



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs B Chattopadhyay  
**Respondent:** Peter Bedford Housing Association  
**Heard at:** East London Hearing Centre (by Cloud Video Platform)  
**On:** 3<sup>rd</sup> December 2020  
**Before:** Employment Judge Reid

## Representation

**Claimant:** In person (supported by her husband Mr A Chattopadhyay)  
**Respondent:** Mr McDevitt, Counsel (instructed by DWF Law LLP)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP video (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents I was referred to were those in the Tribunal file including the Claimant's husband's application for a postponement of the final hearing dated 1<sup>st</sup> September 2020, the Respondent's applications and costs schedule dated 22<sup>nd</sup> October 2020 and the further correspondence from the Claimant and from her husband including the medical evidence provided by her.

## COSTS JUDGMENT (RESERVED)

1. The Claimant is ordered to pay £125 legal costs to the Respondent, pursuant to Rules 74-84 Tribunal Rules 2013 because the Claimant acted unreasonably within Rule 76(1)(a) in the way she conducted her claim by not attending the final hearing.
2. The date the Claimant must pay this amount is 1<sup>st</sup> February 2021.

# REASONS

1. The Respondent made an application for costs under Rule 76(1)(a) of the Tribunal Rules 2013 on the basis that the Claimant not attending the final hearing on 9<sup>th</sup> September 2020 was of itself unreasonable behaviour. The Respondent provided a costs schedule totalling £10,725. The Claimant's claims had been dismissed under Rule 47 for non-attendance at the final hearing. This judgment should be read in the light of the Rule 47 judgment.
2. I heard oral submissions on both sides, asked some questions of the Claimant about her financial means and reserved my decision due to lack of time because the Claimant said she had to leave for a doctor's appointment. The Respondent's costs said to relate specifically to the non-attendance at the hearing on 9<sup>th</sup> September 2020 were identified (£3,545 including Counsel's fees for today's hearing) but it was argued that the entirety of the total costs for defending the claim should be awarded. The Claimant said that as she and her husband had both been on Universal Credit for the past 18 months and had no savings, no costs should be awarded.

## Relevant law

3. The relevant Tribunal Rules are Rules 74-84 of the Tribunal Rules 2013. Costs in the Employment Tribunal are the exception rather than the rule and there is a high threshold.
4. There is a two stage test, to consider firstly whether the relevant ground under Rule 76 is made out and then if it is, secondly whether the Tribunal should exercise its discretion to award costs.
5. The Tribunal may (but is not required to) take into account the paying party's ability to pay in deciding whether to make a costs order and if so in what amount (Rule 84).
6. *Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420* requires the Tribunal to consider all the circumstances as a whole. and *McPherson v BNP Paribas [2004] IRLR 558* establishes the need to consider the nature, gravity and effect of the claimed unreasonable conduct.
7. In *AQ Ltd v Holden 2012 IRLR 648* the EAT stated that the threshold tests governing the award of costs are the same whether a litigant is or is not professionally represented, but that the application of those tests should take this factor into account. However, a litigant in person can be found to have behaved unreasonably even when proper allowance is made for their inexperience and lack of objectivity.
8. There is also Presidential Guidance on costs (Presidential Guidance; General Case management – Guidance Note 7 Costs) which I have followed.

Findings of fact relevant to costs application

9. The Claimant's claims have been dismissed because she did not provide evidence showing that she had been unable to attend the final Tribunal hearing on 9<sup>th</sup> September 2020 due to her mental health or due to witness unavailability.
10. The Claimant's husband made the application for a postponement on 1<sup>st</sup> September 2020. That application was made more than 7 days prior to the hearing such that the provisions of Rule 30A(2) did not apply but as a litigant in person the Claimant (or her husband) may have wrongly thought that she was entitled to make an application before 7 days which would be likely to be granted because it was made in good time (she referred to making the application more than 7 days in advance, suggesting she thought that that was significant).
11. The Claimant (or her husband writing on her behalf) initially did not understand the need to produce medical evidence to support the assertion that she was unable to attend the hearing due to her mental health. When she did later provide a GP letter it did not support that she was unable to attend a hearing. She also did not initially understand that if claiming witnesses were too unwell to attend she would need to produce medical evidence. The need to produce such medical evidence on both grounds was however made clear to her after the Tribunal received the postponement application and she was then given a clear opportunity to produce it both after the application was made and after she did not attend on 9<sup>th</sup> September 2020.
12. The Claimant was aware on 8<sup>th</sup> September 2020 that the hearing was going ahead, her application having been refused. She was also aware that the Tribunal could discuss reasonable adjustments for her at the start of the hearing.
13. The Claimant brought her claim in July 2019 and was aware of the preparation the Respondent had undertaken to prepare for the final hearing. She was aware the Respondent was legally represented. She was aware that by not attending the final hearing the Respondent was ready and able to proceed and had already incurred legal costs.

