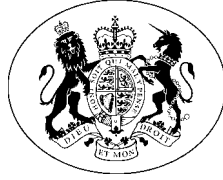


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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Michael Hannant  
**Respondents:** Hambling Utility Services Limited  
**Held at:** The East London Hearing Centre  
**On:** 21 December 2021 (in chambers)  
**Before:** Employment Judge Allen QC  
**Members:** Ms S Harwood  
Mr J Quinlan

## JUDGMENT ON COSTS APPLICATION

1. The Respondent has behaved unreasonably in its conduct of the proceedings.
2. The Respondent must pay costs of £500 plus VAT of £100 totalling £600 to the Claimant via his solicitors, Fosters Solicitors LLP.

## REASONS

1. Following a hearing on 15 December 2020, the reserved Judgment and Reasons was sent to the parties on 4 January 2021 and an application for costs was made by the Claimant on 4 January 2021.

2. The Tribunal made case management orders on 13 August 2021 proposing to deal with the costs matter on paper (i.e. without a hearing) unless any party objected and requiring the Claimant to respond by 6 September with a written submission setting out all the bases on which costs were sought and attaching all relevant correspondence or other documentation. The Respondent was permitted to respond by 27 September 2021.

3. Neither party objected to the Tribunal's proposal that the matter be dealt with on paper. The tribunal met in chambers on 21 December to determine the application for costs.

4. The Claimant sent his submission (late) on 10 September attaching relevant documents. The Respondent did not reply at all. The Tribunal have considered this matter in chambers. The Claimant has re-supplied the Tribunal with the 80 page bundle which was before the Tribunal at the hearing on 15 December 2020.

5. The Claimant seeks his costs of £5,262 plus VAT totalling £6,314.40. The costs are broken down in a Schedule attached to the written submissions and their level has not been challenged by the Respondent. They are reasonable, indeed moderate, costs for this type of work.

6. In summary, the basis of the Claimant's application is that the Respondent behaved unreasonably in the conduct of proceedings:

- 6.1 by failing to submit a response on time, necessitating an application to do so out of time;
- 6.2 (as a consequence of (a)) by placing the burden on the Claimant of preparing the case including the hearing bundle;
- 6.3 by failing to pay those elements of the claim that were admitted prior to the final hearing (e.g. the redundancy payment);
- 6.4 by failing to pay those elements of the claim that were (in the Claimant's contention) unarguable (i.e. the 7 days pay for the last week of employment);
- 6.5 making a late without prejudice offer of £2,500 when most of the costs of the hearing had been incurred by the Claimant;
- 6.6 by denying all the claims and putting the Claimant to strict proof;
- 6.7 in its application on 25 February 2021 out of time for reconsideration - in regard to the content of that application and to the false assertion in that application that some payment had already been made;

7. The Claimant disclosed without prejudice correspondence from the Respondent's representative to the Claimant's representative dated 12 December 2020 in which the Respondents offered £2,500 in full and final settlement of all claims. It also records that the Claimant at that time was seeking a total of £16,442. The Claimant's open Schedule of Loss dated 5 October 2020 which was in the Tribunal's bundle sought a total of £23,998.12.

8. The Claimant had been employed by the Respondent for just over 2 years. He was paid £400 gross per week. The Claimant's claim was presented on 18 May 2020. He claimed unfair dismissal, disability discrimination (by association), notice pay, holiday pay and arrears of pay (including a redundancy payment if the Claimant's

dismissal was by reason of redundancy – which was not agreed by the Claimant to be the reason for dismissal).

9. Initially the Respondent did not present a response to the claim. Following an application by the Respondent in early November 2020, it was permitted to enter a late response at a preliminary hearing on 7 December 2020. The Respondent's Particulars of Response contested all elements of the claim save that it contended that the reason for dismissal was redundancy and therefore it conceded the claim for redundancy pay. However the Respondent did not pay the claim for redundancy pay at that point.

10. The issues had largely been agreed at a preliminary hearing on 14 September 2020. In the record of that hearing, the Employment Judge noted at para 11:

11. Mr Hambling accepted that the Claimant was owed redundancy pay because he had been with them 2 years, he thought he owed him 1 week's pay. I explained that as the Claimant was over 41 years old at the relevant time the statutory redundancy pay is 1.5 week's pay for each year's service. The Respondent accepts he is owed 3 weeks' pay.

11. The Employment Judge at that preliminary hearing also made clear to the Respondent the consequences of not having entered a response. That should already have been clear to the Respondent given the letter to that effect sent by the tribunal on 21 August 2020. The Respondent however took a further 7 weeks after the preliminary hearing before making an application to enter a response out of time.

