Neutral Citation Number: [2022] EWHC 145 (QB)

Case No: QB-2018-001395

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 January 2022

Before:

Mrs Justice Lambert DBE

- -

Between:

Milan Radia	**Claimant**
- and -	
Professor David Ian Marks	**Defendant**

- -
- -

Dr Anton van Dellen (instructed by **Direct Access**) for the **Claimant**
Ms Nadia Whittaker (instructed by **MPS**) for the **Defendant**

Hearing dates: 21-22 July 2021, 26 July 2021 and 6 September 2021
Further submissions on 9 and 17 November 2021

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 1630 on Wednesday, 26 January 2022.

Mrs Justice Lambert:

Introduction

1. Between June 2006 and March 2017 the claimant worked for a global investment banking firm, Jefferies Ltd ("Jefferies") as a research analyst in the equity market. On 19 November 2009, he was diagnosed with Acute Myeloid Leukaemia ("AML") which resulted in his admission to hospital for treatment. He remained an in-patient until 16 April 2010 and then returned to work on a phased return basis in late June 2010.

2. In May 2015 he commenced proceedings in the Employment Tribunal ("the Tribunal") alleging disability discrimination against Jefferies, the disability in question being AML. In a detailed reserved judgment handed down on 3 February 2017 ("the liability decision") the claim was comprehensively dismissed. The Tribunal found that in a number of respects the claimant had not told the truth and that he had intentionally misled the Tribunal. There was no appeal from that judgment. As threatened by Jefferies in pre-action correspondence, the dismissal of the claim was closely followed (in March 2017) by an application by Jefferies for its costs incurred in defending the claim. This application succeeded. In a further reserved judgment ("the costs decision") the Tribunal found that the claimant had acted unreasonably by telling lies which were "*deliberate, serious and central to the case*" concerning his weight following chemotherapy and concerning a holiday in Mexico in May 2011 which he had alleged he had been "*forced to miss*". This unreasonable conduct justified an award of costs in respect of those complaints. However, the Tribunal also found that a whole costs order should be made because none of the many complaints of disability discrimination had had a reasonable prospect of success and the claimant had acted unreasonably in commencing and/or pursuing such a claim when he knew or ought to have known that the complaints were unmeritorious.

3. The costs ruling was appealed unsuccessfully to the Employment Appeal Tribunal. The claimant sought permission to appeal from the Court of Appeal which was refused by Lord Justice Bean on 20 November 2020. Bean LJ noted that the claimant had not appealed the liability decision of February 2017 and that that decision had contained "*a devastating series of findings about the claimant's evidence which amount in my view to findings of dishonesty*". He found that both the liability and costs decisions contained unimpeachable findings of fact which the Tribunal had been entitled to make and which justified the Tribunal making an award of costs in Jefferies' favour.

4. Following the refusal of permission, there was a contested detailed costs assessment (lasting, it seems, over seven days). On 5 May 2021, the Tribunal awarded Jefferies £600,672.66 made up of assessed costs of £357,844, the costs of the detailed assessment of £138,044 and interest of £104,784. It is, in essence, those costs which are the subject of this claim.

5. There has been other litigation arising from the claimant's employment by Jefferies. It is not central to the issues which I must decide, so I sketch it in outline form only. The claimant brought a second claim for victimisation in September 2016. Following the promulgation of the liability decision, the claimant was suspended by Jefferies and, after a disciplinary hearing, summarily dismissed for gross misconduct on 6 March 2017. The credibility findings of the Tribunal were a matter of particular concern given that the claimant was regulated by the Financial Conduct Authority. The dismissal was

unsuccessfully appealed, albeit without an appeal hearing having been conducted by Jefferies. In April 2017, the claimant issued a further (the third) set of proceedings in which he complained that his suspension on full pay, his dismissal and Jefferies' refusal to hold an appeal hearing amounted to whistleblowing detriment, victimisation and unfair dismissal. The unfair dismissal claim and the other claims were heard in October 2017 and dismissed. On appeal, Laing J (as she then was) remitted the case to the Employment Tribunal to consider a single point: whether the failure to conduct an appeal hearing rendered the dismissal unfair. That remitted point was considered by the Tribunal on 4-6 October 2021 and the decision promulgated on 25 October 2021. The Tribunal concluded that the claim for unfair dismissal was well founded on the basis that Jefferies had not conducted an appeal hearing. However, it also found that the decision to dismiss the claimant would have been upheld even if an appeal hearing had taken place. A reduction of 100% was applied to any compensation that might have been awarded on the basis that the claimant contributed to his dismissal to that extent.

6. This civil action for damages was commenced in May 2018. The defendant is a consultant in haematology and stem cell transplantation at University Hospitals Bristol NHS Foundation Trust. He was instructed in the liability hearing as a single joint expert to report upon, and if necessary give evidence about, the effect of AML and its treatment upon the claimant's condition and his mental and physical fatigue levels following his return to work. It is the claimant's case, in essence, that in breach of duty (in tort and in contract) the defendant misreported the claimant's account to him (given at the assessment consultation on 22 March 2016) concerning his chemotherapy-related weight loss and that he then compounded this error by (again in breach of duty) not undertaking a competent review of the medical records which would have revealed the error in the report and taking steps to correct his mistake. The discrepancy between the weight as recorded by the defendant in his report and that recorded in the medical records was explored during the liability hearing. The discrepancy was, submits the claimant, the root cause of the Tribunal's conclusion that the claimant was untruthful which in turn led it to, as he put it to me, "exclude" all of his evidence. This, he submits, led to not only the adverse liability findings but the consequential adverse costs order.

7. There are three central issues for my determination.

    a. The first is whether the loss alleged (however characterised) falls within the scope of the duty owed by the defendant to the claimant. This issue raises the question of what harm (or what risk) the defendant was under a duty to protect the claimant from.

    b. The second issue is whether the defendant acted in breach of that duty. It is worth noting at this stage that the defendant accepts that he made a mistake by not picking up the references to the claimant's weight on discharge when reviewing the hospital records. The question for me is whether that mistake (and the other allegations) amount to a breach of duty. To my initial surprise, the parties deployed expert evidence on this point in order to assist me on the standard of care of an expert witness. I return to this later.

    c. The third issue, putting it broadly, is one of causation. Both factual and legal causation.

8. Before me, the claimant was represented by Dr van Dellen and the defendant by Ms Nadia Whittaker. I repeat my thanks to them for their careful submissions.

Factual Background

9. The factual background to the claim is largely uncontentious. I set it out below.

10. The claimant started his career in the City in 1993 after graduating with a first class degree in economics from Cambridge University. He had an apparently successful and lucrative start to his career with Prudential Portfolio Managers before moving first to UBS and then to Bridgewell Securities. He tells me that he was head-hunted by Jefferies and that following a period of garden leave he joined that company in June 2006 as Senior Vice President and Senior Research Analyst.

11. On 19 November 2009, the claimant was diagnosed with AML a serious form of blood cancer. He was admitted to hospital where he underwent four cycles of chemotherapy, remaining an in-patient until 16 April 2010, save for five days at home every seven weeks. He emerged from hospital at the end of treatment in April 2010 in a "*frail and exhausted state*". His hair, which had fallen out during chemotherapy, had grown back entirely white and he looked about 20 years older than when he had gone into hospital in November 2009. He returned to work on a phased basis in late June 2010 following an occupational health assessment.

