduct in relation to their application. The appellant believes that this behaviour is calculated to cause her the maximum amount of distress.

64. The Respondents' approach to the settlement discussions was also carried out in 'bad faith' and as a means to intimidate/threaten the appellant. The respondents' wrote to the appellant on 22 November 2011, with a settlement offer, which she 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 the appellant challenged Paris Smith Solicitors about this, the response was as follows:

65. **'*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*'.**

All of this was raised by the appellant in her written representations dated 16 April 2012 **[S382 – S425]**.

66. On **22 November 2011** Paris Smith Solicitors also wrote to the appellant again warning that their clients' would apply for costs if she still refused to settle the case. The appellant 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. The appellants' attempts to settle were not specific to the Tribunal proceedings alone, the settlement negotiations encompassed existing further and potential claims. The respondents' did not accept any of the

appellant's offers. All of this was raised by the appellant in her written representations dated 16 April 2012 **[S382 – S425]**.

67. The Tribunal stated that the appellant's 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 the appellant's case was not. It cannot be said, by any stretch of the imagination, that the appellant's 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 the appellant were totally consistent with the undisputed contemporaneous documentation.

68. A finding of unreasonableness requires consideration of a thought process as a motivation of the person(s) responsible for conducting the litigation. The appellant put her case in an intelligible manner and provided a detailed schedule of claims. On two separate occasions she even sought further information and written answers in order to help her assess the merits of her claims, however the respondents' refused to comply with her requests and the ET refused both her applications for orders. The appellant also served 5 questionnaires **[C567 - C691]**. This was presented to the tribunal and analyzed **[S35 – S96.paras 433 - 607]**, however in its judgment, the Tribunal failed to even make any references to any of the questionnaires at all **[C703]**.

69. A significant issue that the questionnaire responses highlighted is the fact that even if those investigating the appellant's grievances and appeals did have control, (by the respondents' own admission), CEL policies and procedures could

not be applied to non-CEL staff because non-CEL staff had their own separate policies and procedures, which could only be implemented and applied by their employer. This line of questioning is evidenced in the appellant's submissions **[S102. para 449]**. There is evidence that Sue Ely perjured herself in relation to this issue **[C82. para 8.1c]** of the respondents' response to the equality form questionnaire and **[S34. para 431a]** of the appellant's witness statement. It is important to point out that the Respondents' grounds of resistance state that CEL had control over HR advisers **[C273. para 9]**. The law firm Paris Smith were responsible for preparing the ET3's and the questionnaire responses.

70. The Tribunal also accepted the perjured evidence of the respondents'- namely that Deborah Francis was the Managing Director of the company that the appellant worked for, (even though there was not evidence in the bundle to support this) and it had asserted at **paragraph 110** of the judgment that Alexander Khan was **[C1.para 110]**. The Tribunal clearly contradicted itself in this respect and it fails to explain why the respondents' evidence was preferred in relation to this. It is important to note that Deborah Francis had previously stated in her response to the appellant's equality form questionnaire, that she was Head of Careers and Employability, **[C626. para 14]**. She accepted that the internal and external processes were separate and should be dealt with separately **[C626. para 15]**, but yet she was dealing with both matters.

71. ***Mowlem Technical Services (Scotland) Ltd*** **v** ***King*** [2005] at **[A23. paras 10 & 16]** also makes references to the omission of the Tribunal to the substance of the appellants' evidence/submissions, as is the case in the Tribunal's decision in

relation to its omission to the substance of the appellant's the five questionnaire responses **[C567 - C691]**.

72. ***R Plettell v British Aerospace (Operations) Ltd*** [2001] UKEAT 446/2007 **[A25. paras 14, 16 & 20]**: The Tribunal's failed to grapple with the inferences from the questionnaire responses. The appellant carefully and painstakingly analysed the questionnaire responses in great detail, highlighting the sections where the responses were evasive, equivocal and obstructive and the inaccuracies, inconsistencies and contradictions with the pleaded case and evidence, as was set out in the appellant's witness statement **[S35 – S96.paras 433 - 607]**. However, the Tribunal made no reference to the 5 questionnaire response at all. They were simply ignored. The Tribunal subsequently failed to make proper assessments on the respondents' witnesses. It is submitted that this seriously weakens the Tribunal's finding

73. The appellant's 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 her to pursue such a claim all the way to a full hearing. As a matter of public policy, discrimination cases should be heard. Discrimination cases are generally fact-sensitive and their proper determination is vital in a pluralistic society- see ***Anyanwu v South Bank Students' Union and South bank University*** [2001] IRLR 305, HL **[A3. para 24]**. The Tribunal in its oral judgment granting the cost order, even specifically referred to and relied on matters that took place during the hearing, so this is self-evident that all the

evidence needed to be heard/tested at the full hearing. There was also a public interest in the case being aired. The Tribunal failed to have due regard to this fact.