Whether to make a costs award

14. I have therefore taken into account the following factors in deciding whether to award costs under Rule 76(1)(a) on the basis of unreasonable behaviour (not attending the final hearing):
  - The Claimant was a litigant in person and she (and her husband) may not have understood that there were possible costs consequences of making a postponement application, even if they thought they had made it in good time
  - The Claimant (and her husband) may also not at the point of making that application have understood that it is not sufficient to merely assert an inability to attend a hearing but that it must be backed up with evidence, in her case medical evidence

- It was however made clear to the Claimant on 1<sup>st</sup> September 2020 that medical evidence was required
  - The Claimant delayed until 8<sup>th</sup> September 2020 in asking for a GP letter which mean the vast majority of the Respondent's costs would in any event already be incurred (even if the letter had supported her non-attendance, which ultimately it did not)
  - On 8<sup>th</sup> September 2020 the Claimant was aware that her mental health condition could be taken into account by way of a discussion about any reasonable adjustments she required; at this point there was a clear opportunity for her to attend but to have her concerns about the arrangements at the hearing addressed
  - The effect of the Claimant's non-attendance meant at the very least that most of the Respondent's costs for attending the hearing as listed would have been incurred but would be wasted as the hearing would not go ahead (even if it had done on a future date)
  - At its highest the effect was that Respondent had incurred costs in defending a claim the Claimant had chosen to bring but at the hearing for which claim she had not attended, despite clear opportunities to provide medical evidence supporting non-attendance and, if that was not possible, despite having the opportunity the day before the hearing to nonetheless attend but ask for adjustments for the hearing itself.
15. Taking the above into account the Claimant's behaviour in not attending her hearing on 9<sup>th</sup> September 2020 was, taken in the round, unreasonable behaviour within Rule 76(1)(a) taking into account the above sequence of events leading to that non-attendance and the effect on the Respondent. Whilst the Claimant was not legally represented she was made aware of the need to provide evidence for the reasons she gave for non-attendance and, if she was even then unable to do so, had a clear opportunity to still attend and ask for adjustments.
16. As to whether I should exercise my discretion to award costs I have taken into account the Claimant's ability to pay, which is limited and the fact that awarding costs is the exception and not the rule. I have also taken into account her mental health condition which is being treated with CBT but this is also the condition which she said prevented her attendance but without ultimately supplying evidence that it did prevent her attendance. Whilst the Claimant's means are limited the Respondent has been put to significant cost at the very least in having to attend on 9<sup>th</sup> September 2020 (and this hearing) and the final hearing not go ahead.
17. Weighing it up I conclude that the high threshold is met for a costs award to be made and that I should exercise my discretion to award costs against the Claimant and in favour of the Respondent.

Amount of costs award

18. I take into account that had this non-attendance not happened the Respondent would have incurred costs prior to that non-attendance in any event.
19. The claimed costs of the actual non-attendance were made up of £165 solicitors' costs for 9<sup>th</sup> September 2020, £2,000 brief fee for 9<sup>th</sup> September 2020 and £1,380 Counsel's fees for preparation (£630) and attendance at this hearing (£750), total £3,545. I take into account that Counsel's fee for the hearing of £2,000 would have already been incurred at the latest by the day before the hearing, whether it went ahead or did not go ahead and also that it encompassed the fee for day 1 of the hearing. I therefore discount Counsel's fee of £2,000 to £1,000. I therefore assess the actual costs solely associated with the hearing not going ahead (including the costs of having to make this application at this hearing) as £2,545.
20. I also take into account the Claimant's ability to pay, it being limited. She told me that she and her husband are on Universal Credit and that they are renting their home. They have no other dependents and do not have any savings. I have assumed that the Claimant and her husband receive only the minimum amount on a joint claim for Universal Credit (currently £594.04 per month) and do not receive any of the additional elements; I have not taken into account that her husband may also receive the carer's element (the Claimant said he was her carer) or that she is in the process of applying for the health element for herself.
21. Taking that into account I make a costs award of £125, being around 5% of the costs incurred only by the non-attendance on 9<sup>th</sup> September 2020 (plus the costs of this hearing) and not taking into account any of the costs incurred prior to that date. I have heavily discounted the costs by 95% to take into account the Claimant's ability to pay. I have fixed the payment date so that the Claimant has two months' worth of income with which to make the payment.

**Employment Judge Reid  
Date: 9 December 2020**