Disability Discrimination Claim

12. The claimant submitted a claim to the Tribunal in May 2015 raising complaints of discrimination, harassment and victimisation in his employment dating back to his return to work in June 2010 and thereafter. His details of claim referred to the condition, AML, which, as a form of cancer, rendered him automatically subject to a disability for the purposes of the Equality Act 2010. He claimed that the condition and the treatment which he had undergone had left him with residual fatigue. He claimed discrimination due to disability in ten respects including the hiring and re-deployment of personnel; being forced to miss the majority of his holiday in May 2011; the conduct of performance reviews; and low relative value bonus payments. He alleged failure to comply with the duty to make reasonable adjustments in requiring him to work excessive hours and in requiring him to miss his holiday, both of which placed him at a substantial disadvantage given his condition. He claimed that Jefferies had failed to take reasonable steps to avoid the substantial disadvantage due to his illness and had thereby discriminated against him.

13. Jefferies resisted each of the claims. In paragraph one of its response it referred to the fact that the claimant had first raised allegations of discrimination which dated back five years in January 2015 in the context of negotiation with his manager about the level of severance payment. Each allegation was considered and refuted but the overarching theme of the response was that the claim was "*opportunistic, has no merit and is largely out of time*".

Instruction of Defendant

14. On 1 November 2015, the claimant emailed the defendant seeking a medical report "*relating to the impact of my AML … centering on the post treatment impact of the condition and the chemotherapy that I underwent*". The defendant indicated that he

would accept the instructions. There was then some considerable delay before a joint letter of instruction was sent to the defendant on 16 March 2016. Correspondence from the defendant to the parties indicated his concern and frustration at not being kept up to date with progress and the short time frames within which he was to see the claimant and provide his report. He made clear that he had professional and other commitments which affected his ability to comply with deadlines.

15. The letter of instruction (which was written by Jefferies' solicitors) included the following:

> "*We set out below the purpose and scope of the medical report that you have been commissioned to prepare. We attach a short bundle of documents which are relevant to the claim. This contains* (contents listed) … *Both parties agree that Mr Radia is disabled by reason of his having suffered from AML. However, there is a disagreement about the effects of the AML and whether or not Jefferies was, or should have been, aware of them. Mr Radia has brought a claim in the employment tribunal alleging that Jefferies treated him less favourably on the ground of his AML, treated him less favourably for a reason related to his AML, harassed him on the ground of his AML and/or failed to make reasonable adjustments for his condition. Jefferies denies these allegations. An understanding of AML and its effects will form part of the issues that the tribunal needs to understand in its decision making."*

16. The defendant was reminded of his duty as an expert to the court "*which overrides any obligation to the person from whom he or she has received instructions*". He was also informed that whether the claimant had been treated in the way alleged by Jefferies was a question for the Tribunal and so "*you should not reach conclusions on these matters*" in the report.

17. Following this preliminary instruction, the defendant was instructed to provide a report addressing a series of questions. Those were:

    i) the nature, seriousness and progression of the claimant's AML from the onset of the condition;

    ii) an explanation of the treatment which the claimant underwent in relation to his AML and any side effects;

    iii) the claimant's medical condition as it would have been (a) between August 2010 and May 2011 and (b) in May 2011 dealing in particular with whether he was suffering from mental or physical fatigue as a direct or indirect consequence of his AML; whether he was suffering from fatigue as a consequence of his treatment during that period and if so, how serious the fatigue was and how it may have affected his ability to work.

18. Medical records were sent to the defendant on 18 March 2016 in ten emailed tranches. The defendant requested discharge summaries from the Royal Free Hospital which were in turn requested by the claimant. On 21 March 2016, a second set of medical records was collected by the claimant in person from the Royal Free Hospital, scanned and sent to the defendant in readiness for the assessment which was due to take place the following day (22 March 2016) at the Spire Hospital in Bristol.

19. The defendant made a handwritten note of his consultation of 22 March 2016 on a document which contained some memory-jogging headings. His note included the following alongside the heading "weight loss": "*95kg -> 50kg white hair, looked 60 years. Not depressed*". Following the heading "exercise tolerance" he noted that the claimant had been discharged from hospital on 16 April 2010 and had resumed work on 28 June 2010, 10 weeks later. Adjacent to the date of the claimant's return to work was a line/arrow linking it with "*70 kg+"*. There was a further weight reference in the handwritten note: "*35 kg in 6 -9 months*".

20. The report was dated 1 April 2016 but was sent to the parties on 29 March 2016. It was divided into a number of sections: issues relating to AML; a chronology of events; an assessment of Mr Radia; and answers to questions posed in the instructions.

21. So far as relevant to the issues before me the report included the following observations:

    i) *"It is very clear that Mr Radia's leukaemic treatment was considerably more arduous than average. When he started treatment, he weighed 95 kg and at the end of treatment he weighed slightly less than 50 kg ie he had lost nearly 50% of his total body weight. In my 35 years of treating patients with leukaemia I have never seen such severe weight loss. This is of relevance to his subsequent fatigue. When he emerged from hospital the final time, he had white hair and his friends and family thought that he looked much older than his chronological age*".

    ii) Between August 2010 and May 2011, "*Mr Radia was suffering from both mental and physical fatigue due to his AML. The physical fatigue was mainly due as a direct effect of his AML. His AML treatment was extremely arduous and he lost nearly half of his body weight. Losing this much weight is always associated with fatigue. There is also a well-known syndrome of post-leukaemia and post-chemotherapy fatigue. This is analogous to chronic fatigue syndrome which is recognised as a real entity although the precise mechanisms are not understood…The chronic fatigue which occurs after chemotherapy can be quite durable but generally improves with time*."

22. He concluded that in his opinion the claimant was suffering from fatigue as a consequence of treatment. It was not functional but "*a real problem*" related to the arduous chemotherapy, prolonged hospitalisation and profound weight loss. The defendant signed off his report by saying that he would be happy to deal with any issues arising from the case or clarify his answers to the questions posed. He submitted a bill which included payment for review of three bundles of documents of moderate size and complexity.

23. Following service of the joint expert report there were various communications between the parties and the defendant concerning preparations for the hearing, but no issues were raised, nor comments made, concerning the joint expert report (by either side). There were no concerns raised about the factual accuracy of the report, specifically, whether it reflected what the claimant had said during the assessment. No questions by way of clarification were posed. Shortly before the Tribunal hearing, Jefferies indicated that they required the defendant to attend the hearing for cross examination. No query appears to have been made by the claimant or his solicitors in response to this unusual request.

The Liability Hearing

24. The claimant was represented at the hearing by junior counsel, as was Jefferies. The hearing was conducted over seven days in two stages: between 3 and 11 November 2016, and between 29 November 2016 and 1 December 2016. The defendant's evidence was interposed between sections of the claimant's evidence.

25. On day 2 of the hearing, and before the defendant had given evidence, the cross examination of the claimant started. The questioning covered each of his many complaints and went on for some time. On a number of occasions, the Tribunal expressed its frustration that the claimant was not answering the questions and the knock-on effect on the timetable.

26. In respect of his weight upon leaving hospital, the claimant was initially directed to a page in his medical records which stated his weight at that time to be 81.5kg. The claimant responded: "*that's not correct, I was around 50/60 kg*". It was put to the claimant once again that the medical records showed that, on discharge, he was at the upper end of the BMI range, to which the claimant responded: "*impossible*" or "*absolutely impossible*". He confirmed that the medical records to which he was referred were his but said that he "*had not looked through them before*". Later in the case, and after the defendant had given evidence, the claimant was asked some further questions about his weight by the Tribunal. He was asked, quite simply, when it was that he had weighed 50kg. According to the transcript of evidence made by his solicitors, the claimant did not answer that question. Instead, he told the Tribunal that his weight had "*bottomed out*" at around 65kg. He referred to an "*error in communication*" but confirmed that his weight had been lower than 80kg. Seemingly, the claimant's response to the Tribunal was that he had never weighed as little as 50kg.

