# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Andrew Bailey
**Respondent:** James' Places (Northwest) Limited

**Heard at:** Manchester Employment Tribunal **On:** 22 November 2022 (remotely in chambers)
**Before:** Employment Judge Rhodes

**REPRESENTATION:**

**Claimant:** Not in attendance
**Respondent:** Not in attendance

# JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's application for a preparation time order is refused.

# REASONS

1. The claimant made an application for a preparation time order ("PTO") by email dated 22nd August 2022. He did not provide any grounds for that application in that email.

2. In a further email dated 27th October 2022, the claimant alleged that the respondent "should have expected the outcome to be as a minimum of worker status" and that it had behaved vexatiously. I have therefore treated the claimant's application as being made under Rule 76(1)(a) (vexatious behaviour) and/or Rule 76(1)(b) (no reasonable prospect of success).

3. The parties agreed that the claimant's application could be determined without a hearing.

4. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

5. The circumstances in which a PTO may be made are set out in rule 76. The relevant provision here is rule 76(1) which provides as follows:

> "*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*."

6. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

7. Rule 84 concerns ability to pay and reads as follows:

> "*In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representative's) ability to pay*."

8. It follows from these rules that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

9. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

10. If there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: **McPherson v BNP Paribas (London Branch) [2004] ICR 1398**. However there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**:

> "*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*."

11. What amounts to vexatious conduct was outlined by Lord Bingham in **Attorney General v Barker [2000] 1 FLR 759**. Although that was a case which concerned the conduct of a claimant, the same principles must apply to the conduct of a respondent (or its representative). To have acted vexatiously, a party must have:

a. adopted a position which has little or no basis in law;

b. subjected the other party to inconvenience, harassment and expense out of all proportion to the issues in the case;

c. abused the Tribunal process, namely using it for a purpose or in a way which is significantly different from the ordinary and proper use of it.

12. The respondent had an arguable defence and it did not adopt a position which had little or no basis in law.

13. In support of his application, the claimant referred me to exchanges of correspondence between him and the respondent's representative which the claimant characterised as hostile and aggressive. In my view, the correspondence cannot fairly be characterised as such. Alternatively, to the extent that it could be, it was no more hostile or aggressive than one would expect in the course of robustly-defended proceedings and does not come close to overstepping the mark into something akin to harassment.

14. The respondent has not abused the Tribunal process. It was entitled to defend the claim against it.

15. For these reasons, the behaviour of neither the respondent nor its representative comes close to meeting the definition of "vexatious" set out above. Nor, for that matter, did it amount to "otherwise unreasonable" conduct in a wider sense. The respondent had an arguable defence and it was not unreasonable for the respondent to have pursued it to trial.

16. In assessing reasonable prospects under Rule 76(1)(b), the Tribunal's focus is on the case put forward in the respondent's response and I am satisfied that the response contained a reasonably arguable defence. The fact that I ultimately made findings against the respondent does not mean that its defence was not arguable.

17. For the above reasons, I am satisfied that the discretion to award costs does not arise under either Rule 76(1)(a) or 76(1)(b). The application is therefore refused.

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Employment Judge Rhodes

Date: 25th November 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

1 December 2022

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