



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs R Jobbin-Kazi  
**Respondent:** Kool Kidze Limited  
**Heard at:** East London Hearing Centre (fully remote hearing)  
**On:** 12 July 2022  
**Before:** Employment Judge Knowles  
**Members:** Mr P Quinn  
Mr S Woodhouse

## Representation

**Claimant:** Mr Kennedy, Counsel  
**Respondent:** Mr Lonergan, Consultant

# JUDGMENT

The unanimous decision of the Employment Tribunal is that the Claimant's application for costs under Rules 78(1)(a) and (b) is well founded and succeeds. The Respondent is ordered to pay to the Claimant her costs in the sum of £6,049.20 (including VAT).

# REASONS

## Issues

1. The issue for determination is the Claimant's application for costs under Rules 78(1)(a) and (b) of the Rules.
2. The Claimant's application was made on 24 November 2021, after judgment in the Claimant's favour was sent to the parties 10 November 2021. The application was made in time.

## Evidence

3. The parties produced a bundle of documents.
4. We also had before us an application to admit a witness statement from Mr Khan, the Respondent's Director, which is contained in the bundle of documents at page 126. The application is by way of an email dated 11 July 2022. With that email was annexed a bundle of medical evidence in support of why

Mr Khan was unable to attend today to give his evidence in person and answer questions.

5. The statement was admitted as a document. The Respondent correctly warned the Tribunal that there is limited weight that can be given to a witness statement in circumstances where the evidence is not given in person and the witness cannot be asked any questions.

6. We also had before us the file which we were provided with at the initial hearing on 1 October 2021.

### **Submissions**

7. The Claimant has produced a written application for costs dated 24 November 2021 (pages 6-11).

8. The Respondent has produced a written objection to the application dated 7 December 2022 (12-15).

9. We adjourned the beginning of the hearing this morning for a period in order that the application and the objection could be read before the hearing began.

10. Each party supplemented their written representations with submissions at the hearing today.

11. On behalf of the Claimant, Mr Kennedy made the following submissions:

- a. That the Tribunal should reflect on its findings which should be the main guide as to how the Respondent's evidence should be considered.
- b. That the Claimant's claim was for a modest value and succeeded.
- c. That the Respondent's only witness was not found to be credible; this is not a case where the Tribunal simply preferred the Claimant's evidence.
- d. That the lack of credibility finding should lead the Tribunal to find that the Respondent's conduct was unreasonable. He changed his evidence and made excuses as to why documents were not available. He gave no explanation why he could not obtain documents.
- e. Costs do not follow the event but unreasonable conduct is one ground and Mr Khan rose to that level.
- f. In the alternative this defence had no reasonable prospect of success. The defence does not reflect Mr Khan's evidence. The Respondent never had a proper defence, the Claimant was bound to win.
- g. Part of the case was about the denial of the Claimant having a trade union representative present at her disciplinary hearing. Either that happened or it did not. It was a straightforward question and the defence was bound to fail.

- h. The rest of the claim turned on whether the Claimant was unable to work because she had no childcare. Mr Khan's evidence was the Respondent's sole defence. What he was saying in his witness statement was simply incorrect.
  - i. The level of costs applied for is modest. Hourly rate of solicitors is low as is the daily rate for Counsel.
  - j. There is no suggestion that the Respondent does not have the means to pay.
  - k. There was no pre-hearing warning as to costs.
12. On behalf of the Respondent, Mr Lonergan made the following submissions:
- a. Drawing on case law (Lodwick v London Borough of Southwark [2004] EWCA Civ 306 and Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255) it can be seen that tribunals have a wide discretion and that the vital point is to look at the whole picture and ask has there been unreasonable conduct and what effect it had.
  - b. The Respondent accepts that it cannot go behind the credibility finding made but the evidence must be considered in its entirety.
  - c. The clear issue is whether or not the Respondent was correct when Mr Khan formed the view that the reason the Claimant could not come to work was because she was looking after her son. Mr Khan did not waver from that position in his evidence.
  - d. There was a clear dispute of fact which needed to be tested in cross examination and in questions from the Tribunal.
  - e. There were other discrepancies, particularly in relation to the timing of the initial telephone discussion. Mr Khan submitted a supplementary statement because it was fixed in his mind that the telephone call occurred on the Friday and wished to correct his evidence. He accepted, in evidence, that Friday was improbable given that the notification from the school was dated the following Monday. He had his honest view of the day.
  - f. As can be seen in the Lodwick case, paragraph 26, "*Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms*".
  - g. It would be overly critical to criticise Mr Khan when the facts became clear, the day was embedded in his own mind and he was convinced it is true.
  - h. The Tribunal should make no inference that the Respondent has not produced documents that it does not have.
  - i. The tribunal found on the balance of probabilities that Mr Khan has reached the wrong conclusion.