27. The defendant gave evidence on day 3 of the hearing. He confirmed that he had recorded that at the end of treatment the claimant had weighed slightly less than 50kg, saying that "*45 kg of 95 kg which is just short of 50% and I think it's quite the worse weight loss I've ever seen in a patient with AML*". He confirmed that weight loss "*was probably the major objective marker of how arduous his chemotherapy was … it certainly impacted very significantly on my assessment, the other major determinant being the claimant's own assessment of how he was feeling and what he was going through at the time"*. Weight, he said was a "*basic parameter of wellbeing plus a person who has uncontrolled cancer loses weight, they are hypermetabolic*". He said that it would have been routine practice for patients undergoing chemotherapy to be weighed on a daily basis and that taken overall the weights recorded would be accurate.

28. With this preamble, he was then taken to the weight measurements on a nutrition screening tool dated 11 April 2010, shortly before the claimant's discharge from hospital. His weight was recorded as 81.5kgs. In the light of this discrepancy, there was a discussion by the Tribunal members and the defendant as to the source of the weight of 50 kg which he had recorded in his report. The defendant told the Tribunal that the weight "*came from Mr Radia. There were minimal records of his third and fourth cycles provided to me and it was my understanding that the Royal Free was asked for them and they were not able to be found and I had to make do with the sources of information I had and what I was told*".

29. Predictably, it was put to the defendant that if the weight loss following treatment had been overestimated and the claimant had been "*actually overweight or appropriate weight*" then his analysis of the impact of the treatment would be different. He responded that the recorded weight loss was substantially less, but it was still in the order of 13.5kg. The defendant was asked whether "*the fact that Mr Radia said his weight was 50 kg when it looks like it was 83 kg raises questions about the accuracy about the other things he told you about his condition*?" To which he responded "*yes, I suppose I've got to agree if a person is inaccurate about one part of their history they're more likely to be inaccurate in other parts*".

30. The Tribunal reserved judgment which was handed down on 3 February 2017. As Bean LJ was later to observe, it was, from the claimant's perspective, a devastating judgment. So far as relevant to the issues before me, the Tribunal made the following factual findings.

31. The Tribunal found the claimant's evidence was not credible in many respects.

    i) It observed that "*under cross examination, he persistently failed to answer the questions put to him and was on lots of occasions evasive and had to be told repeatedly by the Tribunal to answer the questions*".

    ii) It found that in a number of respects the claimant "*either did not tell the truth or misled the Tribunal*". Various examples had been identified by counsel for Jefferies in her closing submission but those which "*stood out*" included the claimant's evidence that he had told the Tribunal that when he left hospital following his treatment for AML he weighed 50 to 60 kg and that this had been a material piece of evidence in the defendant's report concerning the impact of AML on him. Given however that the hospital discharge records demonstrated that the claimant weighed 81.5 kg at the time of discharge, the Tribunal concluded that the account given to the defendant by the claimant was "*clearly an untruth*".

    iii) The Tribunal also referred to the claimant's evidence that he had been forced to miss his holiday in Mexico when he had to do some additional work for Jefferies. "*However, not only did he join his family on the holiday within four days of it commencing but he also extended his holiday so that it was just as long as he wanted it to be. He finally admitted that it was misleading for him to refer to joining his family for the "last few days" of his holiday in his claim form when in fact he joined them for a matter of weeks".*

    iv) The Tribunal found that the claimant had given "*untrue evidence*" by exaggerating the length of his absence from work for his knee injury; that he had given untrue evidence that he had not been aware of his disabled status until the end of 2014 "*which he then corrected to say in June or July 2013*" when in his witness statement he had said his wife had given him advice in May/June 2010 that he had been subjected potentially to disability discrimination.

32. In addition to the findings of "untrue evidence" or, to put it less euphemistically, dishonesty, the Tribunal found that the claimant had "*behaved cynically*" by "*sitting on serious allegations"* whether or not he believed them to be true and choosing to deploy

them tactically when he considered it to be in his interests to do so many years later. The Tribunal noted that "*in cross examination following a number of evasive answers the claimant finally admitted that the fact that he had sat on it for five years could be a cause for concern*". Further that the claimant "*is always ready to believe the worst about anybody and that very often his assessment of events simply did not tie in with reality … This unwillingness to acknowledge the obvious casts further doubt on his credibility*".

33. The Tribunal's assessment of the claimant's credibility and reliability as a witness compared unfavourably with its assessment of the witnesses called on behalf of Jefferies. It concluded that in the absence of contemporaneous documentation or other evidence to the contrary where there was a conflict between the evidence of the claimant and that of the respondent's witnesses it would be "*inclined to prefer the evidence of the respondent's witnesses to that of the claimant*".

34. Having set out its initial assessment, the Tribunal proceeded, over the course of the following 250 paragraphs of the liability decision, to state its findings of fact and its conclusions on the agreed list of issues. A number of those findings of fact were determined or influenced by the Tribunal preferring the evidence of the Jefferies' witnesses over that of the claimant, but by no means all of them. For example, the claimant had raised a series of complaints about the level of his bonuses between 2010 and 2014. He relied upon comparators to prove his point. The Tribunal rejected those claims on the basis that it identified significant differences between the various comparators which the claimant had selected, both generally and specifically in relation to specific bonus years, and the claimant himself such that the comparators were inappropriate for the purposes of the complaints. The Tribunal found that there was nothing to suggest that the bonus figures had not been made on the basis of established and appropriate criteria.

35. The evidence of the defendant was directly relevant to claims that Jefferies had failed to comply with its duty to make reasonable adjustments. The Tribunal had to consider whether the provision, criteria or practice of requiring research analysts to work long hours during the working week placed the claimant at a substantial disadvantage due to fatigue derived from his AML (and its treatment) when compared with persons not so disabled. The Tribunal found as a fact that the claimant had not suffered from significant fatigue as a result of AML or its treatment. In reaching this conclusion it noted the contents of the defendant's report that between 2010 and 2011 the claimant had been suffering from both physical and mental fatigue due to his AML and that such fatigue typically improves within 6 or 12 months following treatment. However it considered that that opinion had to be viewed in the context of the defendant's evidence as a whole including his acceptance that (a) weight was the major objective marker of the effect of chemotherapy and (b) if the claimant's weight at the end of treatment was not as it had been reported to him then his analysis would change.

36. In rejecting the claim that the claimant was at a disadvantage due to significant fatigue, the Tribunal also relied upon the absence of any contemporaneous evidence (between 2010 and 2015) that the claimant had reported fatigue due to AML. It noted that in other contexts the claimant had demonstrated that he was well able to speak up for himself as he had done after his knee injury when he "*had been perfectly well able to tell his line manager in great detail about the prognosis for his knee*." It concluded that if he had felt as tired as he claimed due to his condition he would "*surely have gone into some of the detail*" with his line manager. Also, the Tribunal found that it was highly unlikely

that the claimant would have been able to continue working as he had done so, if he had been suffering from fatigue to the extent claimed.

37. The Tribunal concluded that "*For these reasons and in particular the change in assessment which the information about his weight brings about we consider that whilst the claimant probably did suffer some fatigue as a result of his AML and the treatment for it, particularly closer to his return to work, that fatigue did not stop him doing his job and did not put him at a disadvantage in doing his job and certainly not one which was a substantial disadvantage*".

38. The Tribunal returned to the issue in the section of the decision dealing with the claim for failure to make reasonable adjustments. It confirmed that there was no substantial fatigue and no need for reasonable adjustments; that Jefferies did not know and could not reasonably have been expected to have known that the claimant was likely to be placed at a substantial disadvantage. It remarked: "*we accept that the claimant should be taken at his word. He never said to his Managers or the Human Resources department that working conditions were difficult for him due to his condition"*.