12. Following discussion at the hearing on 15 December 2020, the remaining issues were as follows:

Unfair Dismissal contrary to sections 94 and 98 Employment Rights Act 1996

1. Was there a genuine redundancy situation?
2. What was the reason, or if more than one reason, the principal reason for the Claimant's dismissal?
  - a. The Claimant avers that he was unfairly dismissed because of his requirement to care for his disabled parents and at the date of dismissal his disabled mother.
  - b. The first Respondent contends that dismissal was by reason of redundancy.
3. Did the first Respondents undertake a reasonable process, or any process at all, before making a final decision about the Claimants dismissal – this global question included consideration of whether the Claimant was consulted and whether sufficient or any efforts were made to look for suitable alternative employment, if available.
4. Was the first Respondent's decision to dismiss within the range of reasonable responses open to a reasonable employer?
5. If the Claimant was unfairly dismissed, has the Respondent proved that if it had adopted a fair procedure, the Claimant would have been fairly dismissed in any event? What is the percentage chance of such a fair dismissal; additionally or alternatively, to what date should the Claimant be compensated?

Direct discrimination contrary to section 13 Equality Act 2010

6. The Claimant relies on his father (cancer) and his mother (physical impairment) as having disabilities and the Claimant asserts that he was dismissed because of disability in that he was dismissed because they were disabled.
7. The Respondents admitted that the Claimant's father was disabled and that it had knowledge of the father's cancer from 4 December 2019 onwards. However the Respondent did not admit that the Claimant's mother was disabled; and the Respondent denied actual or constructive knowledge of her disability, thereby placing both matters in issue.
8. Did the Respondents treat the Claimant less favourably:
  - a. by not paying him his contractual salary when he was available to work in the last 7 days of his employment;
  - b. by dismissing him?than it would have treated a hypothetical comparator in the same relevant circumstances?
9. Was that less favourable treatment because of disability?
10. If the Claimant is successful what award should be made for injury to feelings and is there any financial loss which is not already dealt with under the heading of unfair dismissal.

Unlawful Deduction from Wages

11. Did the Respondent fail to pay the Claimant's contractual pay of £80 per day but instead only paid SSP during the last 7 days of his employment when he was available and fit to work?

Breach of Contract

12. Did the Respondent fail to give the Claimant's his statutory notice of 2 weeks and if so what is the appropriate level of damages payable for that period?

Uplift for failure to follow the ACAS code of practice

13. If redundancy is not the reason for the Claimants dismissal, did the Respondent breach some or all of paragraphs 2, 3, 4, 5, 7, 9, 10, 11 and 13 of the ACAS Code of Practice. If so should the Claimant's compensatory award be increased and if so, by what percentage?
14. The Tribunal Judgment and Reasons was sent to the parties on 4 January 2021 was reconsidered by the tribunal on application by the Claimant and part of the Judgment (relating to a calculation error on the part of the tribunal) was amended and sent to the parties on 11 March 2021. The full Judgment (as amended) was as follows:
  1. The claim of disability discrimination fails and is dismissed.
  2. The claim against the second Respondent, Gary Hambling, fails and is dismissed.
  3. The redundancy pay claim is conceded by the Respondent and succeeds. The Respondent must pay to the Claimant the sum of £1200 being 2 x 1.5 times the Claimant's gross weekly pay of £400. That sum is not subject to taxation.

4. The notice pay claim succeeds. The Respondent must pay to the Claimant the sum of £800 gross being 2 times the Claimant's weekly pay of £400. The notice pay claim may be subject to taxation either at source or in the hands of the Claimant.
  5. It having been agreed that any claim for underpayment of accrued holiday entitlement upon termination of employment has been satisfied, that claim is dismissed.
  6. The Claimant's claim for full payment of 7 days wages up to the date of dismissal on 25 February when he was no longer off sick but available for work succeeds. The total due for that period is 7 x £80 per day equals £560 to which the payment of SSP for 7 days at £131.95 must be deducted. The total gross owed to the Claimant is £428.05. This gross sum may be subject to taxation either at source or in the hands of the Claimant.
  7. The claim for unfair dismissal succeeds. The reason for dismissal was redundancy but the dismissal was procedurally unfair. The compensatory award comprises the following elements:
    - a. 400 loss of statutory rights
    - b. 8840 net loss of earnings for a period of 6 months
    - c. This totals 9240
    - d. This amount is reduced to 25% of the total on the basis of the tribunal's reduction of compensation under the principle in Polkey to take account of the possibility that the Claimant would have been dismissed in any event if a fair process had been followed.
  8. The total net amount payable by the Respondent to the Claimant for unfair dismissal is therefore £2,310.
  9. Given that this was found to be a redundancy dismissal, the ACAS Code of Practice does not apply and therefore there is no uplift.
  10. 2 week's pay in the total sum of £800 is awarded under section 38 Employment Act 2002 because of the inadequate provisions of the statement of terms and conditions given to the Claimant.
15. The Tribunal notes that the total awarded to the Claimant was £5,538.05.
16. In its Reasons, the Tribunal noted at para 28:
28. The Claimant had effectively been discarded by the Respondents and the second Respondent in oral evidence volunteered that he hadn't realised that the Claimant had 2 years service and therefore the right to a redundancy payment. The tribunal could not help but notice that in the months since it became clear that the Claimant did have 2 years service, the Respondents have still not paid him a redundancy payment or indeed any notice pay. This was unimpressive.
17. In paras 31 and 32 of the Reasons, the Tribunal stated:
32. There is no evidence before the tribunal that any process whatsoever was followed. The Claimant was not invited for a meeting – in person or by telephone. He was not 'consulted' in any way. He was given no right to appeal against the decision to dismiss.
  33. It is unsurprising that the Claimant states that he was distressed by the Respondents' conduct.
18. At paragraphs 34 and 35 of its Reasons, the Tribunal stated:

