



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE K ANDREWS

**BETWEEN:**

Dr U Prasad Claimant

and

Epsom & St Helier University  
Hospitals NHS Trust Respondent

## **JUDGMENT ON COSTS APPLICATION**

The claimant is ordered to pay costs to the respondent in the total sum of **£1,520** plus vat.

### **REASONS**

1. On 12 January 2021 the respondent applied for costs against the claimant pursuant to rule 76 the Employment Tribunal Rules 2013. The respondent requested that that application be dealt with on the papers without the need for attendance at a hearing (as permitted by rule 77).
2. The claimant agreed to a paper consideration and on 28 June 2021 made written submissions in reply to the merits of the application.
3. Relevant Law
4. According to rule 76:
  - 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; or
    - (b) any claim or response had no reasonable prospect of success.
5. Accordingly there are two stages in a decision to make a costs order. First, whether the discretion is engaged and if so, should it be exercised.
6. In general terms, costs do not follow the event in Employment Tribunal proceedings and an award of costs is the exception and not the rule. The

vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed (*Barnsley Metropolitan Borough Council v Yerrakalva* 2012 IRLR 78).

7. Rule 84 provides that in deciding whether to make a costs order and if so in what amount, the Tribunal may have regard to a paying party's ability to pay but is not required so to do.

8. I am also assisted by the guidance note on costs attached to the Presidential Guidance on case management (as updated in 2018). This emphasises that awarding costs is not the norm in the Tribunal and that each case will turn on its own facts.

9. Background

10. On 10 November 2016 the claimant brought claims for sex discrimination, harassment, victimisation and detriments on the ground of having made protected disclosures. Those claims were heard in September 2017 but dismissed by a Judgment sent on 25 November 2017.

11. The claimant appealed and the Employment Appeal Tribunal remitted two distinct matters to the Tribunal:

a) whether, subject to the time point, the conduct of the respondent in sending the letter of 30 July 2015 to the Secretary of State and the patient was conduct related to sex, and, hence, whether, subject to the time point, the harassment claim in question was well founded in that respect; and

b) whether it is just and equitable to extend time in relation to that complaint so as to make presentation of it in time.

12. A preliminary hearing was held before Judge Harrington on 6 January 2020 at which usual orders were made regarding disclosure of documents and preparation of bundles for the remission hearing which was subsequently listed for 2 days in May 2020.

13. The 2 day hearing was then, in accordance with general arrangements at the time due to the pandemic, converted into a telephone preliminary hearing. The claimant was represented by Counsel at that hearing. An Order was subsequently sent to the parties in which I recorded:

'There are unresolved issues between the parties as to disclosure of documents and I have made relevant orders below. I gave general guidance to the claimant that documents are only to be included in the bundle if they are relevant to the narrow issues before us. I also informed her of the reconsideration process she should follow if she believes she has now received documents that would have been relevant to the original issues we decided back in 2017.'

and then ordered:

1. On or before 1 June 2020 the claimant shall send to the respondent copies of any documents that she says are relevant to the narrow issues before this Tribunal that have not been included by the respondent in the current proposed joint bundle. It is anticipated that the parties shall be able to work together to either incorporate those additional documents within the bundle or add them in a separate section. If agreement cannot be reached, the claimant shall be responsible for producing the extra copies required.

2. On or before 15 June 2020 Dr Marsh of the respondent will send to the claimant and the Tribunal a signed witness statement, containing a statement of truth, explaining his statement in paragraph 99 of his witness statement for the original hearing, with regard to whether notes of a meeting on 30 November 2015 have or have not been disclosed together with a definitive statement on behalf of the respondent as to the existence or otherwise of those notes.

3. If the claimant has any application further for receipt of that statement she shall make it promptly to the Tribunal.

and extended time for exchange of witness statements to 18 August 2020.

14. The respondent's submissions

15. The respondent says that the claimant then acted unreasonably in that she:

- a. insisted on Dr Marsh producing a witness statement and then disputed it despite its brevity and focus on one sole issue;
- b. during May and June 2020 sent the respondent a huge volume of documents unrelated to the issues to be decided. Despite the respondent explaining this to the claimant she insisted that her documents were relevant and should be included in the bundle. The respondent was therefore required to spend a significant amount of time perusing the documents, corresponding with her in respect of them, sending her paper copies of irrelevant documents and corresponding with the Tribunal in relation to this; and
- c. did not exchange witness statements in accordance with the Tribunal's order and sought no extension for doing so from either the respondent or the Tribunal.

16. It says that that unreasonable conduct has resulted in the respondent having to incur additional legal fees amounting to £7,420.20 plus VAT, over and above the fees it would have expected to incur had the claimant conducted her case in a reasonable and proportionate manner. They provided a schedule of costs supporting that claim.

17. The claimant's submissions

18. The claimant resists the application.

19. As far as Dr Marsh's supplementary statement is concerned she, rightly, points out that this statement was ordered by the Tribunal as it was potentially relevant both to the remitted issues and a possible application for a reconsideration. Further she was given the opportunity to make any application arising out of it which in due course she did (albeit

unsuccessfully).

20. With regard to documentation she says that the extra pages she wanted included in the bundle were appropriate because they (or a significant proportion of them) had not been available to her at the first hearing but went to a pattern of behaviour by Dr Perikala which was in turn relevant to his motivation - one of the issues remitted. In the event, she says, she prepared the further bundle and therefore the respondent was not put to significant additional cost.
21. As far as the late exchange of witness statements is concerned, the claimant acknowledges that she was very late but says there were real and substantial reasons for this including not least her own clinical roles during the pandemic as well as her ongoing employment/legal issues.

### **Conclusions**

22. I conclude as follows:

- a. The issues concerning Dr Marsh's statement do not meet the threshold for a costs order being made against the claimant. Although she was found to be incorrect in her concerns regarding this issue, that is insufficient to amount to unreasonableness.
  - b. The claimant undoubtedly submitted an unreasonable amount of documentation to the respondent for inclusion in the bundle for the remission hearing. She did this after I had explained to her at the May 2020 hearing the narrow scope of the remission hearing and what the correct process would be for asking the Tribunal to consider fresh evidence (an application for reconsideration). The threshold is met and I consider that the respondent was put to additional unnecessary expense in trying to resolve this with the claimant, even recognising that ultimately she produced the extra bundles for the hearing.
  - c. Turning finally to the issue of late witness statements, again the threshold is met. Whilst recognising in particular the demands on the claimant's time in 2020 occasioned by the pandemic, she was entirely culpable in failing to seek any extension of time and that was unreasonable behaviour on her part that put the respondent to unnecessary additional expense. That additional expense in the greater scheme of things, however, would be relatively modest.
23. As to the amount of costs to be awarded, the claimant correctly points out that the respondent's schedule of costs does not allocate the costs sought according to the matter relied upon. Further, the schedule includes time spent on matters that would have had to be done even absent the claimant's unreasonable conduct. That in itself is not problematic. It is open to me on a summary assessment of costs to take a broad brush approach with a view to my own experience of the likely time taken in dealing with such matters.

24. The claimant made no submission regarding her ability to pay any order. Given that she is a practising medical consultant I do not consider this to be an issue however given the level of costs sought.
25. I assess the costs payable by the claimant to be **£1,520** (calculated as 10 hours at a rate of £120 for the additional unnecessary work on the documents and chasing statements plus 2 hours at £160 in preparing the costs application) plus vat.

**Employment Judge K Andrews**

Date: 18 February 2022