The Costs Hearing

39. Following the handing down of the liability decision on 3 February 2017, Jefferies brought an application for costs (on 3 March 2017) in respect of its costs in defending the first claim. The Tribunal heard evidence and submissions on the costs issue on 31 July 2017 and 1 August 2017 and reserved its decision which was handed down on 7 September 2017. The application for costs was granted.

40. The Tribunal referred to its findings of fact in the substantive hearing which included that in some respects the claimant had not told the truth or had misled the Tribunal and that he had "*sat on serious allegations*". It found both to be examples of unreasonable conduct. However, it did not find that everything which the claimant had said and every allegation which was made was a lie and "*to this extent it cannot be said that the whole claim was a lie*". There were two lies which "*related, both deliberately, seriously and centrally"* to various of the allegations: the lie about his weight at the end of treatment and the statement that he had been "*forced to miss his holiday in Mexico, when in fact he did not*". The Tribunal concluded that to the extent that costs were incurred in defending these particular complaints it would have, subject to other factors, been minded to make an award of costs in relation to the costs of defending those specific allegations. The Tribunal continued: "*we would not have considered that other costs incurred in defending the claim flowed from these examples of unreasonableness and would not on this particular basis have made an order in respect of the costs of defending those other elements of the claim*".

41. The Tribunal then considered whether any of the complaints had had any reasonable prospect of success. It noted that there were many complaints in a long list of issues which had failed on multiple grounds. It found that in the context of this case "*with an intelligent claimant and good legal representation*" the claimant should have been well aware from the start that there was no reasonable prospect of success in showing that any of the alleged treatment was for a discriminatory reason. Although in its liability decision the Tribunal had found that the claimant had acted "cynically" in sitting on allegations of discrimination until 2015 it had not gone so far as to find that the claimant had known from the outset that his claims were wholly fallacious. It made good that shortfall in the

costs judgment by finding expressly that, had the claimant believed that his allegations were true, then he would have raised them much sooner than in fact he did. The Tribunal therefore concluded that the claimant did act unreasonably in commencing and/or pursuing his claim given that the claimant knew that his complaints had no prospect of success from the start.

42. The Tribunal decided that it should exercise its discretion to make the whole costs order. It reasoned that many of its earlier findings were relevant but additionally the Tribunal considered the claimant (although claiming to have substantial debts) had a stream of income available with which to pursue expensive litigation involving the instruction of reputable firms of solicitors and counsel.

The Appeal to the Employment Appeal Tribunal and Application for Permission to Appeal to the Court of Appeal

43. The claimant's appeal from the costs order was comprehensively dismissed by HHJ Auerbach. This defeat was closely followed by an application for permission which was considered by Bean LJ on 20 November 2020. He noted the detailed and careful judgment of Judge Auerbach and agreed that there was no arguable error of law in the costs decision. He observed that in the liability decision from which Mr Radia did not appeal, the Tribunal had made a devastating series of findings about the claimant's evidence which amounted to findings of dishonesty. He found the Tribunal's conclusion that the claimant had not believed his complaints to be meritorious from the outset to be unimpeachable. He observed that in reaching this decision, the Tribunal had been entitled to take into account not only the timing of the allegations but also that the claimant was a man of high intelligence which provided "*a sound basis for the conclusion that the claimant had been aware from the start of the claim that it had no reasonable prospect of success*".

This Claim

The Issues between the Parties

44. The claim, issued in May 2018, is brought in tort and in contract. The claimant's case is pleaded simply. It alleges that the defendant owed a duty of care both tortious and by way of implied contractual terms to exercise all reasonable care and skill to be expected of an experienced, skilled and competent expert witness. It is alleged that the claimant relied upon the report and in reliance of the defendant's oral evidence the claimant continued to pursue proceedings against Jefferies.

45. The pleaded particulars of breach/negligence run to 13 sub-paragraphs. However, as developed during the trial they boil down to the following criticisms:

    i) failing to record accurately what he was told by the claimant during the consultation. The claimant had weighed 50 kg at his lowest point of treatment which was not at the end of treatment but midway through his 4 cycles of chemotherapy. The defendant therefore had made a grave error in recording inaccurately what he had been told by the claimant during the assessment on 22 March 2016.

ii) The defendant had neither read properly nor cross-checked the medical records to confirm that the information which he included in his expert report was correct. Had he done so, he would have noted the discrepancy between what he thought he had been told by the claimant about his weight at the point of discharge during the consultation and what was in the medical records.

iii) The claimant alleges that the defendant then breached his duty of care by giving oral evidence to the Tribunal which was at odds with the contents of his report, in that, as I understand it, he accepted that if the weight on discharge had been different (that is, normal or near normal) it would alter his analysis of the claimant's fatigue level.

iv) The claimant alleges that the defendant was in breach of duty by "*leaving the Employment Tribunal with the impression following the defendant's oral evidence that the claimant had sought to deliberately mislead the defendant*" and "*causing the Employment Tribunal to find that the claimant was dishonest".*

46. The defendant disputes that his mistake in failing to pick up the discrepancy in the post discharge weight amounts to a breach of duty. Weight was only one of the relevant factors which he had to consider when advising upon the effect of the condition and chemotherapy. Even if the discrepancy had been identified by him it would not have altered his opinion given that a fall in weight of even 10 kg would have been significant. There are two additional hurdles which are raised by the defendant. First, Ms Whittaker submits that the harm alleged is the finding of dishonesty and that any duty of care owed by the defendant did not extend to protect the claimant from such a risk. Second, she submits that the claim fails on causation: the Tribunal found that the claimant had been dishonest for many reasons, including his demeanour in court. Even in the absence of the discrepancy between the weights, the outcome would have been the same. Also, on a proper analysis of the costs decision, the whole costs order did not follow from the finding of dishonesty but from the finding that the claims had no reasonable prospect of success and the claimant had known this from the outset.

The Claimant's Evidence

47. The claimant told me that his weight had dropped down to 50 kg at its lowest point, but this was not at the end of treatment but around about the time of the second cycle of his chemotherapy. He accepted that his grounds of claim dated 22 May 2015 referred to him having "*emerged from hospital considerably slimmer having lost 40 kg in weight*" but said he had been referring to a drop in weight from his normal healthy weight (well before diagnosis) of 110 kg. The further reference in his witness statement for the Tribunal proceedings dated 22 April 2016 to having lost over 40 kg over a five month period had not been drawn from his memory of his weight but from his memory of what had been said in the defendant's report. There were, he said, points in the report which he felt he could usefully make in his witness statement.

48. He said that he had not paid particular attention to the report when it had been received and so had not picked up on the defendant's error. He just assumed that the report was correct. It never occurred to him that there was a mistake in it. Nor had he gone through the medical records himself. He was taken aback by the questioning about his weight during the hearing. He accepted that, even before the defendant had given evidence, he

had told the Tribunal that he weighed only 50 kg or 60 kg at the end of the treatment but this was he said only because he had in mind the contents of the defendant's report; when confronted by the medical records he could not understand how there was a difference between the report and the records. He also accepted that towards the end of his evidence (after the defendant had given evidence) he had been asked by the Tribunal exactly when it was that he had weighed 50 kg and that he had not taken the opportunity to spell out that this had been mid-treatment rather than at the conclusion of treatment. He said he did not do so because he did not have the records, he was a bit perplexed and had not understood what had happened. By that stage he was only just starting to think about how the confusion could have arisen. He told me that it had occurred to him, in retrospect, that he had probably never weighed as little as 50 kg even though his recollection was that he had. He had not told the Tribunal that he had made a mistake nor that his estimated/recollected weight of 50 kg was at its lowest point. He had assumed that it had all been understood by the Tribunal.