74. The Tribunal misdirected itself as to the correct test to be applied when considering unreasonable conduct. The Employment Tribunal needed to decide, based on what the appellant knew before the 19 April 2012, if her claim was misconceived and second, if she ought to have understood this from the outset. In ***Cartiers Superfoods v Laws*** [1978] IRLR 315, the EAT **[A10]** 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. The ET failed to take this authority into account.

75. In ***Her Majesty's Attorney General v Mr S Deman*** [2006] UKEAT/0113/06, 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. The appellant's conduct did not involve an improper purpose. There was nothing to suggest that the appellant proceeded with her claim in the "clear knowledge" that it allegedly had no merit nor a prospect of financial reward. The ET failed to take this authority into account.

76. 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. The appellant clearly did. The pre-hearing assessment system was introduced in October 1980 in order to discourage hopeless cases. There were two PHR’s which took place prior to the full hearing. The Employment Tribunal clearly undertook an objective assessment of the prospects of success for the appellant’s 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 the appellant given a warning that she risked an award of costs by pursuing her application and that the Respondents’ contention was that the appellant’s claims had 'no reasonable prospects of success'. The starting point in considering whether the misconceived/unreasonable ground has been made out would be here. The Tribunal failed to have due regard to these facts.

77. The Tribunal failed to have due regard to 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 have made a cost order because the appellant 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'.

78. Throughout the Respondents' failed to point out any alleged 'lack of merit' in the appellant's case 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 progressively increased throughout the proceedings- all of this evidence was presented to the Tribunal in her PHR bundle **[S138]**. The first Respondents' application is therefore also too much of a pendulum swing to be credible. It is also important to note that after its second offer, the Respondents' never offered to pay for the appellant to seek legal advice, (as they had previously done in earlier negotiations).

79. The Tribunal failed to have due regard to the fact that in ***Power v Panasonic (UK) Ltd*** [2004] UKEAT/0439/04/RN, 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, paragraphs 17 – 18.

80. In the light of these facts the Respondents' application is clearly unreasonable and vexatious. The appellant 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 the appellant's actions made during the hearing were not unreasonable and/or unlawful in nature. However, the appellant submits that the respondents' actions have been throughout.

81. The nature of the unreasonable conduct of the proceedings made by those other parties may include the following, (which the Tribunal failed to have due regard to):

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

b) The Respondents' unreasonable refusal of the appellant's 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 the appellant).The Respondents and their legal counsel, have consistently acted in a threatening and abusive manner, introducing scandal at every opportunity in order to frighten the appellant 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 to the EAT in the appellant's Notice of Appeal dated March 2012 and in the Notice of Appeal for this case. 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 the unreasonable conduct by the Respondents and the ET's Orders

82. It is known that, as the results of the unreasonable conduct by the Respondents' and the subsequent decisions/Orders of the ET and the long and drawn out proceedings have had a devastating impact on the appellant's health.

83. The appellant is disabled and suffers from depression, panic attacks, insomnia, eating difficulties and anxiety. The appellant is taking two sets of prescription medication for these conditions. The appellant believes that the manner in which proceedings have been conducted by or on behalf of the Respondent party and by the ET has been oppressive and unreasonable. This is severely compromising her medical condition and she fears for her physical and psychological health. The appellant has no legal representation and she is therefore already more disadvantaged by the pressures.

84. 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. The appellant conservatively estimates that all the Tribunal and Appeal hearings have cost her thousands of pounds in materials and transport alone. In relation to the recent appeal hearing on 5

January this year she generously made no claim for the cost of her time, which in itself would be considerable.

85. In its judgment the Tribunal stated that the respondents' costs were largely incurred by Lewisham Council and that they cannot afford this in times of cost cutting and austerity measures and in those circumstances **'*it cannot be right for the claimant to walk away with no financial repercussions*'** and that she should therefore pay a third of the respondents' costs. It is clear from this comment that the judge was unable to disabuse her mind of any irrelevant personal beliefs or predispositions.

