EMPLOYMENT TRIBUNALS

Claimant:
Mr D Wezowicz C1
Mr K Markowski C2
Mr P Blazejewski C3
Mr K Smykowski C4

Respondent:

Polyclear Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Southampton (by Video Hearing) **On:** 11 March 2022

Before: Employment Judge Dawson

Appearances
For the claimant: Mr Werenowski, solicitor
For the respondent: Mr Kohanzad, counsel

JUDGMENT

The respondent is ordered to pay the claimants' costs assessed at £10737.00.

Employment Judge Dawson
Date: 11 March 2022

Judgment sent to parties: 29 March 2022

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Hearing
The hearing was conducted by the parties attending by Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic.

Recoupment

The recoupment provisions do not apply to this judgment.

REASONS

1. The case has been listed to consider two applications made by the claimant for costs. The first was made by letter dated 20 December 2019. The second was made by email dated 7 October 2021, which also pointed out that the claimant's application of 20 December 2019 had not been listed. Directions were given for the applications to be heard.

2. The context to the applications is that shortly before the matter was listed for a final hearing in 2019, the respondent's response was struck out on the basis that it had failed to comply with unless order. Initially the respondent's application to set aside the unless order was refused and a remedy hearing held. Following that remedy hearing, the Employment Appeal Tribunal overturned the decision refusing to set aside the unless order and the matter was remitted, at which point the unless order was set aside. Thus the respondent was able to defend the claim which proceeds to a final hearing in September 2022. The remedy hearing was set aside, by consent.

Issues

3. At the outset of the hearing I asked the claimant's representative to clarify the unreasonable conduct which he said meant an order should be made. He listed the following:

    a. Failure by the respondent to comply with the order for disclosure made on 12 June 2018 by Employment Judge Harper.

    b. Failure by the respondent to adequately respond to requests for specific disclosure made between June 2018 and December 2018.

    c. Agreeing to an order by Employment Judge Emerton in respect of disclosure on 20 December 2018 and then failing to comply with it.

d. Agreeing to an unless order by Employment Judge Harper MBE 14 January 2019 when it could not comply with the order.

e. Failing to comply with the unless order of Employment Judge Harper MBE

f. Failing to comply with directions given by Employment Judge Wright in respect of the remedy hearing,

g. Making several applications to postpone the remedy hearing,

h. Failing to agree a bundle for the remedy hearing agree the bundle for the remedy hearing

i. One day before the remedy hearing seeking to adduce further evidence.

j. Failing to comply with the date for written submissions given by Employment Judge Craft in respect of the remedy hearing.

k. Failing to honour the judgment made by Employment Judge Craft requiring the claimants to instruct bailiffs.

l. Failing to provide a bundle for the hearing considering setting aside the unless order on 1 October 2021.

m. Failing to comply with the directions given in respect of this hearing.

4. The respondent contended that whilst it had anticipated the application was in respect of its conduct in failing to deal with disclosure and/or comply with the tribunal orders in respect of disclosure, it had not anticipated the application would cover those matters after paragraphs 3(f) - (l) above.

5. I determined that, having regard to the way in which the two applications were drafted and, in particular, the lack of specificity within them, the respondent's assumption that the application was in respect of the way it had dealt with disclosure and the tribunal orders in respect thereof was a reasonable one. There was nothing to put the respondent on notice that the other matters were to be raised. The claimants say that there costs schedule, served in support of this hearing, should have put the respondent on notice and it could, at least, have asked the claimants for more information. However, as the respondent's counsel pointed out, the cost schedule could simply have contained those costs on the basis that it was to be argued that they flowed from the alleged unreasonable conduct in respect of disclosure (as, indeed, the claimant did argue).

6. Considering the overriding objective and the importance of the respondent knowing the case it had to meet at this application, I considered that the application, today, should be limited to an application in respect of unreasonable conduct based on the respondent's behaviour in respect of disclosure and/or tribunal orders in respect thereof.