- j. The Respondent operated 2 nurseries at the time and the one at which the Claimant worked has had to close whereas the other is open half days only. The Claimant does not suggest an award could not be met, but he would need to ask the Claimant for a payment plan.
- k. The Respondent does not object to the hourly or daily rates of costs claimed. The Respondent's position is that this issue had to come to a hearing, there was a dispute on the facts, the facts developed during the course of the hearing (recorded in the application at page 8) and therefore the hearing was a necessity. The costs should not be allowed.

## The Law

13. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contain the Employment Tribunal Rules in Schedule 1.

14. Rules 74 to 84 cover costs.

15. Rule 76 sets out when a costs order may or shall be made as follows:

*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; or*

...

16. Costs means "*fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing)*" (Rule 74(1)).

17. Under Rule 78 a costs order may 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 (Rule 78(1)(a)). This is known as unassessed costs. Costs exceeding this limit require detailed assessment (Rule 78(1)(b)).

18. This case involves a claim below the limit and is a claim for unassessed costs under Rule 78(1)(a).

19. Costs do not "follow the event", meaning that if a Claimant succeeds in Tribunal with their claim that does not mean that they will automatically be able to recover their costs.

20. Costs are discretionary under rules 76(1)(a) and (b).

21. Whether or not there has been unreasonable conduct is a matter of fact for the tribunal to determine.

22. In **HCA International Ltd v May-Bheemul** EAT 0477/10 the EAT stated that *“a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct.”* This statement was subsequently endorsed by the Court of Appeal in **Arrowsmith v Nottingham Trent University** 2012 ICR 159, CA.

23. In **Yerrakalva v Barnsley Metropolitan Borough Council** and anor 2012 ICR 420, CA Mummery LJ stated that *“the tribunal has a broad discretion and should avoid adopting an over-analytical approach. 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 has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.”*

24. In considering Rule 78(1)(b) the focus is on the claim or response itself.

25. In **Radia v Jefferies International Ltd** EAT 0007/18 the EAT emphasised that the test is whether the claim had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. Thus, the tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. In doing so, it should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time.

26. It is clear from the authorities that under either Rule 78(1)(a) or (b) the Tribunal must undertake a two stage approach. First, it must consider whether or not the wording of the relevant subsection is met. If it finds that the wording of the subsection is met, the Tribunal must go on to consider whether or not it will exercise its discretion to award costs in all of the circumstances of the case.

27. It was reiterated in the **Yerrakalva** case that *“in the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion”*.

28. Several cases have established factors which might be taken into account when assessing whether or not to exercise the discretion. These include noting that costs awards are compensatory not punitive and we must take care to consider what costs have reasonably been incurred and whether or not they arise from the conduct in question. The Tribunal should explain whether or not it took into account means to pay and if so how. The Tribunal may take into account whether or not a warning as to costs has been given, and whether or not a party has acted under legal advice, or was acting alone without experience of the matters in hand. We will take into account the nature of the evidence and claims. But none of these factors are determinative in isolation and the decision on which factors are

relevant in a particular application for costs and the degree to which they influence the exercise of the discretion is something for the Tribunal to determine.

## **Conclusions**

29. This matter involved two claims by the Claimant, firstly that she suffered unauthorised deductions from her wages between 22 and 29 September 2020 and secondly that she was denied the right to bring a trade union representative to a meeting on 21 October 2020 at which she was dismissed.

30. These were relatively straightforward and simple claims and the sums in dispute were relatively small.

31. In relation to the claim of unauthorised deductions from wages, the Claimant's case was that she received on 21 September 2020 an email from her son's school advising her that because her son had been in contact at school with someone who had tested positive for COVID-19, her son must isolate.

32. She claimed that she was told by the Mr Khan to stay at home whilst he checked with the Council the rules governing self-isolation for families.

33. Mr Khan claimed that he did not tell the Claimant to refrain from work nor did she need to. He claimed that the Claimant told him that she had to stay at home with her son because she had no childcare and it was because of that he decided she should not receive pay.

34. We heard their evidence and found that the Claimant's account was on the balance of probabilities more likely than not to be true. We also found Mr Khan not to be a credible witness.

35. It is not for us to revisit those findings now. The case has already been determined. No reconsideration application has been made nor any appeal instituted. Indeed, neither of the parties ever requested written reasons.

36. We gave eight reasons why we preferred the Claimant's evidence and why we found Mr Khan not a credible witness.

37. Essentially, the Claimant's first application is that Mr Khan has lied and that amounts to unreasonable conduct for the purposes of Rule 78(1)(a).