86. Further to the above, this was a matter that the Tribunal should not have taken into account. It is important to note that standard clauses for all public authority contracts require the contractor (CEL/Babcock- the appellant's former employer), not to discriminate unlawfully, and to indemnify the public authority). The appellant had submitted evidence to this effect to the Tribunal during the main hearing in January/February 2012 **[S33.para 52]** and **[S1 – S23]** - an extract of documentary evidence from the trial bundle which is related to the appellant's main hearing witness statement. Therefore this was a perverse finding and not a matter which the Tribunal were entitled to take into account, in relation to the statement that it made about cost cutting and austerity measures - '*it cannot be right for the claimant to walk away with no financial repercussions*'.

87. There is no factual basis contained in the decision for the Tribunal reasoning in relation to the above. The Tribunal determined the appellant's case on this basis. Such error was enormous and there was an error of law in this connection which

formed a significant part of the findings of the Tribunal. The Tribunal proceeded on this basis and in doing so it erred. It is plain to the appellant that this Tribunal was in error of law. A person will be in contempt of court if he presents a deliberately false statement of case, witness statement, (under CPR part 31).

88. It is submitted that the respondents' committed an abuse of the ET's process in consequence of giving a false statement of case. This was extraordinary audacity on the part of the respondents' to confound the judicial process; this is particularly disturbing as the conduct complained of by the appellant did affect the outcome of the hearing.

89. It is submitted that the Respondents' conduct and the ET's failure to take this into account, inhibited the ability of the ET to dispose fairly of the case. The appellant relies upon the Court of Appeal's decision in ***Arrow Nominees Inc v Blackledge*** [2001] BCC 591, [2000] All ER (D) 854 C.P. Rep. 59 **[A5]** for the proposition that the ET's decision on the cost order should be overturned. It is submitted that the Respondents' did not 'play by the rules' and strived to undermine the judicial process.

90. ***Boyce v (1) Wyatt Engineering (2) S J Tapsell Ltd (3) Black & Veatch Ltd*** [2001] EWCA Civ 692 **[A9. paras 10, 15, 20 - 21, 29 -30, 32, 36 - 38]**. As was highlighted in this case, the Tribunal paid too much attention and/or alternatively gave too much weight to the respondents' evidence, the appellant also believes that this applies to her case, thus resulting in the granting of the respondents' unreasonable and vexatious application for a cost order.

91. Anti-discrimination criteria and clauses provide the local population with an assurance that their tax funds are not going to companies willing to discriminate against them. These clauses are in use in the United Kingdom, Austria and Sweden. They can be applied on all public contracts both above and below the European thresholds in goods, services and products. Such a clause would for example include the following wording:

'***The Contractor shall indemnify and keep indemnified the Authority against any liability, loss, costs, expenses, claims or proceedings whatsoever arising under any statute or at common law in respect of:***

a) any loss or damage to property (whether real or personal); and

b) any injury to any person, including injury resulting in death

c) in any way arising out of the provision of the Services by the Contractor, its servants or agents except insofar as such loss, damage or injury shall have been caused by negligence on the part of the Authority, its servants or agents (not being the Contractor or employed by the Contractor).

During and after this agreement, the Contractor agrees to protect, indemnify, defend and hold harmless the Authority, and to the extent required from time to time by the Authority, its officers, agents, and employees, from and against any and all expenses, damages, claims (whether valid or invalid), suits, losses, actions, judgments, liabilities, and costs whatsoever (including legal fees on a full indemnity basis) arising out of, connected with, or resulting from, the Contractor's negligence, misrepresentation or the breach of any obligation to be performed the Contractor under this agreement'.

92. In addition, Lewisham Council were aware of the alleged discrimination by November 2010. Therefore they could have attempted to take action to try to help resolve the matter at the relevant time and when the appellant transferred Lewisham Council chose to defend a case that it had no involvement in, unreasonably incurring costs which were allegedly being funded by tax payers money. They outsourced this work to a private law firm on 9 August 2011, even though they have their own legal department.

93. The appellant believes Lewisham Council unreasonably defended the case and that its actions were also discriminatory. This is clearly set out in her pleadings for the five outstanding claims that she has against Lewisham Council and the individual respondents', which constitute continuing acts. The appellant has covert recordings **[C828]** which evidence the discrimination which took place since her transfer to the council on 1 April 2011. The Council is seeking to prevent the appellant from admitting this crucial evidence. This is also the subject of an EAT appeal, which was lodged on 9 August 2012.

94. If the Tribunal really believed that the appellant's case had no reasonable prospect of success from the outset should have warned the appellant. It had a duty, but failed to give a costs warning where it believed that there was a real risk that an Order for costs would be made against the unsuccessful appellant at the end of the hearing. The Tribunal failed to have due regard to the fact that the Respondents' failed to set this contention out during the settlement negotiations and their correspondence threatening costs, and in particular the Respondents' correspondence on 8 November 2011 which clearly represented a speculative costs threat, designed to do no more than frighten the appellant, regardless of the actual merits of her case.

