



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr J Ramm**

**V**

**Home Office**

## JUDGMENT

The Respondent's application for a costs order dated 22 July 2022 succeeds in part.

The Claimant has acted unreasonably in the way the proceedings have been conducting by him after 12 May 2022 and is ordered to pay to the Respondent the sum of **£6,970.10** in respect of the Respondent's costs.

## REASONS

### Background and Facts

1. On 22 November 2021 the Claimant brought a claim against the Respondent for disability discrimination. The claim was *prima facie* out of time.
2. At a case management preliminary hearing on 4 March 2022 the Tribunal ordered that there shall be an open preliminary hearing on 24 June 2022 by video to consider whether the Tribunal has jurisdiction to hear the Claimant's claim because it was brought out of time and whether time should be extended on a just and equitable basis. The Tribunal gave the parties case management orders in preparation for the hearing.
3. Pursuant to the Tribunal's orders the Claimant presented his schedule of loss late, but otherwise failed to comply with the Tribunal's orders. The Claimant did not disclose his documents to the Respondent and did not cooperate with the Respondent in preparing the bundle for the hearing.
4. On 12 May 2022, the Respondent's solicitor sent an email to the Claimant reminding him of the outstanding actions on his part. Later the same day, the Claimant replied stating that he "*will not be pursuing the case through the courts*" and would prefer to "*have [his] day with the media instead*".

5. On 13 May 2022, the Respondent's solicitor wrote to the Claimant asking him to confirm that he was withdrawing his claim and that he would be writing to the Tribunal to confirm that. The Respondent's solicitor told the Claimant that in the absence of his confirmation the Respondent would have to continue to prepare for the preliminary hearing.
6. In that email the Claimant was also warned that if he did not confirm the withdrawal of his claim and did not attend the hearing or if he withdrew the claim very close to the hearing date, the Respondent would seek a costs order against him.
7. The Claimant did not reply. There were further emails from the Respondent to the Claimant on 13 and 20 May and 9 June 2022, which emails the Claimant also ignored. The email of 9 June 2022 contained another costs warning.
8. Prior to the hearing on 24 June 2022, the Claimant did not inform the Tribunal that he wished to withdraw his claim.
9. On 23 June 2022, the Tribunal sent to the parties the joining instructions to join the video hearing on 24 June 2022.
10. The Respondent's representative, Counsel and three witnesses joined the hearing at 10:00. The Claimant did not join the hearing. The Tribunal's clerk telephoned the Claimant and asked him to join the hearing. The Claimant told the clerk that he had informed the Tribunal that he was not pursuing the claim.
11. The clerk searched the case file and the Tribunal's email inbox but could not find any correspondence from the Claimant informing the Tribunal of his decision to withdraw the claim.
12. At 10:10am I asked the clerk to call the Claimant again and tell him that he must join the hearing. The Claimant did not answer the call and it went straight to his voicemail. The clerk left a voice message instructing the Claimant to join the hearing. The Claimant did not join the hearing.
13. At 10:20am the clerk tried calling the Claimant again and left another voice message telling the Claimant to join the hearing. The clerk conducted further searched of the Claimant's withdrawal notification, but nothing was found.
14. I waited another 10 minutes and started the hearing at 10:30am. The Claimant did not join the hearing. I dismissed his claim upon withdrawal under Rule 52 of the Employment Tribunal Rules of Procedure 2013, based on the Claimant's telling the clerk on the phone that he was not pursuing the claim. The Respondent indicated that it would be seeking a costs order against the Claimant.

