# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms A Baker**

**Respondent:** **House of Commons Commission**

**Heard at:** **London Central (remotely by CVP)**

**On:** **13 July 2022**

**Before:** **Employment Judge Brown**

**Appearances**
**For the Claimant:** **Ms C Brooke-Ward, Counsel**
**For the Respondent:** **Mr T Kirk, Counsel**

## COSTS JUDGMENT

**The Judgment of the Tribunal is that:**

1. **No order for costs is made against either party.**

## REASONS

1. The parties each made a costs application against the other. This hearing was listed to determine them. I have set out the applications and my decisions on each separately in this judgment, but I did consider both applications, in the context of the whole of the litigation, when making my decisions.

### Background

2. The Final Hearing on liability in this case was heard in and Judgment promulgated on 24 March 2022. The Claimant succeeded in her complaints in relation to 2 matters. Most of her complaints against the Respondents did not succeed.

### Relevant Law

3. *Rule 76 Employment Tribunal Rules of Procedure 2013* provides 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 … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that proceedings or part have been conducted; or*
*(b) any claim or response had no reasonable prospect of success."*

4. The Tribunal must consider making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.

5. Following *Hayden v Pennine Acute NHS Trust* UKEAT/0141/17, the Tribunal should take two-stage approach:

a. Consider whether any of the grounds in *r76(1)(a)* have been established;
b. Consider whether, in all the circumstances of the case, a costs award is merited, *Ayoola v St Christopher's Fellowship* UKEAT/0508/13.

***Exercise of Discretion***

6. In *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255 Mummery LJ stated (at para 41) that "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 if had".

7. It is usually appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented, given that "a lay person may have brought proceedings with little or no access to specialist help and advice. This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear", *AQ Ltd v Holden* [2012] IRLR 648, EAT at [32]-[33].

**The Respondent's Application for Costs**

8. By an application dated 24 March 2021 the Respondent made an application for its costs of a case management hearing on 18 May 2020 against the Claimant. It said that the case management hearing had been adjourned during the hearing, with the costs of preparation and Counsel's attendance already incurred, because the Claimant announced her intention to appeal an earlier order of EJ Goodman, during the hearing itself.

9. The application said that it had been anticipated that the hearing would deal with outstanding case management issues, the Respondent's application for a deposit order, and finalising the disputed list of issues, but none of those was dealt with because the claim was stayed pending the outcome of the proposed appeal.

10. The application further noted that, following receipt and consideration of the Claimant's Notice of Appeal dated 17 June 2020, the Respondent had written a Costs Warning Letter to the Claimant, indicating its intention to seek the costs of the wasted 18 May 2020 hearing, on the grounds that the appeal had no reasonable prospects, even of receiving permission to proceed, because the notice of appeal identified neither an error of law, nor perversity, but set out general dissatisfaction with the findings of fact made by EJ Goodman.

11. At this costs hearing, Mr T Kirk, Counsel for the Respondent, said that the Claimant had appealed EJ Goodman's judgment not to accede to the Claimant's application for reconsideration of her judgment which had itself refused the Claimant's application to amend her claim. The Claimant had not applied to reconsider the judgment until 27 April 2020, 3 months outside the time limit. He said that the Claimant had been in receipt of legal advice at the time.

12. Mr Kirk said that Lavender J had rejected the appeal at the "sift" stage because it had no reasonable prospect of success, p674. Mr Kirk submitted that the sole reason for stay and the wasted hearing was an appeal which had no reasonable prospects of success. Disclosing such an appeal late and scuppering the hearing had been unreasonable conduct.

13. Ms Brooke-Ward, Counsel for the Claimant said, in response, that EJ Goodman had given oral judgment refusing the Claimant's application to amend on 23 January 2020 and a case management order had been sent out, but it had not been clear to the Claimant that she could appeal the order. She had made an application to reconsider the Judgment on 24 April 2020 and had received the outcome of that on 8 May, 1 week before the case management hearing on 15 May 2020. Ms Brooke-Ward said that the Claimant had had a week to consider the reconsideration decision, when obtaining advice on appeal would normally take longer than one week. Ms Brooke-Ward said that Zehrah Hasan, a pupil barrister, had been instructed 3 days before the preliminary hearing on a pro bono basis. By 18 May 2020, therefore, the Claimant had been in receipt of legal advice for 3 days. Ms Brooke-Ward contended that it was not unreasonable for the Claimant to say, at that point, that she was appealing.