95. The Tribunal failed to have due regard to the fact that the Respondents' failed to issue a cost warning as early as possible. The EAT is entitled to conclude from this failure that even if her claim was misconceived, she 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 she chose to ignore the warning.

96. The Tribunal failed to have due regard to the fact that the fact that if the Respondents' really believed that the appellant's 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 her supporting evidence from the bundle, which it subsequently agreed to put back in when the EAT intervened). 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

97. 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 **[A22]**, 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.

98. In addition to the above the ET failed to look at the matter as a whole and have regard to the overriding objective. It should not have exercised its discretion to award costs against the appellant in this case. It failed to take into account the factors above and in considering the exercise of that discretion, including the fact that the appellant 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.

99. In ***McPherson v BNP Paribas*** [2004] ICR 1398 **[A22]** 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."

100. It is important to note 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 **[A20]**, at paragraphs 23-27.

101. The ET failed to 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, as demonstrated by the difficulty that the respondents' Barrister and Judge Balogun experienced with the issue in question during the PHR- as set out in page 2, paragraphs 5 and 8, **[C1]**.

102. Claimants should not be discouraged from asserting their rights by costs orders, which are the exception rather than the rule in Employment Tribunals. The appellant set out clearly her inability to pay costs and although this was acknowledged by the Tribunal, it failed to take this into consideration, particularly in light of her poor prospects in finding future employment in her chosen career and at the same level of pay. This is set out in the appellant's written representations dated 16 April 2012 and in her oral testimony. A record of ill health, her unfair dismissal and the fact that the appellant had to take legal action against her employer will clearly debar her from gaining further employment. The Tribunal failed to take this into account.

103. The ET erred in its decision to awards costs against the appellant and the Judge failed to challenge the merit of the costs application. The appellant's believes that she provided the Tribunal with compelling reasons for granting her application, however, these reasons were ignored by the Tribunal and as a result of the Tribunal's decision the appellant will be saddled with a huge debt that she

will struggle to pay for years to come, which will severely exacerbate her already fragile mental state. She will also be prevented from being able to adequately present her next claims and this would amount to a handicap to the attainment of justice. It's clear that natural justice does require that the European Convention for the protection of Human Rights and Fundamental Freedoms in the Article 6 is adhered to.

The Tribunal's Fact Finding and Conclusions

104. Many of the Tribunal's conclusions were based not based on any primary facts or any evidence at all. The Tribunal came to conclusions on an inconsistent and false basis and by an inconsistent and false process of reasoning. It therefore requires scrutiny. The Employment Tribunal failed to undertake extensive treatment of the evidence, with no reference at all to the submissions of the appellant which it would have recorded together with a list of the authorities cited to it. The appellant recognises that the test for perversity is very high. There is hardly any reference at all by the Employment Tribunal in its conclusions to anything said by the appellant.

105. This failure fell foul of the Tribunal's obligation to provide an adequate explanation for its conclusions: ***Meek v City of Birmingham District Council*** [1987] IRLR 250; ***Yeboah v Crofton*** [2002] IRLR 634. There was a failure by the Tribunal to adopt an analytical approach to the evidence. Their findings simply represented a series of criticisms of the Appellant, of which could not be said to be permissible criticisms to make. The fact that the ET failed to give a decision or make findings complying with the comprehensibility test laid down in the cases of

(Meek v City of Birmingham and affirmed in ***Llewellyn Ryland Ltd v Jones & Kemp*** [1999] UKEAT/912/99 **[A19. paras 6 - 8]** amounts to an error of law and in breach of Article 6.1 and 14 ECHR.

106. The absence of reasons which accord with or failure to give reasons consistent with the oral and documentary evidence will constitute an error in law under the principles in Meek. The Meek attack is supported by later authorities (see in particular ***Lindsay v Alliance & Leicester plc*** [2000] EAT/1317/98, **[A18. paras 29 to 50, 51 to 55, 62 & 81]**; ***Sands v Greater Manchester Passenger Transport Executive*** [2001] UKEAT/538/00, **[A28. paras 18 – 27]** and ***Dione v DSG Retail Ltd*** [2000] EAT/811/98, **[A12. paras 7 - 10, 23 & 25]**. ***Mowlem Technical Services (Scotland) Ltd v King*** [2005] at **[A23. paras 10 & 16]** also makes references to the omission of the Tribunal to the substance of the appellants' evidence/submissions.