15. On 22 July 2022, the Respondent made a costs order application under Rule 76(1)(a) on the ground that the Claimant has acted unreasonably in the way he has conducted his claim, for the following reasons:
- a. *The Claimant failed to cooperate in preparing for the preliminary hearing which took place on 24 June 2022;*
  - b. *Apart from filing his Schedule of Loss three days late on 21 March 2022, the Claimant failed to comply with any of the Tribunal's orders contained in the Case Management Order dated 4 March 2022;*
  - c. *The Claimant failed to acknowledge or respond to correspondence from the Respondent's representative;*
  - d. *The Claimant failed to withdraw his claim before the preliminary hearing on 24 June 2022;*
  - e. *The Claimant failed to attend the preliminary hearing on 24 June 2022 without notification to the Respondent or the Tribunal.*
16. The Respondent also applied for costs under Rule 76(1)(b) on the ground that the Claimant's claim had no reasonable prospect of success as it was brought out of time.
17. On 26 July 2022, the Tribunal wrote to the Claimant asking him to submit his representations on the Respondent's application by 5 August 2022. The Claimant did not reply.
18. On 9 August 2022, the Tribunal wrote to the parties asking the Respondent to clarify the amount for which the costs order was sought.
19. On 22 August 2022, the Respondent sent a response stating that the order was sought in the total sum of £19,739.10 (of which £585.60 was Counsel's fee) and attaching a detailed costs schedule.

## The Law

20. Rule 76 of the Employment Tribunals Rules of Procedure 2013 (the "**ET Rules**") provides:

*(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*

*[...]*

21. Rule 78(1) of the ET Rules gives the Tribunal various options of assessing costs, including making an “*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*”
22. The following key propositions relevant to the tribunal’s exercising its power to make costs orders may be derived from the case law:
- a. Costs awards in the employment tribunal are still the exception rather than the rule. The tribunals should exercise the power to order costs more sparingly than the courts (Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA)
  - b. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered (Haydar v Pennine Acute NHS Trust UKEAT/0141/17).
  - c. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).
  - d. For term “vexation” shall have the meaning given by by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759: “*[T]he hallmark of a vexatious proceeding is ... that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*” (Scott v Russell 2013 EWCA Civ 1432, CA)
  - e. “Unreasonable” has its ordinary English meaning and is not to be interpreted as if it means something similar to ‘vexatious’ (Dyer v Secretary of State for Employment EAT 183/83).
  - f. In determining whether to make a costs order for unreasonable conduct, the tribunal should take into account the “nature, gravity and effect” of a party’s unreasonable conduct — (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA), however the correct approach is not to consider “nature”, “gravity” and “effect” separately, but to look at the whole picture.

- g. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances – (Yerrakalva v Barnley MBC [2012] ICR 420). Mummery LJ gave the following guidance on the correct approach: *“41. 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. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances”*.
- h. As to whether a claim had reasonable prospects of success, this is an objective test. It is irrelevant whether the claimant genuinely thought that the claim did have reasonable prospects of success: Scott v. Inland Revenue Commissioners [2004] ICR 1410 CA, at [46].
- i. Whether a claim had no reasonable prospects of success from the outset is to be judged by reference to the information that was known or was reasonably available at the start of the proceedings: Radia v. Jefferies International Ltd EAT/0007/18, unreported, at [65]. The tribunal should be wary of being wise with hindsight. However, if a claim was such that it cannot be said that it had no reasonable prospects of success from the outset, pursuing it after it has become clear that it does not have reasonable prospects of success will engage the costs jurisdiction.
23. Costs awards are compensatory, not punitive – (Lodwick v Southwark London Borough Council [2004] ICR 884 CA).
24. The fact that a costs warning has been given is a factor that may be taken into account by a tribunal when considering whether to exercise its discretion to make a costs order, however a warning is not precondition to the making of an order — (Raveneau v London Borough of Brent EAT 1175/96)
25. Under Rule 84 of the ET Rule, the tribunal may, but is not required to have regard to the paying party's ability to pay.
26. However, where the costs award may be substantial, the tribunal must proceed with caution before disregarding the paying party's means – (Doyle v

North West London Hospitals NHS Trust [2012] ICR D21, EAT, at paras.14-15).