38. It was markedly the case that Mr Khan was not telling the truth when he claimed that the Claimant had said she could not work rather than that he told her not to come in. The text messages put that issue beyond any reasonable doubt. On 21 September 2020 the Claimant was asking about the position in relation to her attending work and on 22 September 2020 she sent the letter from the school to Mr Khan with a clear highlight around the paragraph which said that "other members of your household can continue normal activities provided your child does not develop symptoms within the 14-day isolation period". The Claimant confirms that her son has no symptoms and explains she can still come to work.

39. Mr Khan replies that he is waiting for the council to give him updated guidance on isolation with families and that he will be in touch.

40. Mr Khan does not reply to say that it doesn't matter whether or not the Claimant needs to isolate, because she has no childcare she must remain at home.

41. It is abundantly clear from these contemporaneous texts that the issue was Mr Khan not knowing whether or not the Claimant needed to isolate and wanting to check that with the Council.

42. There were other reasons why we found Mr Khan's evidence incredible, but the above is perhaps the most stark.

43. Mr Khan has maintained his position through the internal proceedings and throughout these proceedings, even in the face of the written communication at the time.

44. We find that he adopted a position he knew to be incorrect simply to avoid paying the Claimant.

45. In our conclusion, the Respondent has acted unreasonably in defending the proceedings in this manner and that Rule 78(1)(a) is engaged in relation to the part of the proceedings concerning the claim for unauthorised deductions from wages.

46. There was no dispute in fact at the Tribunal hearing that the Claimant had requested to be accompanied by a trade union representative at the meeting on 21 October 2020 and that Mr Khan denied that right.

47. It should be noted that the Respondent never explained in its grounds of resistance why it denied that the right to be accompanied had been breached. The Respondent simply denied that part of the claim without any explanation.

48. At the hearing, in submissions, the Respondent tried to suggest that this was an investigation meeting which did not trigger the right to become accompanied but the question for the tribunal was whether or not the meeting was one which could result in the taking of some action in respect of the Claimant by the Respondent.

49. The meeting resulted in the Claimant's employment being terminated by letter the following day handed to the Claimant the day after that, 23 October 2020.

50. The Respondent has never engaged with the issue concerning the right to be accompanied and to the extent that its submissions at the end of the Tribunal hearing amount to its defence (albeit those matters had not been articulated until that point) that defence had no reasonable prospect of success.

51. The defence of the claim concerning the denial of the right to be accompanied was plainly hopeless in the circumstances.

52. In our conclusion, Rule 78(1)(b) is engaged in relation to the defence of the claim concerning the right to be accompanied.

53. We therefore find that the costs regime is engaged in relation to all of the Claimant's claims.

54. We next considered whether or not we should exercise our discretion and make an order for costs.

55. Costs are not automatic and we are grateful for each party's careful presentation of the law and the authorities.

56. In our conclusion the nature of the conduct we are faced with is simple avoidance by the Respondent of a liability which it had to the Claimant.

57. These proceedings ought never to have reached tribunal.

58. They have done so because the Respondent has not reflected on what the position was at the time and has in the unauthorised deduction claim chosen to adopt a position unsupported by the contemporaneous evidence and, in relation to the right to be accompanied claim, chosen to defend a claim which in reality they never had an answer for.

59. The effect of this has been that the Claimant has had to engage her trade union solicitors and some £6,049.20 in costs have been incurred pursuing the matter through tribunal.

60. The Respondent has not suggested that he does not have the means to meet the claim for costs.

61. The Respondent has had access to legal advice throughout the internal and Tribunal proceedings.

62. The Respondent has not disputed the level of costs claimed or rate used in the calculation, their objection is to whether or not the costs should be awarded.

63. There is no suggestion that the costs have been calculated on an unreasonable basis or that the time engaged recorded in the calculation is excessive.

64. The hourly fee earner rate of £110 per hour and Counsel's fees of £350-500 per day are low.

65. We have been provided with medical evidence in support of the application to admit a statement from Mr Khan but it has not been submitted to us that his health affected his conduct of the defence. In any event we allowed his witness statement to be admitted and considered this.

66. In all the circumstances of this particular claim, looking at the matter as a whole, we determined that we should exercise our discretion and make an order of costs.

67. Given the particular nature and gravity of the conduct in relation to the defence, we consider that the whole of the Claimant's costs should be allowed.

68. We calculate the cost order to be in the sum of £5,041 including the £100 added today by Counsel to correct the brief fee for today's hearing. We added



VAT to that amount at the prevailing rate (20%). The amount that the Respondent is ordered to pay to the Claimant is therefore £6,049.20.

**Employment Judge Knowles  
Dated: 15 July 2022**