107. The ET stated that it has considered the appellant's submissions, but gave no further detail on the conclusions drawn from it. That is insufficient as reasoning. The Tribunal failed to comment on whether or not it was persuaded by any of the submissions. It does not say what those submissions were, and if it wasn't, why they were rejected. The appellant believes that the judgment neither articulates the issues as fully as the rule requires nor sets out the facts relating to those issues adequately nor explains its reasons for reaching the conclusions adequately.

108. The Tribunal failed to deal with the specific criticisms that the appellant put before it. The Appellant does not know if parties were to conclude that the

Employment Tribunal had rejected the evidence and submissions that the ET made no reference to. Applying her conclusions on the law to this judgment, the appellant is driven to the conclusion that the judgment does not comply with Rule 30(6) either in form or substance and, is inadequately reasoned to the extent that it is erroneous in law.

109. The ET took into account irrelevant matters and it:

a) failed to apply rules 40(2) and (3) and the guidance in ***Barnsley Metropolitan Borough Council v Yerrakalva*** [2012] IRLR 78 **[A6]**; and

b) made the extreme award even though it is unusual for costs to be awarded at all in Employment Tribunals. In those circumstances any award would therefore be the exception to the normal rule. This is particularly so when a Claimant is unrepresented at a Hearing. It is submitted that the Tribunal failed to take a broad overall approach in relation to ***Yerrakalva***, in that it was appropriate when assessing whether the conduct of proceedings had been reasonable, to keep in mind that a party is a litigant in person, likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser; and

c) failed to take into account that no request was made by the Respondent for a Pre-Hearing Review to decide on the prospects of success of the claim in the Response form or at the Case Management Discussion; and

d) failed to take into account that no consideration was given by Employment Judges at the Case Management Discussions or Pre-Hearing Reviews as to the chances of success of the claim. In relation to point c) and d), this is significant because what mattered was whether a party knew or ought to have known that

the claim was unmeritorious. There is no evidence to suggest that the appellant was aware that her claims had no reasonable prospects of success and it was therefore not a case that the Appellants knew that her claims was doomed to failure. The Tribunal did not give any consideration as to whether or not the Appellants had reasonable grounds for believing that she had a winnable case. The Employment Tribunal was in a position to give warning to the appellant as to costs and it was also aware of offers made to the appellant before the hearing, (which was discussed at the PHR in June 2011 before Judge Baron). Before the hearing the Tribunal adjourned for a full week to read all the evidence and witness statements- the Tribunal failed to express the view to the appellant that she should take advice and that her case may be weak or misconceived, as a preliminary view, and no more. By definition, this means that it cannot be said that the appellant's claims had no reasonable prospect of success, particularly in light of the fact the Tribunal had referred to, in its own judgment dismissing the appellant's claims, that she had genuinely belief in her allegations **[C710.para 28]**.

e) took into account irrelevant matters, i.e. the respondents' costs warning; the incorrect assertion that the appellant's claims were misconceived; the perverse finding that LBL had bared most of the legal costs and the cost-cutting and austerity measures argument in relation to this finding; findings made by the Tribunal during the full hearing; events which had taken place before tribunal proceedings began; and

110. The Tribunal failed to take into account relevant matters:

a) the absence of an application from the Respondents' for a PHR to assess the merits of the appellant's claims or to apply for a strike out or a deposit order; and

b) the appellant's attempts to settle; and

c) the respondents' conduct in relation to settlement negotiations, (carried out in bad faith and refusal of the appellant's reasonable offers); and

d) the respondents' perjured evidence; and

e) the fact that the appellant would be de-barred from future employment; and

f) the fact that the appellant was unrepresented throughout; and

g) the appellant's ill-health throughout most of the proceedings; and

h) the fact that the Tribunal had referred to, in its own judgment dismissing the appellant's claims, that she had genuinely belief in her allegations **[C71.para 28]**.

111. A failure to give effect to the overriding objective to deal with cases justly or a ***Wednesbury*** unreasonable omission (such as the points raised above), in the appellant's judgment is an error of law and an error of law which may have led to a substantial injustice to the Appellant. The Tribunal applied rule 40(3) which was the foundation of the Respondents' application, but was inapplicable. The Tribunal erred and misdirected itself in law in deciding that the Appellant had acted unreasonably in the conduct of the case by pursuing it until the end of trial; alternatively, that such a conclusion was perverse, it was not misconceived to

advance the point. Facts found by the Tribunal that the claim was misconceived and the decision that that the Claimant had therefore acted unreasonably were ones which were unsustainable.