14. Ms Brooke-Ward drew my attention to an attendance note of the hearing, P420, which recorded that the Respondent said it wanted to deal with its deposit order application and the Claimant had said that she was in a position to deal with the Respondent's amendment application, but EJ Taylor had said that he could not deal with either application without a bundle and the pleadings. Ms Brooke-Ward said that it was the Respondent's obligation to provide the documents necessary for the Tribunal to adjudicate on its applications; the Respondent had not provided the documents and its own actions had led to any wasted costs.

**Decision on Respondent's Application**

15. I noted that the Claimant's appeal had been rejected at the sift stage, but even if the appeal had no reasonable prospects of success, I considered that the Respondent was relying on the timing of the appeal as the unreasonable conduct in seeking its costs of the case management hearing. It was the fact that the Claimant had announced her intention to appeal during the hearing which resulted in the adjournment. Ordinarily, the fact of an unmeritorious appeal would not on its own result in a case management hearing being adjourned or "wasted".

16. I decided that the Claimant had been not been unreasonable in informing the Respondent and Tribunal, at the case management hearing, that she intended to appeal the reconsideration judgment. She had only had 7 days in which to consider whether to appeal, and had only been in receipt of pro bono legal advice for 3 days of that period. I considered that 7 days was not an unreasonable delay in her informing the Respondent of her intention to appeal.

17. I noted that the Claimant had considerably delayed in making her original reconsideration application. That delay was excessive but I noted that EJ Goodman had made a decision on the reconsideration application, rather than rejecting it as out of time.

18. However, even if I had decided that the Claimant had acted unreasonably, I would not have exercised my discretion to order the Claimant to pay the costs of the case management hearing. It was clear from Counsel's note of the hearing that the Respondent had wished to proceed with its deposit order application and the Claimant had agreed to deal with the Respondent's application to amend. EJ Taylor declined to do so because he had not been provided with the requisite documents. I agreed with the Claimant that it was the Respondent's responsibility to provide the documents relevant to its own applications. I considered that the Respondent's failure to do so meant that the hearing did not deal with those matters and was therefore completely wasted.

**The Claimant's Application for Costs**

19. By an application dated 29 April 2022, the Claimant applied for a costs order / preparation time order. The parties agreed that the Claimant might make applications for both, but she could not be awarded both a costs and a preparation time order.

20. The background to the Claimant's costs application was a hearing on 28 July 2021 when Regional Employment Judge Wade made a Case Management requiring the parties to do the following by unspecified dates:

21. The Claimant was ordered to go through the index to the Final Hearing bundle and highlight any of her documents which she said had not been included. The parties were advised "they must try to keep the bundle as focused as possible including only relevant documents" (para 10).

22. The Respondent was ordered to provide the Claimant with a proposed index to a Core Bundle which the Claimant would then suggest additions to or subtractions from. The parties were to try to agree the Core Bundle and were advised that "the whole point of a core bundle is it is brief enough and focused enough for the key individuals in the case to be able to pick it up and flick through it without needing too much strength. If it proves impossible to agree the core bundle then each party may provide their own separate core bundle of documents which they consider to be key to the process" (para 12).

23. In her costs application the Claimant said that her application was in respect to the Respondents (legal team's) unreasonable behaviour toward the Claimant/her support network when working to produce a joint Trial Bundle over a period of 16 weeks with the Claimant. She said complained of muddled and confusing instructions set out by the Respondent's solicitor on 15 October 2021. She said that the Claimant had questioned the Respondent on why documents were being removed from the index and bundle, but had received no response on this issue from the Respondents.

24. Ms Brooke-Ward reminded me that ET had used the Claimant's bundle at the Final Hearing, saying, at para 9 that it was navigable in PDF.

25. She said that, following the hearing on 28 July 2021, the Claimant sent the Respondent's solicitor 51 documents which she said had not been included. Ms Brooke-Ward told me that the Respondent had then taken out 400 documents which had originally been included on the Claimant's behalf, from the Core Bundle, and replaced them with the 51 new documents.