7. However, I considered that the respondent should also be able to deal, today, with its failure to provide a bundle for the last hearing and its failure to comply with the directions given in respect of today's hearing. It seemed to me that they were sufficiently closely connected to the issues of disclosure and failure to comply with the tribunal's orders to be said to be part of that issue. Counsel for the respondent had been at the last hearing and I expressly made reference to the failure to provide a bundle in the reasons I gave on the last occasion when setting aside the unless order. Those issues could fairly be decided today and should have been anticipated by the respondent.

8. The other matters (those in paragraphs 3(f)-(k)) can be considered at the end of the final hearing if the claimant wishes to pursue them. There is no prejudice to the claimants in that respect save that they will have to wait a little longer for any judgment to be made in respect of those costs. If I were to determine the matter today I would have to rely upon the documents, none of the matters being matters that I dealt with as the judge. Thus, another judge in the future will be in just as good a position as me to make a decision on those matters and the prejudice to the respondent in having to deal with the matter today when it was, reasonably, unprepared to do so outweighs the prejudice to the claimants in having to wait longer for a judgment- if they are entitled to one.

Relevant factual matters

9. The background in respect of the application for disclosure is as follows.

10. On 12 June 2018, Employment Judge Harper MBE made a standard order for disclosure by 20 July 2018 (page 16[1]).

11. On 22 October 2018, the claimants' solicitor wrote to the respondent asking for disclosure in respect of "job sheets for the period the claimants worked for the first respondent to include the work undertaken by these 4 claimants and the work undertaken by Mr Chima" (page 83).

12. On 5 November 2018, the claimant made an application for disclosure to the employment tribunal which requested "an order for all daily job sheets from 13.10.2015 (when Mr Wezowicz started to work for the first respondent) until all four claimants were summarily dismissed on 31 October 2018." (Page 86). In the same letter the claimant's solicitor highlighted various failures to comply with the orders made by Judge Harper.

13. On 7 November 2018 the respondent solicitors replied

    With respect to the job sheets requested, I have attached an example job sheet. You will note, job sheets only pertain to the materials used and do not hold personal information. Furthermore, there can be between 10-30 job sheets

[1] references to page numbers are to the claimants' bundle of documents

completed per day. Therefore, should you continue to pursue this aspect of disclosure, I will require you to narrow your search (page 90).

14. On 10 December 2018 the claimant's solicitor then made an application to the tribunal for specific disclosure. The letter included, amongst other things, Request 4 , which after some explanation, stated in the penultimate paragraph on page 2 of the letter:

15. Accordingly, we ask for disclosure and copies of 30 job sheets for machine numbers 3,5 and 10 and 30 job sheets for machine numbers 8,14,& 16. We ask that the same date be used and that the sheets deal with a time the Claimants were still employed.

(page 91)

16. The respondent's counsel submits that that was an order which could not be complied with because there were not 30 job sheets for those machine numbers all from the same date. However, he also accepts that the respondent did not say that but, instead, consented to an order at the next hearing, to which I will now turn.

17. The matter came before Employment Judge Emerton on 20 December 2018 and his order stated

Disclosure Request 4: pages 2-3 of the letter: The issue of comparing the evidence relating to tasks carried out by Polish employees, and those of Indian extraction, is central to the discrimination claims, and the material requested is relevant and may be probative. The first respondent is to disclose copies of the job sheets referred to in the penultimate paragraph on page 2 of the letter, the information in the bottom paragraph on that page, the information referred to in the top two paragraphs on page 3, and the cleaning records referred to at paragraph 3 of page 3.

18. As I have indicated, it is not in dispute that the respondent's representative, present at the hearing, agreed to an order in those terms.

19. The matter next came before Employment Judge Harper MBE on 14 January 2019 when he stated

> 1.1 This is the third PH. The first was before me on 12th June 2018 and the second was before EJ Emerton on 20 th December 2018. There was much non compliance with the Orders I made on 12 June 2018. Orders are made to be adhered to; they are mandatory not simply for guidance only. I explained to Miss Jackson that I was not impressed by the respondents' non compliance and she acknowledged that the respondents had difficulties on this issue. Non compliance produces serious consequences for the defaulting parties. I indicated that I was not confident that this Order would be sent out today but it was to be noted that the

Orders made below are operational now and not when the parties receive this document.