112. Even if the appellant's claims were misconceived, it was not until the evidence had all been heard that the Tribunal could have made its findings of fact, (as set out in its reasons for the cost order), and reached its conclusions. Yet Judge Balogun stated in her judgment, that the appellant's claims had been misconceived from the outset. There was no evidence to suggest that it was, particularly given the fact that no deposit order had been made and the panel themselves, (who prior to the full hearing, had read the extensive documentary evidence over the course of a week), had failed to bring this contention to the appellant's attention. The Tribunal also made reference to events which occurred before the claimant brought legal proceedings against the respondents', and

<u>An appearance of pre-judgement/closed mind</u>

113. The appellant believes that the Tribunal had a closed mind and that it is clear that the Tribunal's sympathy for the Respondents' and distaste for the appellant had weighed with it, as demonstrated by:

a) the way in which the ET dealt with her recusal application, including the 2 month delay in providing a decision; and
b) the fact that it made an extreme order cost against the appellant; and

c) Further, the position was further undermined by the Employment Judge's remarks during the PHR on 19 and 20 April 2012: In the course of giving her judgment the Employment Judge had not merely expressed an opinion but given a formal Judgment on the very points which the three members of the Tribunal would have to decide at the next hearing for the un-stayed part of claim 23000254/2011B, as set out in the cost order dated 23 April 2012 **[C1]**, the appellant's recusal application dated 27 April 2012 **[C845]**. The appellant followed this up with an e-mail to the Tribunal on 30 May 2012 **[S464]**. She did not receive the refusal on the application until 20 June 2012 **[C853]**. In the appellant's view, a fair-minded and informed observer would believe that there was in those circumstances, a real risk that the other two members would feel inhibited in coming to a different conclusion from that which the Judge had apparently definitively expressed and that there is a real risk that there is an appearance of pre-judgment.

114. With regards to point 113c: The Appellant alleges that there is an appearance of pre-judgment. One only has to look at the order on the PHR dated 23 April 2012, **[C1]** - page 4, paragraphs 9 - 11 & 14, - which in a nutshell states that the appellant's claims were 'misconceived from the outset' and 'unmeritorious'. It is important to note that these findings were made by the panel in spite of the supporting evidence, (post-December 2011), that was put before the panel during the hearing at the beginning of the year and which will be re-submitted and the subject of the next full hearing. The panel characterised the totality of that evidence as constituting 'no evidence'.

115. The respondents' are not even seeking to submit new witness statements in relation to the stayed part of claim number 2300254/2011, they indicated at the PHR on 20 April 2012 (by way of written submissions), **[S438]** that they will be using the witness statements that were submitted for the previous hearing. They also indicated that they will not be submitting any new evidence, asserting that all the evidence has already been presented to the Tribunal. By 2 August 2012, during another PHR, they indicated that they would not even be calling any witnesses either, which is clearly an attempt to avoid their witnesses having to answer any questions relating to their previous perjured evidence.

116. The Appellant believes that there is evidence of pre-judgment and that the Tribunal had a closed mind and that this vitiated the Tribunal's decision on the cost order. In the appellant's view, there is nothing provisional about the findings that were made by the Tribunal in relation to the forthcoming case and its demonstrates pre-judgment and also throws doubt on the Tribunal's decision on the cost order, in that it was not could not have been made with an objective judicial mind.

117. It is clear that the Tribunal's sympathy for the Respondents' and distaste for the appellant had weighed with it, as demonstrated by the language in its judgment dated 23 April 2012 **[C1]** and the fact that it made an extreme cost order against the appellant, even though the appellant had set out compelling reasons as to why it should not, in her written submissions and witness statements dated 16 April 2012 and which made it clear that she was unemployed, disabled and would be debarred from employment as a result of her unlawful dismissal by the respondents'. However, this was ignored and the

appellant was severely criticized by the ET for bringing the claims against the respondents'. It is difficult to imagine a more adverse series of conclusions by an Employment Tribunal against the appellant, particularly as the Employment Tribunal was not entitled to come to the vast majority of conclusions on the evidence it heard.