49. One of the points which the claimant made, somewhat surprisingly, was that the Tribunal's conclusion that he was evasive had not been prompted by his answers about his weight but had been to do with his evidence about something completely different, a subject access request which he had made. He said however that there had been what he thought of as a "*turning point*" in the hearing; day one had been "*actually quite smooth*" but following the evidence of the defendant the approach of the Tribunal appeared to him to change and the mood of the Tribunal seemed to have turned against him. His perception was that the Tribunal had obviously formed the clear impression that he had been trying to distort things for his own gain. Following the medical evidence "*I feel a lot of the other findings arose because it was looked through these tainted lenses where they were confident that I had tried to mislead him and in turn the Tribunal*". In his view, the critical findings concerning his misleading evidence about his Mexican holiday were "*following a certain mould*". He maintained in his evidence to me that the Tribunal had not been justified in reaching the conclusion that he had exaggerated the effect of his knee injury but "*for reasons which I believe are tied in with the mood of the Tribunal*" it had ignored his evidence and "*opted to side with Jefferies*".

50. He also told me that when he had attended the defendant for the assessment on 22 March 2016 he had been unwell and on antibiotics. He had made the journey from north London to Bristol however because he was aware of the court deadline for service of the joint report. He accepted that, notwithstanding his ill health, he had been sufficiently well on 21 March 2016 to travel by car to the Royal Free Hospital, obtain a copy of his medical records, scan them at home and send them to his solicitor.

The Defendant's Evidence

51. The defendant admitted that before the assessment on 22 March 2016 he had received a large volume of records and that those records had included the five pages which documented the discharge weight. The records had arrived in a "*higgledy-piggledy fashion*" and had been difficult to read as some pages had been scanned in sideways.

52. His notes of the assessment of 22 March 2016 had been made at the time and he had dictated parts of the report immediately after the assessment before he had left the room. The claimant, he said, had told him that he had weighed 95 kg before treatment and following treatment he had weighed 50 kg. In seeking this information he was trying to quantify, by reference to weight, the effect of the totality of the treatment from beginning

to end. The focus of the report was not weight in itself but an assessment of post-chemotherapy fatigue of which weight was only one aspect as it might contribute to post-chemotherapy fatigue. He had not included in his report the claimant's weight on return to work (70kg) as this would not have been particularly relevant; nor was the weight before leukaemia had been diagnosed; nor was the claimant's weight at its lowest point. He told me that acute leukaemia is so called because it comes on quickly over a few days, sometimes over as short a period as a weekend. It is in the nature of the disease that most people with AML will weigh much the same weight two months before diagnosis as when first diagnosed. For this reason he had never bothered to ask any patient what they had weighed a period before diagnosis. It would simply not be relevant. The weight at the beginning and at the end of therapy was the best way of assessing the effect of the whole therapy.

53. He had not had the chance to read all of the notes before the consultation as they had only arrived the day before. He had gone through them by the time he had finalised his report. Even so, the timescales were tight and he admitted that he had missed the weights recorded on discharge. He thought however that even if he had seen the reference to the discharge weight of 81.5 kg it would have been unlikely to have changed his opinion that there was significant post chemotherapy fatigue. A drop from 95 kg to 81.5 kg was still a significant weight loss.

54. He was asked what he would have done had he seen the weight recorded in the claimant's notes. When responding to the claimant's formal written complaint to him of April 2017, the defendant had said that, whilst generally he believed patients to be the best witnesses of their health, it would have been better to have reverted to the claimant to ask him further about his asserted weight loss. However, on reflection, he told me that he did not think that this is what he would have done. He would have gone back to the solicitors, rather than the claimant directly. He would have included both weights in his report, both the weight as reported to him by the claimant and that in the records. He did not think that, as a single joint expert, it was for him to go back to the claimant but did not exclude the possibility that the claimant's solicitors would have done so.

55. He considered that, even though he had made a mistake, he had discharged his duty as an expert in the case which had been to describe the effects of AML and its therapy on the claimant. He said that weight was a relevant part of his total remit but only one part. Even though he did not pick up on the discharge weight (as he accepted he ought to have done) he believed he had discharged his duty in writing a comprehensive report in accordance with his instructions.

Findings

56. I start by clearing the decks of an important issue. This action cannot be used as a means of mounting a collateral attack upon the findings of the Tribunal, either the liability decision or the costs decision. Such an attack would be an abuse of the court process. The liability decision was not appealed. The costs decision was appealed but that appeal failed in the Employment Appeal Tribunal and permission to appeal was refused in the Court of Appeal. A significant element of the reasoning of both appellate decisions was that the Tribunal had been entitled to reach the findings of fact which it recorded. No appeal lies from the orders of any of the bodies previously involved in this case to the High Court. The case is not advanced by Dr van Dellen as an attack upon the findings and it is implicit in the way in which he argues the case that he respects that, on the

material before the Tribunal, its findings were unimpeachable. However, in his evidence, Mr Radia came, at times, perilously close to arguing that some of the Tribunal's findings were wrong, even setting aside issues of credibility. I make it clear that the only basis upon which I can approach this claim is that the Tribunal had been entitled to reach its factual conclusions on the evidence before it and that given those factual conclusions its decisions were lawful. Any suggestion to the contrary I put to one side.

Scope of Duty Question

57. The first issue which I address is whether the harm alleged falls within the scope of the duty of care owed by the defendant to the claimant. Although the point was not explored by either party in submissions, I accept that the claim falls outside established categories of negligence and is therefore a novel claim to which the six-point plan identified in *Meadows v Khan* [2021] UKSC 21 and its linked case *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 should be applied. Applying that six-point plan therefore, the scope of the duty owed by the defendant to the claimant is the first substantive issue with which I must grapple, there being no dispute that a claim for pure economic loss is justiciable.

58. It is not contentious that the defendant owed the claimant (and Jefferies) a duty of care as a single joint expert in his assessment of the claimant's medical condition and in his reporting upon his condition to the Tribunal. See Lord Dyson in *Jones v Kaney* [2011] UKSC 13 at [95]: "*it is not in dispute that an expert who acts in civil litigation owes his client a duty to act with reasonable skill and care. He owes this duty in contract ... and in tort ... He holds himself out as a skilled and competent person. The client relies on his advice in determining whether to bring or defend proceedings, in considering settlement values and in appraising the risks of trial. The client also relies on him to give the court skilled and competent expert opinion evidence*". It had been, observed Lord Dyson, "*rightly acknowledged*" by Lord Chadwick in *Stanton v Callaghan* [2000] QB 75 at 88E that an expert was a professional man who undertook for reward to provide advice within his expertise. In *Jones* Lord Dyson found there to be no conflict between the duty owed by an expert to his client and his overriding duty to the court in CPR 35(3). He said at [99]: "*His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Thus, the discharge of his duty to the court cannot be a breach of duty to the client*".

59. The question for me therefore is not whether the defendant owed the claimant a duty of care but whether the harm or loss claimed falls within the scope of that duty. Causation does not answer that question: it does not follow that every element of loss which would have been avoided but for the breach of duty would have is actionable. See Lord Oliver in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 651: "*the duty of care is inseparable from the damage which the plaintiff claims to have suffered from its breach: it is not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained*". In determining whether the loss is of a kind for which the defendant must take care to protect the claimant, the court should consider the purposes for which the information was given and the circumstances in which it was given, see Lord Roskill in *Caparo* at 629B. It is necessary to see what risk the duty is supposed to guard against and whether the loss represents the eventuation of that risk. This must be judged objectively.