34. On 23 August 2020, the second Respondent emailed the Tribunal in the following terms:

I can confirm that Micheal Hannant was offered alternative work on an[o]ther contract, he decided not to take it. It was Anglian water that told us they have no work for him at the moment so we had to let him go, we paid him his notice and all holiday pay that was owed to him, the only thing that I can see is that we may owe him redundancy pay of one week that I'm more than happy to do.

Michael Hannant is now working for Anglian water doing the same job.

35. That email is in part misleading. It is not accurate to say that the Claimant was offered alternative work, nor that the Claimant was paid his notice.

19. And at paragraph 38:

38. No notice pay or redundancy pay was ever paid to the Claimant. The respondent does not dispute before this tribunal that the Claimant was entitled to both redundancy pay and notice pay.

20. The Respondent paid the amounts due on 12 March 2021 after a threat by the Claimant on 11 March 2021 to enforce the judgment through the civil courts.

21. The Respondent made an application for a Reconsideration out of time on 25 February 2021. It was rejected by the Employment Judge on the basis that there was no reasonable prospect of the judgments being varied or revoked in relation to any of the matters raised. In the Respondent's application it referred to a payment "already made". However no such payment had been made at that date.

22. The relevant part of the Claimant's application for costs dated 4 January 2021 states as follows:

It is the Claimant's case that it was unreasonable for the Respondent to maintain that the Claimant was only owed one weeks redundancy pay, which is denied, and simply not pay it. In addition, it was unreasonable for the Respondent not to have paid the Claimant his correct pay and notice pay and/or to engage with the Acas early conciliation process causing the Claimant to incur the expense of having to seek legal advice and issue a claim.

It is further submitted that the Respondent's conduct in its application to file its response out of time contained statements which the Claimant will say were untrue.

On instructing solicitors, it was open to the Respondent, now in receipt of legal advice, to make the payments owed to the Claimant and/or engage with the Claimant's representative over the same. In any event, at the date of the hearing the Respondent had not made any payments to the Claimant even though it had accepted, albeit to redundancy only, a payment was owed. That said, and on the evidence before the Respondent and the tribunal, it was obvious that payment for the days the Claimant was available to work were not paid, in addition his notice pay had not been paid. The Claimant will say that the Respondent's actions were unreasonable and that it has only been by the determination of this tribunal that any payment will be made to the Claimant.

The Claimant therefore makes this application for a costs order or wasted costs order in the sum of £5,262.00 plus 20% VAT £1,052.40 totalling £6,314.40 and in accordance with the attached Schedule of Costs for the Respondent's and/or its legal representative's unreasonable conduct.

23. The Tribunal notes the reference to the ACAS Early Conciliation period. A refusal to engage with ACAS may be unwise but it is not unreasonable behaviour and in any event the conduct of the parties during the ACAS Early Conciliation period is not something that the Tribunal is permitted to take into account and the Tribunal has put that aside.

24. In the written submissions submitted on 10 September 2021, the Claimant made reference to a without prejudice offer of £2,500 from the Respondent on 12 December 2020, just before the hearing, noting that the preparatory work for the hearing had already been done and costs incurred.

### **Legal Framework**

25. Costs do not follow the event in the Employment Tribunal.

26. The relevant grounds for making a costs order under rule 75(1)(a) of the Tribunal Rules are set out in rule 76(1):

#### **76.— When a costs order or a preparation time order may or shall be made**

(1) A Tribunal may make a costs order or a preparation time 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 that the proceedings (or part) have been conducted; [...]<sup>1</sup>
- (b) any claim or response had no reasonable prospect of success

27. The grounds are discretionary - i.e. the tribunal may make a costs order if the ground is made out but is not obliged to do so. Although those two grounds are discretionary, the tribunal is under a duty to consider making an order when they are made out - rule 76(1).

28. It is not punitive and impermissible for a tribunal to order costs without confining them to those attributable to that conduct. A tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring the costs-seeking party to prove that specific unreasonable conduct by the other party caused particular costs to be incurred.