118. In addition, the Tribunal expressed itself incorrectly in holding, **[C1]** on page 4, paragraph 13 of the cost order, that: '*There is no reason to assume that she won't return to her chosen career at this level at some point in the future*'. This finding was clearly perverse and it was not a conclusion that the Tribunal was entitled to arrive at, based upon the evidence. The Tribunal was presented with clear evidence that in fact the opposite was true and the her ill health meant that she would be unlikely to be able to work again for a further period into the future and she even if she did become well enough to work again, she would be debarred from work in her chosen career at that level again. The Judge may consider the ability to pay of the paying party, but that is a discretionary matter and he/she is not obliged to do so, but since the Tribunal did it is obliged to set out the reasons why this was not taken into account. It is submitted that the reasons given by the Tribunal were not reasons that the Tribunal were entitled to come to and as such, were perverse.

119. On page 4, paragraph 14 of the cost order **[C1]**, the ET even makes a statement which supports the appellant's above assertion- '***Those costs have largely been borne by the first Respondent, a public body. These are costs that the local authority can no doubt ill afford in these times of cost cutting***

and austerity measures. In those circumstances, it cannot be just for the Claimant to walk away with no financial repercussion'.

120. The ET persistently failed to make deposit orders in relation to the appellant's claims and this is a familiar patter which has continued since the ET's cost order dated 23 April 2012. It is important to note that on 19 and 20 April 2012, the Tribunal failed to make a deposit order in relation to the 'stayed' part of claim number 2300254/2011, even though the appellant raised the issue of a cost order with the judge on 20 April 2012 and the respondents' put forward written submissions asserting that the appellant's claims have no reasonable prospect of success in light of the fact that the 'unstayed' part of the claim had been dismissed. The appellant highlighted the Tribunal's failure to make a deposit order, in her e-mail to the ET dated 27 April 2012, setting out additional grounds for a review of the decision on the cost order. It is clear from the order on the PHR/CMD that the Tribunal did not see this as an issue, **[C1]** at page 6, paragraph 6.

121. **On 28 May 2012**, the ET again failed to list a PHR to determine the issue of a deposit order for her on-going claims **[C851]**, even though the appellant had requested this and the respondents had asserted in their ET3's **[S455 & 458 - 45]** dated 15 May 2012 that the appellant's claims (**2302643/12 & 2302645/12**) have no reasonable prospect of success and threatened costs if the appellant's claims failed. At the PHR on 2 August 2012, the ET again failed to determine the issue of deposit orders for her on-going claims **[C862]**, even though the appellant

had raised the issue of the Respondents' numerous cost threats in her written submission **[S471a –m]**.

122. The EAT is entitled to have regard to this fact, as it is clear evidence that the appellant has been prejudiced by the ET's persistent failure to assist her as an unrepresented disabled claimant and aid her in assessing how serious she should take the respondents' numerous costs threats.

123. Judge Balogun had also expressed very clear views during the PHR on 20 April 2012 in relation to the appellant's allegations regarding the individual respondent Marina Waters' and her alleged inducement by LBL, stating on page 2 & 3, paragraph 8 of the order on the PHR/CMD dated 23 April 2012 **[C1]**, '***it is difficult to see how that gives rise to a disability discrimination complaint. On the conspiracy allegation, there are no primary facts pleaded that remotely establish a prima facie case of discrimination under the EQA***'. This firm conclusion was made by the Judge without her having seen/heard all the evidence. The Tribunal did not state that the view was provisional only and it clearly was not. The appellant is therefore of the view that she was not given a fair hearing.

124. The appellant was severely criticized by the ET for bringing the claims against the respondents' **[C1. paras 9 - 14]**. It is difficult to imagine a more adverse series of findings of fact and conclusions by an Employment Tribunal against the appellant, particularly as the Employment Tribunal was not entitled to

come to the vast majority of findings of fact and conclusions on the evidence it heard.

125. The appellant believes that the above statements made by the Tribunal were inflammatory and prejudicial and she is not satisfied that the Tribunal properly carried out its fact finding role so as to fully explain its judgment and conclusions. The ET did not state that its opinions were expressed as provisional views and the way the panel expressed itself has clearly made the position irretrievable. It can be argued that the mere fact that a judge/panel, has commented adversely on a party would not without something more found a sustainable objection. However, it is clear that the appellant has offered much more than this as constituting grounds for granting her appeal.

126. In ***Amjad v Steadman-Byrne*** [2007] EWCA Civ 625, [2007] All ER (D) 348 **[A2. para 10, 12, 16 & 18]** the appeal was allowed because it was held that there was the premature formation of a concluded view adverse to one party. The Tribunal failed to have regard to all circumstances relevant to the issues in the action and the history of the action hitherto and the matters leading to the action. The EAT will need to ask itself, how will the fact that the panel did not withdraw ahead of the PHR and then went on to make an extreme cost order appear to the reasonable onlooker? The appellant believes that the panel was unable to bring to bear, on the determination of the cost application, an open mind and objectivity which is required in the discharge of judicial office and in any event there must now be an appearance of pre-judgment.