60. I must first therefore identify the nature of the loss or harm asserted by the claimant. On this point I agree with Ms Whittaker that the harm alleged is the Tribunal's finding that the claimant was a dishonest witness and had been dishonest in his interactions with Jefferies. As pleaded, the defendant's mistake "*caused the Employment Tribunal to find that the claimant had been dishonest*". It is alleged that this finding then led to the financial losses sustained by way of the costs order made by the Tribunal: "*the costs of Jefferies in the ET awarded against the claimant on the basis that the claimant had been found to be dishonest following the evidence of the defendant*". The issue therefore is whether the scope of the defendant's duty to the claimant extended to protect the claimant from the risk of an adverse credibility finding, or a finding of dishonesty. Without hesitation, my answer to that question is that it did not.

61. I reach this view for the following overlapping reasons.

    i) My starting point is the letter of instruction. The defendant was instructed to provide expert evidence on three matters: the course of the claimant's illness from its onset; an explanation of the treatment which he had received and its side effects and the effect of the cancer upon the claimant's condition during two time-periods. Those were medical matters which were within his expertise as a specialist in blood cancer. He had a duty to report on those matters, following assessment of the claimant, for the purpose of assisting the Tribunal in its decision making and assisting the claimant and the defendant in their respective evaluations of the merits of the disability discrimination claim and claim arising from the alleged failure to make reasonable adjustments. It was no part of his retainer by either party to advise or assist on issues concerning the credibility of the claimant or the reliability of the claimant's evidence. Nor was it part of his retainer to advise upon the credibility of the Jefferies witnesses. This was not the purpose of his instruction.

    ii) Nor could a medico-legal expert in these circumstances give evidence about the credibility of the claimant (or any party). The expert's opinion is admissible only to the extent that it addresses issues which are within his or her expertise and not matters of common knowledge which the Tribunal would be competent to address for themselves. Although a question was posed of the defendant by counsel instructed by Jefferies inviting him to agree with her that a person who is unreliable in one part of his evidence is likely to be unreliable in another, this question was impermissible. As well as inviting speculation, it was not within the defendant's expertise to comment on the point. The defendant was in no better position than the Tribunal (or anyone else for that matter) to give an opinion upon whether the claimant was telling the truth. Putting it succinctly, the scope of the defendant's duty of care in this case cannot extend to the protection of a party from a risk upon which the defendant was not competent to give an opinion.

    iii) I accept that one of the effects of a medico-legal expert's evidence may be to highlight an oddity or inconsistency or discrepancy in lay evidence which may then inform a Tribunal's judgement on matters of credibility and reliability of parties and witnesses. This happens frequently. But the fact that this is, or may be, a side-effect of the expert evidence does not extend the scope of the duty of such an expert to protect a party or witness from the risk of adverse

> credibility findings, just as it is no part of the role of the expert to seek to support the credibility of a witness or party. The critical duties and responsibilities of an expert, consistent with the overriding objective, include objectivity and independence: expert evidence should be and should be seen to be the independent product of the expert uninfluenced by the exigencies of litigation; an expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise (see "*The Ikarian Reefer*" [1993] 2 Lloyds Rep 68). To extend the scope of the expert's duty to the protection of a party from the risk of an adverse credibility finding would create a real conflict between the expert's overriding duty to the court and his or her duty to the party. Lord Dyson in *Jones* aligned the duties on the basis that by complying with the overriding objective of independence and objectivity, the expert was fulfilling his duty to the client. But such an alignment would be unsustainable if the scope of the duty to the client was extended in the way proposed by the claimant in this case. All the more so, when, as here the expert is instructed jointly by both parties.

62. Dr van Dellen's submissions do not address the issue of the scope of the defendant's duty, at least not head-on. In his questioning of the defendant however he sought confirmation that the topic of the claimant's weight at any particular time was a relevant if not important factor in the defendant's assessment of the claimant's fatigue and that weight was therefore an issue within the scope of the defendant's instructions. In his closing submissions Dr van Dellen put it this way: that it was trite law that he needed to establish that "*reporting on weight was within the scope of the duty of care*". But this submission misses the point. It ignores the need, when determining scope of duty, to take into account the harm claimed and ask whether the type of harm falls within the scope of the duty. This is not a new ingredient in the tort of negligence although its location in the analysis may have been elevated as a result of the judgment in *Meadows*. Dr van Dellen's approach does not seem to me to take it into account at any stage.

63. I therefore find that the harm asserted does not fall within the scope of the defendant's duty of care. This is dispositive of the claim in tort. However, the claim in tort and contract falls at each of the other hurdles also.

Breach of Duty

64. The parties relied upon expert evidence addressing the defendant's standard of care in reporting upon the claimant's medical condition. I was surprised that permission had been granted for this purpose until I was shown the order of Master Yoxall which limited the terms of the instruction to the topic of "*weight loss during oncological treatment*". I understand why it might have been thought appropriate to make such a case management order given that the claimant challenged the accuracy of the weights included in the defendant's report and sought to underscore the importance of weight loss when an assessment was made of his post-treatment condition. I can see how it may have been thought, out of an abundance of caution, that the court would be assisted by expert evidence on, for example, whether a weight of 50 kg was ever a realistic weight following treatment. However, the expert evidence ranged far beyond the confines anticipated by the Yoxall order.

65. The claimant relied upon the expert evidence of Professor David Dodwell. He is a consultant clinical oncologist at Oxford Cancer Centre which is a site-specialized breast oncology practice associated with Churchill Hospital in Oxford. As he acknowledged in the pre-amble to his report he had no expertise in haematological cancer (including AML) and his advice was therefore confined to the "*generic issue of the content, completeness and accuracy of the medical expert input about weight provided to the employment tribunal and the conduct of the medical expert involved in relation to that discrete issue*". The Defendant relied upon the evidence of Dr Robert Marcus a consultant haematologist and a specialist in cancers of the blood. Both provided reports, dealt with questions posed in a joint expert meeting and gave evidence to me.

66. I intend no criticism of either of the experts, both of whom I am quite satisfied were doing their best to assist me by answering the questions posed by counsel. However, there was at times a sense that they were addressing issues in a different case to the one before me. This is not a re-trial of the issues before the Tribunal which had at its heart the question of whether the claimant had suffered from a significant degree of post AML fatigue such that he was less able to do his job than others.

67. The relevant breach (and linked factual causation) issues for me are quite discrete. They concern: first, what the claimant told the defendant during the consultation on 22 March 2016 and specifically when he said that his weight had been 50 kg; second, whether the defendant's admitted mistake in not picking up the record of weight in the hospital notes was a breach of duty; and third, what should have been done by the defendant in the event that he had picked up the reference in the records. Whether the expert report should have been more detailed, whether it should have included reference to the claimant's weight two months before diagnosis or at the time of his return to work are not relevant to the issues before me save to the extent that they impact upon any of the three questions. Likewise whether the report should have sought to reconcile and explain the reference to the weight of 35 kg, is not an issue that I need address. Nor am I concerned with whether the claimant was suffering from post-treatment fatigue or not.

68. The first question is one of fact. The second and third questions are matters for me to judge and to which the expert evidence is, at best, peripheral. Generic issues concerning the standard of care of an expert, for example: whether in general medical records should be checked or re-checked; the structure of a medico-legal report; whether sources of information should be referred to, are not it seems to me matters within the expertise of a medical expert. Putting it bluntly, neither Professor Dodwell nor Dr Marcus were competent to give expert evidence on the provision of expert evidence. Setting aside the difficulty of determining how the expertise of such a person could be judged (whether by the number of reports written; whether the person was a member of the Academy of Experts or had taken a course in expert reporting) these generic issues are ones for the judge to evaluate taking into account CPR 35. The expert evidence has provided me with only marginal assistance in resolving this case.