### **Conclusions**

Has there been unreasonable behaviour / has part or all of the Respondent's case had no reasonable prospects of success

- a. *by failing to submit a response on time, necessitating an application to do so out of time;*
- b. *(as a consequence of (a)) by placing the burden on the Claimant of preparing the case including the hearing bundle;*

29. Taking the first two matters together, there is no obligation on a party to instruct solicitors when bringing or pursuing proceedings. Therefore, the failure to instruct solicitors until late in proceedings does not in itself constitute unreasonable conduct. Ignorance of the process does not necessarily amount to unreasonable behaviour – although the tribunal note that guidance is sent out with claim forms to assist Respondents to complete the response and that basic information as to the employment tribunal process is widely available.

30. The initial failure to respond was not in itself unreasonable behaviour and the making of an application to be permitted to enter a response out of time was not in itself unreasonable behaviour. However, given the correspondence from the tribunal on 21 August 2020 and the Respondent's attendance at the hearing on 14 September 2020 and its understanding of the consequences of its failure to enter a response at that point (if not earlier) the tribunal were troubled by the failure of the Respondent to make a timely application for permission to enter a response out of time. That put the Claimant to additional expense and caused additional stress. The tribunal considered the Respondent's behaviour overall in the conduct of this litigation before arriving at the conclusion that this specific behaviour of the Respondent amounted to unreasonable conduct of the litigation.

c. *by failing to pay those elements of the claim that were admitted prior to the final hearing (e.g. the redundancy payment);*

31. It was not unreasonable to admit that the redundancy payment was due. The tribunal have already noted that it was unimpressive that the Respondent failed to pay the redundancy pay earlier. However this was a case in which the Claimant was arguing that the reason for his dismissal was not redundancy and therefore this only became certain upon the tribunal's judgment and the tribunal did not consider that the unimpressive behaviour of the Respondent amounted to unreasonable conduct of the litigation.

d. *by failing to pay those elements of the claim that were (in the Claimant's contention) unarguable (i.e. the 7 days pay for the last week of employment);*

32. The tribunal did not consider that this was unarguable or that in seeking to argue about it, or at the very least requiring the Claimant to prove it, the Respondent has acted unreasonably in its conduct of the litigation nor that the Respondent had no reasonable prospect of success on this element of the claim.

e. *making a late without prejudice offer of £2,500 when most of the costs of the hearing had been incurred by the Claimant;*

33. A failure to adopt a proper negotiating position can be unreasonable in some circumstances as can a failure by a party to accept an offer put by the other side. However there is nothing unreasonable in this Respondent making an offer, nor in the size of this offer, nor in the timing of the offer. Many cases in the employment tribunal are settled shortly before or even during a final hearing.

f. *by denying all the claims and putting the Claimant to strict proof;*



34. The Respondent did not deny all of the claims. The Claimant did not win all of his claims. In particular in relation to the unfair dismissal and disability discrimination claims, which took up most of the time during the hearing, it was not unreasonable for the Respondent to require the Claimant to present his evidence to the tribunal. The positions adopted by the Respondent at the hearing were not unarguable and their arguments were not without any reasonable prospect of success.

*g. in its application on 25 February 2021 out of time for reconsideration - in regard to the content of that application and to the false assertion in that application that some payment had already been made;*

35. The tribunal noted that this was the second occasion on which the Respondent has made false assertions to the tribunal in correspondence. This was unreasonable behaviour, whether or not there was any direct costs consequence for the Claimant. The Respondent on both occasions tried to create a false impression as to the reasonableness of its stance. The Respondent has been offered an opportunity to comment and has failed to take it. The tribunal decided that this was unreasonable behaviour in the conduct of the proceedings.

Costs consequence if any

36. The tribunal reminded itself that there need not be a direct causal link between the specific unreasonable behaviour and specific costs incurred by the Claimant as a result of that behaviour, although looking at such a link could be a relevant factor in determining whether to award costs and if so at what level.

37. The tribunal considered the Claimant's costs schedule and noted that a large part of the costs claimed therein would have been incurred in any event. The tribunal noted that nearly £500 plus VAT of costs were related in some way to the late application for permission to enter a response and the burden on the Claimant of preparing the bundle for the final hearing.

38. Adopting a broad brush approach and taking into account all of the aspects of unreasonable behaviour as listed above which included the making of false assertions to the tribunal, the tribunal determined that it was appropriate to make a costs award against the Respondent and that the amount of £500 plus VAT was proportionate.

39. The amount of £100 VAT is added to the costs of £500.

40. Therefore the Respondent is ordered to pay £500 plus VAT of £100 totalling £600 to the Claimant via the Claimant's solicitors.

**Employment Judge Allen QC**

**4 January 2022**