1.2 The first Respondent was ordered on 20th December 2018 to "disclose the quotation and contract of 18th October 2016..." by 8th January 2019. Miss Jackson said that this had been disclosed by the sending of an email with an iCloud droplink. She was unable to tell when this had been done. Mr. Werenowski said that he had not received it. It was apparent, in the absence of any proof that it had been done, that it had not been done and the first respondent is in breach of the order. I made an unless order in paragraph 2 below.

1.3 On 20 December 2018 the Respondent was very specifically ordered, in conjunction with the penultimate paragraph on page two of the claimants email dated 10 December 2018, to produce specific job sheets for specific machines as a snapshot of one day. What the respondent has done is to serve upon the claimant 260 pages of all sorts of job sheets on various dates which completely misses the point of the original request and also does not comply with the order. It is not good enough to bombard the claimants with paperwork and expect them to sort out what is or is not relevant. Since it may take a little longer now to comply I made the Unless Order in paragraph 3 below.

1 .4 On the 20th December the parties were specifically ordered to agree the List of Issues. The claimants had provided a draft very early on. Miss Jackson understood that agreement had been given by submission of a List of Issues to the claimants. Upon checking she said that she was embarrassed to tell me that this had not been done either. I therefore made an unless order as set out in paragraph 4 below.

20. Employment Judge Harper made an unless order in the following terms:

> Unless the first respondent discloses to the claimants and the tribunal the job sheets referred to in the claimant's email of 10th December 2018 and referred to in paragraph 25 of the Order of 20th December 2018 by 4pm on Wednesday 16th January 2019 the response of the first respondent will stand struck out without further order.

21. Again, I am told, the respondent's representative agreed to that order.

22. On 16 January 2019 at 15:33, the respondent's representative sent an email that included a link for documents to be downloaded. That email is not in the bundle of documents before me but, in my earlier decision in respect of relief from sanctions I quoted from the judgment of the EAT which recorded that the email stated;

> "We write on behalf of both Respondent's, and following the order dated 14 January by Employment Judge Harper.

We understand the strict deadline, and in order to avoid breaching this order, please see attached the link to the respective job sheets.

It is understood that the documents alone may be difficult for the Claimant, and the Tribunal, to draw inferences from, and therefore the Respondent is in the process of collating these documents into a short bundle.

It is submitted that an index will be provided which will allow a more simple analysis to take place.

Unfortunately, the Respondent's bandwidth was struggling to send the capacity of the documents and these have only been received by the Respondent's Representative recently. In any event, this will be formatted before the end of the day."

23. Again, in my earlier decision, I recorded that later on the same day a further email was sent attaching a paginated amnd indexed version of the documentation. Nothing was said about the extent to which the documentation complied with the unless order. The documentation did not relate to one particular day but instead spanned a number of dates and went beyond the particular machines requested.

24. On 21 January 2019 the claimants wrote to the tribunal contending that the respondent's response had been automatically struck out.

25. On 22 January 2019, the respondent wrote to the tribunal stating that its ability to provide the information was significantly limited and that as far as was reasonably practicable the respondent had complied with the unless order.

26. On 23 January 2019 a letter was sent from the tribunal headed "Confirmation of Dismissal of Response" and stating that the response had been dismissed. It vacated the trial which was due to be heard on 28 January 2019.

27. On 29 January 2019 the respondent made an application to set aside the unless order which had been made by Employment Judge Harper MBE.

28. On 8 February 2019, the respondent produced 11 more sheets which more closely correlated to one particular day (although they still spanned at least 2 days).

29. On 11 April 2019 Employment Judge Wright refused to set aside the unless order and listed the matter for a remedy hearing. The respondent, having appealed to the Employment Appeal Tribunal made an application to postpone the remedy hearing. The claimants objected because, amongst other reasons, they have not seen any documentation relating to the appeal. In part for that reason Employment Judge Wright refused the application to postpone. That documentation was provided to Employment Judge Wright but she again refused to adjourn the remedy hearing in accordance with the claimant's wishes.