27. The Presidential Guidance on General Case Management state:

*“17. Broadly speaking, costs orders are for the amount of legal or professional fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party.”*

*18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows:*

*18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);*

*....*

*21. When considering the amount of an order, information about a person’s ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person’s earnings, savings, other sources of income, debts, bills and necessary monthly outgoings.”*

## Conclusions

*Whether the Claimant’s claim had no reasonable prospect of success?*

28. The Respondent relies on the fact that the Claimant’s claim was brought out of time. However, in my judgment, it is not enough to conclude that the Claimant’s claim had no reasonable prospect of success. The Tribunal has a wide discretion to extend time on a just and equitable basis, and without considering all the relevant facts and hearing from witnesses it is generally not possible to determine this issue “on the paper”. That what the preliminary hearing on 24 June 2022 was for.

29. There is no evidence in front of me based on which I can conclude that there was no reasonable prospect of success for the Claimant to overcome the out of time point at the preliminary hearing. For these reasons the Respondent’s application on that ground (Rule 76(1)(b)) fails.

*Has the Claimant acted unreasonably in the way he conducted his claim?*

30. I find the Claimant has acted unreasonably in the way the proceedings have been conducted by him after 12 May 2022, when he informed the Respondent that he was no longer wished to pursue his claim and yet failed to formally withdraw it until the morning of the hearing.

31. I also find that he has acted unreasonably in not complying with the Tribunal's orders, ignoring the Respondent's correspondence, and in the way he conducted himself on the day of the hearing - by refusing to join the hearing and then ignoring the clerk's calls and voice messages.

*Should a costs order be made?*

32. Now, having found that the costs jurisdiction under Rule 76(1)(a) is engaged, I need to decide whether in the circumstances it would be just and proper for me to exercise my discretion and make a cost order against the Claimant. In doing so, I must look at the whole picture considering the nature, gravity and effect of the Claimant's conduct.

33. I find that the Claimant's conduct was such that it would be just and proper for me to exercise my discretion and make a costs award. The facts speak for themselves.

34. Having decided not to pursue his claim, it could not have been a simpler task for him to email the Tribunal to withdraw it, yet the Claimant did not bother to do that. His ignoring the Respondent's correspondence led to the situation where the Respondent had to continue to prepare for the hearing thus incurring unnecessary costs. The Claimant's conduct has also caused valuable Tribunal time and limited resources to be wasted. Finally, he did not even have the courtesy of joining the hearing, despite being told to do so several times. The Claimant was warned by the Respondent of possible costs consequences for his conduct twice.

35. In short, I find no mitigating circumstances, and the Claimant did not trouble himself to make any representations as to why a costs order should not be made against him, despite being invited to do so by the Tribunal.

*How much should be awarded?*

36. The Claimant did not submit any representations as to his ability to pay. If he had, I would have considered that factor in determining the quantum. In the absence of any such information, I cannot take into account the Claimant's ability to pay and shall proceed on the basis that the award shall compensate the Respondent for reasonable legal costs incurred in the preparation for the preliminary hearing on 24 June 2022 from the period starting on 13 May 2022.

37. I find the Respondent's claimed costs excessive. This was a preliminary hearing to consider the time issue only and on relatively straight forward and time limited facts. The Respondent spending over 54 hours in preparing for the hearing and engaging seven fee-earners appears to me excessive. The Respondent rightly acknowledged in the letter of 22 August 2022 that their costs "*may be higher than expected for this stage in the proceedings.*"

38. Furthermore, the Respondent's costs schedule includes costs for a period starting on 7 March 2022, where my finding is that the Claimant unreasonable conduct has started on 13 May 2022.
39. Therefore, on a summary basis I award to the Respondent the Counsel's fee of £585.60 and  $\frac{1}{3}$ <sup>rd</sup> of the other claimed legal costs (that is  $(£19,739.10 - £585.60)/3 = £6,384.50$ ), making the total award of **£6,970.10**, and make the order that the Claimant must pay to the Respondent that sum towards the Respondent's costs.

**Employment Judge Klimov**

24 September 2022

Sent to the parties on:

26/09/2022

For the Tribunals Office