69. I start with my finding about what, on 22 March 2016, the claimant did or did not tell the defendant concerning his weight at the end of treatment. I am wholly persuaded that the claimant informed the defendant on 22 March 2016 that his weight was 50 kg at the end of his treatment. The claimant's case before me that he told the defendant that he had weighed 50 kg earlier in his treatment or when his weight was at its nadir is not sustainable and I reject it. I reach this conclusion for the following reasons.

i) There is no dispute that the handwritten notes of the defendant on 22 March 2016 were contemporaneous with the assessment. The record of the weight of 50 kg must therefore be read in the context in which it appears on the handwritten document. Alongside the weight the defendant described the claimant's appearance as white haired, looking 60 years but not depressed. In his witness statement of April 2016 for the purposes of the Tribunal he recorded at [38] "*I emerged from hospital at the end of the treatment on 16 April 2010 in a frail and exhausted state. My hair which had fallen out by the end of the second cycle of chemotherapy had grown back entirely white*". The statement is unambiguous. The reference to his hair being white refers to his appearance at the end of treatment and could not be a reference to the claimant's appearance at the end of the second cycle of chemotherapy (when he had no hair). The defendant's note taken in context associates the weight of 50 kg with the claimant's appearance at the end of treatment and is consistent with his evidence that he was told by the claimant that his weight was 50 kg at the end of treatment.

ii) To be clear, I find that the defendant noted down accurately what he had been told by the claimant and that the claimant had intended to tell him that his weight had been 50 kg at the end of treatment. I reject any claim now made by the claimant that he had been unwell on 21 and 22 March 2016 to the extent that he may not have been quite himself or not thinking clearly. As Ms Whittaker explored in her cross examination of him, the claimant had been sufficiently well the previous day to track down records, scan them and send them to his solicitor. There was no evidence before me that on 21 or 22 March 2016 he had inquired of his solicitor whether because of his high temperature he could put the examination and assessment off which would have been the first thing he would have done had he not been well enough to travel to Bristol and undergo an assessment.

iii) If the defendant's report had contained the mistake which the claimant now alleges then, without doubt, the claimant would have picked up on the mistake when he read through the report. He did not do so. As to the attention which he paid to the report when it was received, the claimant's evidence is hopelessly inconsistent. On the one hand at [19] of his witness statement of 5 November 2020 (for these proceedings) he said: "*I read through the report at the time of receipt, which was the only occasion on which I did so prior to the hearing. I had noted in passing the references made by the Defendant to my weight loss during treatment …*". On the other hand he explained his reference in his witness statement for the Tribunal, and at the Tribunal hearing, to having weighed only 50 kg at the end of treatment to his memory of what was in the report rather than his memory of his own weight. As he explained to me: "*this paragraph was drawn very much from that report*" and "*it was drawn from Professor Marks' report of our discussion*". Later, he told me *"I very much did read the medical report, yes*". The claimant cannot have it both ways. If he had read the report with sufficient care to be able to remember it and reproduce it in his statement, then he would have picked up on the mistake. If he had not read it properly then his subsequent inclusion in his witness statement confirming what was in the report cannot be explained. Given his emphatic evidence to the Tribunal that the weight of 81.5 kg at the end of treatment was "*impossible*" or "*absolutely impossible*" it seems to me to be abundantly clear that he was

referring to his own memory of his weight not what he had read in the report. In these circumstances, he would have immediately picked up on the mistake in the report (even on a cursory reading of it).

iv) The claimant was present during the hearing when the defendant gave evidence. By that stage the claimant had already, and with some insistence, claimed his weight to be 50 kg at the end of treatment. However, as Ms Whittaker pointed out he was given a golden opportunity to set the record straight later in his evidence when he was asked a direct question by Tribunal about when he had weighed 50 kg. He did not correct the mistake made by the defendant. In fact, he did not answer the question at all. If, as the claimant told me, he had witnessed a sea-change in the Tribunal's attitude towards him as a consequence of the defendant's evidence and it was all down-hill for him from then on, it is inexplicable that he did not seize the chance to make the position clear.

70. For the reasons set out above therefore I find that there was no error in the defendant's report. He recorded accurately what the claimant had told him. This disposes of this allegation.

71. Both experts gave their opinion upon whether the failure to pick up the weight in the hospital records amounts to a breach of duty by the defendant. Professor Dodwell considered that it was a breach of duty, arguing that because the reported weight loss had been so significant (and the worst ever seen by the defendant) this should have prompted what Dr van Dellen referred to as a targeted search of the records for confirmation. Dr Marcus's evidence on the point was more nuanced. He considered that a review of the records after the consultation would have been preferable but that a failure to spot the entries did not amount to a mistake of such seriousness as to be a breach of duty. He referred to the volume of notes, the manner in which they had been sent to the defendant and the time constraints in which the defendant was working.

72. I have considered the expert opinions with interest but conclude that the issue of whether the failure to pick up the weight reference in the hospital notes is, essentially, a matter for me. The defendant accepts that it was a mistake. Both experts are in agreement that it would have been preferable. However, I do not find that it was a breach of the standard of care to pick up the references in the notes to the discharge weight. The volume of records was large. As the defendant told me, and I accept, his review of the records could not be limited to only those which concerned the claimant's weight: there were several hundred pages of blood results which he also had to examine for the purpose of ascertaining whether the claimant's fatigue could be due to a contributory cause (anaemia, renal impairment). The records were provided to the defendant late in the day. It is clear that they had not been organised, let alone paginated by the claimant or his solicitors which would have made them more time consuming to review. No chronology was provided and no attempt made by either the claimant or the solicitors to help the defendant navigate his way through the emailed tranches of records. As the defendant told me, ultimately, even if he had picked up the weight references in the records it would not have altered the thrust of his report which was that the claimant had suffered from post treatment fatigue. For all of these reasons, I do not find that it was a breach of duty to fail to identify the weight references in the records.

73. As to whether there should have been a targeted search of the records for confirmation of what the claimant had told the defendant, both experts were engaged by counsel in

the question of whether it was reasonable for an expert to accept what a claimant says at face value or whether it should be cross checked or challenged. Neither expert was, it seems to me, qualified to comment on the point. I am quite satisfied that there was no need for a targeted search for the purpose of confirming the claimant's account. The defendant was undoubtedly entitled to accept the word of the claimant as to his weight on discharge, particularly a claimant who is highly educated and intelligent and apparently reliable.

74. I accept that, given the significance of the weight loss which was, according to the defendant, the worst that he had encountered, there may be a superficial attraction to the argument that there should have been a detailed review of the records after the consultation. However as the defendant said, and I accept, he did review the records as studiously as he could within the time constraints, including after the consultation. He was also aware that, if there were errors in his report, or there was a need for him to clarify any matter, then both parties would be able to raise questions of him or challenge the accuracy of his report. If, as Dr van Dellen asserts, it was imperative that there was a targeted search of the records after the assessment to cross-check the weights, then this could have been undertaken as well by the lawyers instructed by the claimant as by the defendant himself. I pause to note that just such an exercise must have been undertaken by the legal team instructed by Jefferies. In these circumstances, I do not find that the defendant's failure to undertake a search of the records after his consultation constituted a breach of duty.

75. Finally on breach, I simply record that the further allegation made by Dr van Dellen that the defendant was negligent because he failed to maintain his opinion when questioned in the Tribunal is unsustainable. The expert's duty is to answer the questions in a manner consistent with his overriding duty, not to stick to his guns when the underlying basis for that opinion shifts. I need say no more on this point.