30. The remedy hearing was heard by Employment Judge Craft on 4 July 2019 and he gave judgment for the claimants in various amounts.

31. On 26 June 2021, the Employment Appeal Tribunal allowed the respondent's appeal against the decision of Employment Judge Wright in respect of the application to set aside the unless order and the matter was remitted to be heard by a different tribunal.

32. I heard that application on 1 October 2021 and set aside the unless order which had been made by Employment Judge Harper. As far as I am aware no appeal has been made in that respect. The matter is listed for a final hearing in September 2022 and I understand that, at present, the case is proceeding to hearing as directed. The revised date for exchange of witness statements is 31 March 2022.

Legal Principles

33. The Employment Tribunal Rules of Procedure provide as follows in respect of costs.

> **Costs orders and preparation time orders**
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> **75.**—(1) A costs order is an order that a party ("the paying party") make a payment to—
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> (a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
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> (b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
>
> (c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.
>
> (2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.
>
> (3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.
>
> **When a costs order or a preparation time order may or shall be made**

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.

The amount of a costs order

78.—(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(**a**), or by an Employment Judge applying the same principles;

34. It was held in *Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255*, *[2012] IRLR 78 that* "The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs."

35. Harvey on Industrial Relations summarises the position in relation to the general approach to costs as follows: "there is an initial two-stage process involved in making a costs order: (a) there must be a finding that the statutory threshold under r 76(1)(a) or (b) has been met, and (b) if it has, the tribunal must then consider whether it is appropriate to make an order in all the circumstances, ie in the exercise of its discretion (see *Ayoola v St Christopher's Fellowship UKEAT/0508/13 (6 June 2014, unreported) at paras 17–18*; *Robinson v Hall Gregory Recruitment Ltd [2014] IRLR 761, EAT, at para 15*). It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of the award payable".

36. The parties agreed that there must be some correlation between the order for costs and the unreasonable conduct. I note the guidance in paragraph 41 of

Yerrakalva that I must ask whether there has been unreasonable conduct and, if so, identify what was unreasonable about it and what effects it had.

37. The claimant referred to *Scott v Russell* 2013 EWCA Civ 1432 in respect of the definition of vexatiousness but did not really pursue a claim on that basis. It also referred me to definitions of unreasonable conduct in the case of *Dyer v Secretary of State for Employment* EAT 183/83 and*McPherson v BNP Paribas [London Branch]* 2004 ICR 1398,

Analysis

38. In respect of the correspondence and the conduct of the parties leading up to the orders in December 2018 / January 2019, I do not consider it was unreasonable. Although an order for disclosure had been made previously, it is not unusual for the parties to, thereafter, debate precisely what documents should have been disclosed and it is clear that there was a process of the claimant refining the precise application it was making in the light of the respondent's response. That is a normal part of litigation and the parties are expected to cooperate to resolve those disputes. The behaviour leading up to the hearing of 20 December 2018 was not unreasonable.

39. However, the respondent should have been in a position by the hearing on 20 December 2018 to know precisely what disclosure it could give in relation to that issue. The claimants' application of 10 December 2018 was clear and detailed and it was primarily within the knowledge of the respondent whether the application was one which could be complied with or not. It should have attended at the hearing before Employment Judge Emerton in a position either to be able to agree to that application for disclosure or resist it, giving reasons. It agreed to the order being made. However, in doing so, it agreed to an order being made which it now says it could never comply with.

40. Thereafter, instead of simply contacting the claimant and the tribunal to explain the position, it served documentation on the claimant which did not comply with the order. Whilst, in it's mind, it may have been genuinely doing its best to comply with an order it could not comply with, all it was actually doing was causing inconvenience to the claimants by serving documents, as described by Employment Judge Harper, which completely missed the point of the original request and amounting to bombarding the claimants with paperwork and expecting them to sort out what was or was not relevant.

