



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Morris

**Respondent:** Cut and Pitched Builders Limited

**Employment Judge Pritchard**

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## JUDGMENT COSTS ORDER

The Respondent is ordered to pay to the Claimant the sum of £4,431.90.

## REASONS

### Issue for determination

1. The issue for determination is whether, by applying the applicable relevant law and legal principles, the Respondent should be ordered to pay costs upon the Claimant's application.

### Findings of fact

2. At the conclusion of the final hearing held on 22 November 2019 the Tribunal found in the Claimant's favour and orally announced its decision with reasons. Written judgment was sent to the parties on 19 December 2019. Neither party made a request for written reasons for the decision.
3. The Respondent indicated in its ET3 Response Form that it resisted the claim but did not appear at the final hearing. Although enquiries were made of the Respondent on the day, no explanation was provided for the Respondent's failure to attend the hearing. The Respondent had not followed any procedural steps in readiness for the hearing.
4. At the conclusion of the hearing the Claimant made an application for costs. Since the Respondent had not appeared at the hearing, the Tribunal took the view that the Respondent should first have reasonable opportunity to made representations in response to the application.
5. By letter dated 28 November 2019 the Claimant renewed his application for costs. The Claimant copied the application to the Respondent and invited

the Respondent to make representations within seven days. In his letter to the Respondent the Claimant stated "Please do not avoid a response to this letter". The Respondent failed to make any representations. By letter dated 19 June 2019, the Claimant reminded the Tribunal that his application remained outstanding.

### **Applicable law**

6. Rule 76(1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 provides that a Tribunal may make a costs order, and shall consider whether to do so, where it considers that:
  - (a) a party, (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted; or
  - (b) any claim or response had no reasonable prospects of success.
7. Thus the Rules provide that a Tribunal must apply a two stage test: firstly, to determine whether the circumstances set out in paragraphs (a) or (b) of Rule 76(1) apply; if so, secondly the Tribunal must exercise its discretion as to whether a costs order should be made and, if so, for how much.
8. The Court of Appeal stated in Gee v Shell UK Ltd 2003 IRLR 82 that costs in Employment Tribunals are still the exception rather than the rule. Importantly, costs are compensatory, not punitive; see Lodwick v Southwark London Borough Council 2004 IRLR 554.
9. In McPherson v BNP Paribas (London Branch) [2004] IRLR 558 the Court of Appeal held that in exercising its discretion to award costs, a Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct. It was also held in that case that unreasonable conduct is both a precondition of the existence of the power to make a costs order and is also a relevant factor to be taken into account in deciding whether to make a costs order and the form of the order.
10. In Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, Lord Justice Mummery said that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had. That case also decided that although there was no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that did not mean that causation is irrelevant.
11. Rule 78 sets out the amount of a costs order that may be made by a Tribunal. Rule 84 provides that a Tribunal may have regard to the paying party's ability to pay when considering whether it shall make a costs order or how much that order should be.
12. In Jilley v Birmingham and Solihull Mental Health NHS Trust

UKEAT/0584/06/DA, His Honour Judge Richardson said that if a Tribunal decided not to take account of the paying party's ability to pay, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision to award costs or on the amount of costs, and explain why. His Honour Judge Richardson also said that there may be cases where for good reasons ability to pay should not be taken into account: for example, if the paying party has not attended.

## **Conclusion**

13. The Tribunal is satisfied that the Respondent has had fair and reasonable opportunity to make representations in response to the Claimant's application. The wording of the Claimant's letter referred to above emphasised the importance of the Respondent doing so.
14. Indeed, it is clear from letters dated 3 May 2019, 6 June 2019 and 15 November 2019 from the Claimant to the Respondent, read together, that an application for costs would be made.
15. The Tribunal finds the Respondent acted unreasonably within the meaning of Rule 76 in that:
  - 15.1. The Respondent failed to take part in any procedural steps, such a preparation for the hearing or exchanging witness statements;
  - 15.2. The Respondent presented a response indicating it wished to resist the claim but failed, without explanation, to attend the hearing in order to do so.
16. Having heard and accepted the Claimant's evidence, the Tribunal would in any event conclude that the Respondent's response had no reasonable prospects of success.
17. The Respondent's unreasonable conduct was sufficiently grave to lead to the conclusion that a costs order should be made. Despite the fact that the Respondent's response had no reasonable prospects of success, the Respondent nevertheless put the Claimant to the cost of attending the hearing.
18. The costs sought are reasonable and would reasonably compensate the Claimant. The Tribunal has not had regard to the Respondent's ability to pay, the Respondent's means being unknown, not least by reason of the Respondent's failure to attend the hearing and engage with the litigation.
19. Costs are awarded accordingly.

Note

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Employment Judge Pritchard

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Date: 30 June 2020