Causation

76. My next finding concerns what would, or should, have happened if the defendant had picked up on the discrepancy between what he had been told by the claimant and what was in the records. The defendant told me that, had he done so, he would not have contacted the claimant directly to seek to clarify matters with him but would have brought the issue to the attention of both sets of solicitors. Given that he was instructed as a single joint expert, he told me that he would have retained the weight reported to him by the claimant in the report but would have added the references found in the records. I accept that this is what he would have done. I have no reason not to accept the defendant's account. Whether such a course of action would, hypothetically, have amounted to a breach of duty, I deal with below.

77. Both experts gave evidence about what would or should have happened in the event that the hospital weight had been picked up. They suggested that the defendant should have contacted the claimant to discuss the discrepancy with him. I do not accept that this is a question that the experts are competent to comment upon. It is a matter for the court to determine what should have been done in this situation. Again, without hesitation, I find that, if the discrepancy had been picked up, the appropriate course for a single joint expert would have been to have recorded both weights in the report and leave it at that. To omit the claimant's account of his weight could have been unfair to the claimant whose own account of his weight loss may have been relevant to his own perception of his fatigue.

Nor would it have been appropriate for the defendant to have contacted the claimant to "*discuss the discrepancy*" to reconcile the discrepancy and iron out its significance. Either course would have been inconsistent with the defendant's overriding duty.

78. I deal now with the claimant's wider case on causation: that but for the defendant's failure to record accurately what the claimant had told him and/or his failure to check the medical records, the Tribunal would not have found the claimant dishonest and would not have made the adverse costs order.

79. I reject the claimant's case. I have no doubt that, even if the Tribunal had not found the claimant's account to the defendant concerning his weight to be what it euphemistically described as an "untruth" it would still have found him to have been dishonest. In reality, the assertion does not bear even the most scant examination. I reach this conclusion for the following reasons:

    i) As the Tribunal made clear, the finding that the claimant was dishonest was based upon a number of different factors, not just his account about his weight. Those factors were his tendency to be evasive in answering questions or, as it was put by the Tribunal in its liability decision, his persistent failure to answer questions put to him; his misleading assertion that he had been forced by Jefferies to miss his Mexican holiday (when in fact he had simply deferred the start by a few days); his misleading account that his knee injury had caused him to remain off work for one third of a year; the shifting sands of his account as to when he had become aware that his treatment potentially represented disability discrimination (end of 2014, June/July 2013, May/June 2010). In its liability decision, the Tribunal also found that the claimant had "behaved cynically" by sitting on serious allegations and choosing to deploy them tactically when it suited him. The Tribunal gave the example of the claimant's assertion that his involvement with Moneybookers IPO had been blatantly illegal. As the Tribunal found, as a regulated person, the claimant was himself knowingly engaging in such "*blatantly illegal conduct*" or he had made a false allegation on oath. Either way, he was at serious fault. Although therefore the claimant's account of his weight upon discharge was undoubtedly a factor informing the Tribunal's conclusion that the claimant was dishonest, it was only one of many. In these circumstances it is impossible to sustain the argument that, but for one of those examples relied upon by the Tribunal, the claimant's evidence as a whole would on balance have been accepted.

    ii) A number of the complaints raised by the claimant in his grounds of claim involved an adjudication upon the relative reliability of the evidence of the claimant on the one hand and Jefferies' witnesses on the other. As the Tribunal recognised, in the absence of contemporaneous documentation or other extrinsic evidence, where there was a conflict of evidence between the claimant and others, the Tribunal had to make a judgement as to where the truth lay or at least who provided the most obviously reliable account. This involved the Tribunal in making an assessment however, not just of the claimant, but of the witnesses called by Jefferies. In the same section of the liability decision which deals with the credibility and reliability of the claimant, the Tribunal considered the impression given by the Jefferies witnesses. Mr Taylor was "*thoughtful and considered*" and "*careful to tell the*

truth" and "*willing to candidly concede points where it was appropriate to do so*." Unlike the claimant, he gave the impression of giving full answers to questions and was not evasive. His account was backed up often with a "*whole succession of documents*" to which he was taken in re-examination. Mr Black was not so well prepared as his colleague and more confused but nonetheless candidly admitted where his recollection was imperfect. He was not disingenuous. The third witness, Mr Ions, was straightforward and prepared to admit things which were not necessarily in Jefferies' interest.

iii) The claimant's case overlooks that in making its assessment, the Tribunal had to consider not just the demeanour of the claimant but that of the other witnesses. It is clear that there was a striking difference. Just as the claimant appeared shifty and evasive, Jefferies witnesses appeared straightforward and candid, even to the extent that they made concessions against their interests.

iv) Also, I have found that even if the discrepancy had been identified by the defendant upon a review of the records, the report would still (and reasonably) have included reference to the claimant's own account to the defendant as to his weight on discharge. The point would doubtless still have been explored by counsel instructed by Jefferies and the finding that the claimant had been lying to the defendant would still have been open to the Tribunal. The point may have lacked the degree of force and the claimant may have been forearmed. But the same conclusion is likely to have been reached by the Tribunal given its evident concerns over the veracity and reliability of the claimant's evidence generally.

80. There is an additional problem for the claimant. He connects the liability findings concerning his credibility with the costs order. However, as Ms Whittaker points out, this submission does not fit with the costs decision. The Tribunal considered that its findings of dishonesty did <u>not</u> justify a whole costs order, only an order for costs limited to two specific allegations. The Tribunal stated in terms that the other costs incurred in defending the claim did not flow from "*these findings of unreasonableness*".

81. The whole costs order was made because the multiple claims taken individually and as a whole had no reasonable prospect of success. The Tribunal noted that "*many of the large number of complaints in the long list of issues failed on multiple grounds*". In many of the claims, the treatment which was said to have been unfavourable was not established and not one of the alleged treatments was found to be for a discriminatory reason.

82. Most critically, the Tribunal found that the claimant knew when he raised his complaints of discrimination for the first time in 2015 that they lacked merit. As Judge Auerbach observed, the Tribunal had not, in its liability decision, gone so far as to say that the claimant had not believed that his complaints had merit and that they had been raised dishonestly. It had not needed to go so far. However, the Tribunal went on to make that finding as part of its costs decision because the claimant had never, at any stage of his five year post illness employment, raised his allegations of disability discrimination. He only did so when it was tactically advantageous to do so in 2015 when a severance package was being negotiated. It was for this reason that the Tribunal found that the claimant knew from the outset that his allegations lacked merit. It was this finding which was critical to the Tribunal's decision on costs, not its earlier finding of dishonesty.

83. This claim fails for the reasons set out above. It fails both in tort and in contract. I note that the defendant also invites me to consider the duty nexus question and the legal responsibility question in the *Khan* six-point plan. The duty nexus question adds nothing to my analysis in this case nor on its facts do the further obstacles raised by Ms Whittaker of remoteness of damage and the defence of illegality.

84. Following circulation of this judgment in draft, I have been reminded by Ms Whittaker that her defence included a Part 20 counterclaim for payment by the claimant of his share of the defendant's fees which remain outstanding. Her closing submissions (a composite document which included her opening) did not address the counterclaim but I understand that the claim has not been abandoned. The Defence denies privity, asserting that the contract existed between the defendant and the two sets of instructing solicitors. I heard no submissions on the issue and the point was not developed. In these circumstances, as Ms Whittaker realistically accepts, her Part 20 claim is dismissed.

Conclusion

85. The claim is dismissed. Judgment will be entered for the defendant.