41. Compounding its error, the respondent then agreed a new date to comply with the order of Employment Judge Emerton on an "unless order" basis. The respondent should not have attended the hearing before Employment Judge Harper on 14 January 2019 and agreed to an unless order without being confident that it could comply with it. Instead, on the basis of the respondent's submissions today, the respondent should have been confident that it could not comply with any unless order and have told Employment Judge Harper that.

42. I find there was unreasonable conduct in agreeing to the disclosure orders of Employment Judge Emerton on 20 December 2018 and Employment Judge Harper on 14 January 2019 when the respondent ought to have known that it could not give that disclosure and in dealing with disclosure between the two orders in the way described by Employment Judge Harper in the above paragraph. It was unreasonable for the respondent to attend the tribunal without knowing precisely what its case was on the application for disclosure.

43. In circumstances where an unless order had been made, it was, in my judgment, further unreasonable behaviour to fail to comply with the order without explaining to the claimant and the tribunal why it was not complying with the tribunal's order. This is not a case where it is open to the respondent to argue that there had been substantial compliance with the unless order since in paragraph 38 of the Employment Appeal Tribunal judgment it is recorded that "in this case there are no appeals against decisions at stage one, making the unless order and its terms or stage two, the decision to issue the rule 38 (1) letter confirming that the response had been dismissed because of material non-compliance. The only appeal is in respect of the stage three decision, hence the necessity for an amendment to the grounds of appeal." (Page 59).

44. As a consequence of the non-compliance by the respondent, it was inevitable that either the matter would be listed for a remedy hearing or the respondent would have to apply for relief from sanctions. In fact both happened in this case, the latter first. Initially the respondent was refused relief from sanctions. The Employment Appeal Tribunal held that decision failed to fully apply the applicable legal principles.

45. I am satisfied that there is unreasonable conduct in this case and, therefore, the statutory threshold has been passed. I am also satisfied that it is appropriate in the exercise of my discretion to award costs against the respondent. The unreasonable conduct of the respondent in respect of the issue of disclosure has to be seen in the light of other conduct as recorded by Employment Judge Harper. It is clear that he took the view the respondent had not been conducting the proceedings properly (see paragraph 1 of his Case Management Summary). There was also unreasonable conduct in more than one respect in this case as I have set out above. The only factors pointing away from me exercising my discretion in favour of ordering the respondent to pay the costs is its argument that it was trying to comply with the order. However, I am not convinced that was the case. It was giving more and more disclosure but that is different to a serious attempt to comply with an order. Had any proper attempt been made, the respondent would have realised that the attempt was not possible and contacted the claimant and the tribunal accordingly. It failed to do so.

46. I must also consider whether there was unreasonable behaviour on the part of the respondent in failing to provide a bundle prior to the last hearing before me. I recorded in my decision on the last occasion, at paragraphs 16 to 18 the following:

a. Somewhat surprisingly, given the procedural history in this case, even at the hearing before me the respondents had only provided a bundle very late in the day. The claimant says that he did not receive his copy until yesterday and had, therefore, completed his own. It appears that a copy was sent to the tribunal on the day before the hearing but only at 2:20 PM. It is difficult to avoid any conclusion other than, even now, the respondent's legal representatives are adapting a very lethargic approach to representing the respondent's position. Any prejudice to the claimant because of the late provision of the respondent's bundle was avoided by parties agreeing that the tribunal would only consider the claimant's bundle.

b. Moreover, only this morning did the respondent serve a witness statement of Mr Mehta on the claimant and the tribunal. The claimant's solicitor, extremely reasonably in the circumstances, did not resist Mr Mehta being called to give evidence and cross-examined him.

c. The respondent's position, as explained by Mr Mehta in his evidence, was that it was never possible to give the disclosure ordered.

47. In advance of this hearing I ordered the respondent to produce a counter schedule of costs within the next 36 days (directions sent to the parties on 24 November 2021) and the parties to agree a set of all documents relevant to the primary issues for use at this hearing. The respondent has failed to comply with those directions.