26. She said that the Claimant had wanted all her documents in the core bundle and had made this clear in letters including on 15 October 2021, p356.

27. Ms Brooke-Ward said that, very late, the Respondent had said that it would produce its own bundle, so that the Claimant was forced to instruct solicitors to produce her bundle, at considerable expense. If the Respondent had made the position clear earlier, the Claimant could have produced the Bundle herself, avoiding that expense.

28. She said that the Respondent had misunderstood EJ Wade's order, removed documents when it should not have done, delayed telling the Claimant she would need to produce her own bundle, which was together unreasonable conduct and worthy of a costs order.

29. Mr Kirk set out a chronology of events in a skeleton argument, as follows.

30. He said that on 8 October 2021 the Claimant had emailed the Respondent's solicitor with a list of documents which she said she wanted to rely on, which had been omitted from the Core Hearing Bundle. She requested that the Respondent's solicitor send her an updated Core Hearing Bundle and Index, with the Claimant's missing documents added back in and "ask[ed] for the index to be in a word document in case there have been any further oversights made by the Respondents which need to be identified and corrected".

31. The Respondent's solicitor replied, saying that the core bundle needed to be focused, and stating that disputed documents would be placed in a separate tab of the bundle: "The Tribunal has not ordered that the Core bundle index include all documents from the full bundle, and this would not be an appropriate or reasonable approach to take. .. The Respondent will prepare an index for the Core Bundle containing those documents relied on in the Respondent's witness statements and the relevant pleadings and court orders only. As stated by the order, you must then tell us which additional documents should be included, which must be limited strictly to those that will actually be referred to in the hearing – that is the purpose of preparing a core bundle.. Where the Respondent disputes the relevance of the documents identified in your list, they will be included under a separate disputed tab, and the Respondent will ask the Tribunal to consider their removal at the housekeeping stage on the first day of the Final Hearing."

32. On 15 October 2021 the Respondent's solicitor sent the Claimant a draft Core Bundle index, marked up with tracked changes.

33. Several items of correspondence later, the parties were unable to agree the contents of a Core Bundle.

34. On 1 December 2021 the Respondent's solicitor said that the Respondent would produce its own core bundle.

35. Mr Kirk said that the Respondent had not taken 400 pages out of the final hearing bundle, but out of the Core Hearing Bundle.

36. He said that it was the Claimant who had misunderstood REJ Wade's orders, in that she had said that, "the whole point of a core bundle is it is brief enough and focused enough for the key individuals in the case to be able to pick it up and flick through it without needing too much strength. If it proves impossible to agree the core bundle then each party may provide their own separate core bundle of documents which they consider to be key to the process". Mr Kirk said that it had therefore always been envisaged that the parties might produce their own core Bundle.

**Decision on Claimant's Costs Application**

37. Standing back and looking at all the correspondence, it seemed to me that the parties were simply unable to agree the correct approach to the Core Bundle. The Claimant wanted more documents in it and the Respondent considered that the Claimant's documents were excessive. They were unable to work together to agree.

38. The Respondent's Core Bundle Index, showing Mr Valentine's marked up amendments, appeared to demonstrate that Mr Valentine had attempted to retain a limited number of documents which were truly central to the issues, such as disciplinary hearing notes, records of tasks completed by the Claimant, a first written warning to the Claimant, p614 – rather than email exchanges, for example. It deleted both email correspondence from the Claimant and between the Respondent's witnesses. That did not appear to be an unreasonable approach, on its face.

39. The Respondent removed documents from the Core Bundle, not the Main Hearing Bundle. It was always envisaged by REJ Wade that the parties might need to produce their own Core Bundles.

40. I did not consider that the Respondent acted unreasonably. It had tried to agree the Core Bundle with the Claimant, but when that was not possible, it said that it would produce its own. While the Tribunal has used the Claimant's Bundle, its ability to be navigated using PDF was not relied on by the Claimant as justifying a costs order.

41. I did not consider that the threshold for ordering costs against the Respondent had been reached.

**Dated: 13 July 2022**

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Employment Judge Brown

SENT TO THE PARTIES ON

20/07/2022

FOR THE TRIBUNAL OFFICE