PRACTICE AND PROCEDURE

127. The Violations of the Legal and European Norms in this case are:

a) To the appellant's 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 and deal with cases justly (including ensuring that the parties are on an equal footing): reg 3(2). This duty cannot be performed without ensuring that the case is heard by a judge and panel who that have not already expressed very firm clear views which are highly relevant to the issues to be determined at the forthcoming PHR and full hearing. This is not consistent with a fair trial/process. This factor is in direct contradiction with The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. This must be an administrative error. In relation to the last ground, the tribunal should act in the way they consider is best in the interests of justice in each individual case. The appellant's consider that she will suffer a great injustice as a result of the Tribunal's decision.

b) The European Convention for the protection of Human Rights and Fundamental Freedoms in the Article 6 clearly states that the appellant has a right to a fair trial. This embraces the principles of equality of arms and the right to adversarial proceedings

CONCLUSION

128. In conclusion, there is ground for upholding the appellant's appeal. The Employment Tribunal erred its approach to this matter. The Appellant respectfully requests that the EAT allow her to amend her 'Notice of Appeal' to include any grounds/arguments advanced in her skeleton arguments, which have not been cited in her 'Notice of Appeal'. The appellant that the decision in this matter be made by the EAT and not remitted. It is submitted that remission on what is in fact a case on evidence is not appropriate and the EAT should not shrink from making its own decision.

129. The EAT is invited to allow the appeal and substitute the decision of the ET. It is clear that the appellant is being punished for simply bringing the case and defending her legislative and human rights. The appellant believes that she has been let down by the ET and as a result of this she believes that this has given power to the perpetrators and deterred future whistleblowers from coming forward.

130. This is a serious case, not only for the appellant, but for other Claimants as well. If the ET's decision is allowed to stand it will set a dangerous precedent and deter unrepresented claimants from bring ET claims, through fear of being hit with crippling cost, which will put them in debt for years to come. The Tribunal made an order for costs in a very large amount against the appellant; such an order is well beyond means of the appellant and will have very serious potential consequences for her and it will also act as a disincentive to other claimants bringing legitimate claims. It simply sends out the wrong message and makes it even harder for minorities, disabled, lay and unemployed people to obtain justice. This is even more so if an individual, (like the appellant), fits all these categories.

131. The appellant turned to the ET for redress and justice, but she did not find this. Instead she experienced further injustice rather than help to resolve it. It could have changed her whole view point about justice, but it didn't and she still has faith that the EAT will be able to provide her with some measure of justice.

132. It would reassure the appellant that the EAT is committed to equal treatment and ensuring just outcomes and the overturning of the ET's decisions would reassure her that the EAT understands the vital role it plays in ensuring that that a disability does not amount to a handicap to the attainment of justice and would further the overriding objective in dealing with this matter in the most expeditious, efficient and fair way possible and in a way that enables her to fully participate in the tribunal process to the best of her ability and without being put at a disadvantage.

133. As such, the Employment Appeal Tribunal should take utmost care in making sure that its overriding objective as defined in the Employment Appeal Tribunal Rules 1993 Overriding objective 2A. (1) The overriding objective of these Rules is to enable the Appeal Tribunal to deal with cases justly. (2) Dealing with a case justly includes, so far as practicable– (a) ensuring that the parties are on an equal footing; (b) dealing with the case in ways which are proportionate to the importance and complexity of the issues; (c) ensuring that it is dealt with expeditiously and fairly; and (d) saving expense. (3) The parties shall assist the Appeal Tribunal to further the overriding objective is achieved.

ORDERS SOUGHT

134. In order to expedite the case in a fair and just way, the appellant urges the Employment Appeal Tribunal to issue the following necessary order:

a) To allow the appellant's appeal on the cost order and set aside the judgment of the ET; and

b) To stay this case pending the outcome of case number UKEAT PA/0401/12/SM (the appellant's appeal of the ET's decision dated 2 March 2012- the dismissed claims), which has been consolidated with this case and/or for these two cases to be consolidated and heard together in a PH and/or FH, should they be ordered and if they should be ordered, for the hearings to be expedited as the High Court hearing for the cost assessment has been set to be heard in the week commencing **18 March 2013 [S474]** . The outcome of this case and the high Court cost assessment hearing will depend heavily on justice case number UKEAT PA/0401/12/SM.

Ms AA Vaughan

3 September 2012