48. Neither party has been able to point me to any order in advance of the last hearing pursuant to which the respondent should have provided a bundle of documents and I have been unable to locate one on the tribunal file. In the absence of an order requiring the claimant to provide a bundle, whilst I consider it to be poor behaviour, I do not consider it to be unreasonable for the purposes of awarding costs.

49. I do consider it to be unreasonable for the respondent not to comply with the requirement to serve a counter schedule of costs prior to this hearing and given everything else that has been said, I consider it appropriate to exercise my discretion to order the respondent to pay costs in that respect (subject to the question of what effect that failure had).

The amount of costs

50. I have considered the claimant's statement of costs as at 7 October 2021 and its statement of additional costs. By reference to that schedule I have awarded the following sums by reference to the subheadings contained within it.

51. In respect of subheading 3, correspondence with the respondents, it is insufficiently clear what those sums relate to. However it would have been necessary for the claimants to spend some time considering and trying to resolve

the amount of documents which had been served on them and trying to consider whether the orders for disclosure had been complied with and I award 4 hours of time at £200 per hour being £800.

52. In respect of subheading 4, it is not clear to me precisely what the applications dated 1 March 2019, 2 May 2019, 16 May 2019 and 12 June 2019 are or how they relate to the above findings. I make no order in those respects.

53. In respect of sub-heading 5, the attendances on the tribunal on 14 January 2019 and 1 February 2019 do flow from the unreasonable conduct of the respondent and are recoverable. The attendance at the hearing on 20 December 2018 was not because of unreasonable behaviour on the part of the respondent but just part of general litigation. I award £260.

54. The sums expended in respect of the hearing before Employment Judge Wright are recoverable on the basis that the application for relief from sanctions was necessitated by the failure to comply with the unless order. However the sums claimed are excessive. A total of £1800 is claimed in respect of travel, waiting time and hearing time as well as a further £640 in respect of attendance on counsel, £4205 in respect of documents and £1800 in respect of counsel's fees.

55. Whilst the hearing before Employment Judge Wright was an important one and it was reasonable for the claimant to attend by counsel, I am not persuaded that it was appropriate for a solicitor to be in attendance as well. There would have been some work on documents which was necessary but I find that the appropriate figure, in total, in respect of that hearing is £5000.

56. I do not consider that the costs of the remedy hearing should be borne by the respondent. It sought a postponement of the remedy hearing pending its appeal in the Employment Appeal Tribunal and the claimant refused that postponement. I do not believe those costs can be said to have been caused by the respondent's unreasonable conduct but, even if they could, I would not exercise my discretion to order them to be payable. The claimant was entitled to run the risk that the appeal would fail, but having done so it cannot lay the costs at the respondent's door.

57. The more difficult question is whether the respondent should pay the claimant's costs of the attendance before me on 1 October 2021. On behalf of the respondent it can be said that it was not the unreasonable conduct on its part that caused that hearing but the decision of the Employment Appeal Tribunal that the earlier decision on setting aside the unless order was wrong. On behalf of the claimant it can be said that it was the respondent's unreasonable conduct which set matters going down the route of setting aside the unless order and if the appellate court has to be involved in that route then that is simply a matter which flows from the unreasonable conduct in the first place. In my judgment the latter is the appropriate analysis having regard to the guidance in paragraph 41 of *Yerrakalva* .

58. It was reasonable for the claimant to prepare its own bundle of documents for that hearing given that the respondent had not done so. I consider that the costs incurred by the claimant were related to the unreasonable behaviour of the respondent but I do not consider it reasonable for the claimant to spend £705 reviewing the bundle of documents which the respondent sent late. In respect that hearing I award £2400.

59. The costs of today's hearing for costs also are connected with the unreasonable behaviour of the respondent and the claimant claims sums amounting to £2277. It seems to me they are also reasonable and I award them in full. It seems to me that nothing extra has flowed from the failure by the respondents to comply with the directions in respect of this hearing and I make no award in that respect.

60. Thus the respondent is ordered to pay to the claimants the total sum of £10,737.