



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. M Adofo  
**Respondent:** Asda Stores Limited  
**Heard at:** Nottingham (In Chambers)  
**On:** 28<sup>th</sup> February 2023  
**Before:** Employment Judge Heap (Sitting alone)

## AT A COSTS HEARING CONDUCTED ON THE PAPERS

### Representation

**Claimant:** No representations made  
**Respondent:** Oral representations previously made

## JUDGMENT ON COSTS

1. The Claimant is Ordered to pay to the Respondent the sum of £3,120.00 in respect of the costs incurred preparing for and at the Preliminary hearing of 30<sup>th</sup> January 2023.
2. The Claimant failed to comply with Unless Orders made at that Preliminary hearing with the result that the claim was dismissed in its entirety with effect from 14<sup>th</sup> February 2023.
3. The Preliminary hearing listed for 15<sup>th</sup> March 2023 is therefore cancelled.

## REASONS

### BACKGROUND & THE ISSUES

1. This hearing was listed for the purposes of determining an application for costs which had been made by the Respondent at a Preliminary hearing on 30<sup>th</sup> January 2023.

2. The costs application was made following an application for an adjournment which was made by the Claimant's solicitor at the commencement of the Preliminary hearing. Whilst I ultimately granted the adjournment because in reality there was little option but to do so, Counsel for the Respondent made an application for the costs thrown away as a result. Both parties were agreed that the application should be determined on the papers.
3. The purpose of the Preliminary hearing on 30<sup>th</sup> January 2023 was to deal with issues which had been identified by Employment Judge Brewer at an earlier Preliminary hearing. That primarily required me to determine whether the claim or part of it had been presented outside the relevant statutory time limits and, if so, whether it should be permitted to proceed.
4. The adjournment application made by the Claimant's solicitor, Mr. Beyebenwo was initially said to be on the grounds of his ill health but it transpired that the larger issue on which the application was thereafter advanced was on the basis that the Claimant had not attended the hearing and apparently was unlikely to do so at any point and no witness statement has been prepared for him to deal with the issues that I was to determine despite Orders made by Employment Judge Brewer to do so.

### **THE BASIS OF THE COSTS APPLICATION**

5. The basis of the costs application is the way in which the Claimant and/or his representative had conducted the proceedings which it was said was unreasonable. Particularly, it was said that there had been a wholesale failure of the Claimant to comply with Orders made by Employment Judge Brewer and what is said to also amount to unreasonable conduct in the Claimant not attending the Preliminary hearing and no arrangements having been made for alternative representation if Mr. Beyebenwo was not able to conduct it.

### **THE CLAIMANT'S POSITION**

6. The Orders that I made at the Preliminary hearing on 30<sup>th</sup> January 2023 gave the Claimant the opportunity to reply to the costs application. Mr. Beyebenwo was present when those Orders were made and they were sent to the Claimant's solicitor by email by the Tribunal on 1<sup>st</sup> February 2023. There is therefore no reason to suppose that Mr. Beyebenwo, and in turn the Claimant, did not know about those Orders. I therefore take it that there has been a conscious decision taken not to reply to the costs application.

### **THE LAW**

7. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of whether an Employment Tribunal should make an Order for costs.

8. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs and the relevant parts of that Rule provide as follows:

***“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; or*

*(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.*

*(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party”.*

9. It should be noted that merely because a party has been found to have acted in the manner set out in Rule 76(1) or (2) of the Regulations, it does not automatically follow that an Order for costs should be made. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. When deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.
10. In accordance with Rule 84, a Tribunal is entitled to have regard to an individual’s ability to pay any costs both in relation to the making of an Order at all, or the amount of any such Order. However, it is not a mandatory requirement that such consideration must automatically be given.

### **CONCLUSIONS**

11. I begin by considering whether the test contained within Rule 76 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is met.
12. I am satisfied that it is and that the Claimant and/or his representative had acted unreasonably in the conducting of these proceedings. I have determined that that is the case for a number of reasons. Firstly, there has been a complete failure to comply with the Orders made by Employment Judge Brewer at the last Preliminary hearing and which were necessary to prepare for the one on 30<sup>th</sup> January. The Claimant did not prepare a hearing bundle as Ordered and that was left to the Respondent to deal with or there would have been no bundle at all. There was also no witness statement prepared either despite chasing from the Respondent’s solicitors to Mr. Beyebenwo’s firm.

13. There was no semblance of any form of reasonable explanation for that state of affairs provided by Mr. Beyebenwo either on 30<sup>th</sup> January 2023 or at any point since that time and despite there being Orders requiring the Claimant to do so. Whilst Mr. Beyebenwo indicated that he had been ill and had been seeking to pass the case onto someone else externally it was plain that he had only fallen ill, and then not with anything incapacitating, two weeks before the Preliminary hearing which was a matter of a couple of days before witness statements should have been exchanged. Clearly, the Claimant's statement should have been prepared for his approval well before that stage and there has been no reasonable explanation as to why that had not happened nor why the bundle had not been prepared either. Non-compliance with Tribunal Orders without any reasonable explanation amounts to unreasonable conduct, particularly when the litigant is professionally represented and should therefore have been advised of what was required.
14. Secondly, the issue of alternative representation has been dealt with unreasonably by Mr. Beyebenwo and the Claimant. That was attempted to be done entirely at the last minute with no steps being taken until the Friday before the Preliminary hearing was due to take place on the Monday and for the Claimant's part even at that late stage and in the knowledge that the hearing was imminent, he did not engage with Mr. Beyebenwo.
15. Finally, the Claimant did not attend the Preliminary hearing. He had been informed of the need to do so within the Orders of Employment Judge Brewer and he had also been present at that Preliminary hearing and so would have been fully aware of the arrangements for 30<sup>th</sup> January and that he needed to attend. There has been no semblance of any explanation about why that had not happened. Like the failure to comply with Orders without explanation, non-attendance at a hearing without any reasonable explanation where there is a requirement for it to proceed and for evidence to be given amounts to unreasonable conduct.
16. Alternatively, even had I not concluded that the conduct of the Claimant and/or his representative amounted to unreasonable conduct then I would nevertheless have found that the requirements of Rule 76(2) of the Regulations were met. Firstly, again there was a wholesale failure to comply with the Orders of Employment Judge Brewer which meant that there was nothing upon which I could even discern any argument that the Claimant may have had as to why the claim appeared to have been presented out of time. That matter and the absence of the Claimant at the hearing necessitated the adjournment because realistically I could not deal with the issues that I was required to determine. Moreover, the second strand of Rule 76(2) (and also for that matter Rule 76(1)(c)) is met in that the hearing had been adjourned on the application of the Claimant.
17. However, that is not the end of the matter and I must be satisfied that it is appropriate to make a costs Order. The Claimant has offered up nothing in response to the application and therefore no representations have been made as to any mitigating factors such that it would not be appropriate to make a costs Order.

18. Ultimately, it is not for me to try to guess what response the Claimant may have or what, if any, mitigating factors there might be and I remind myself that he has been given ample opportunity to make representations and has at all material times had the benefit of legal advice and representation by a solicitor specialising in employment law.
19. For all of those reasons, it is appropriate to make a costs Order in favour of the Respondent.

### **THE AMOUNT OF THE COSTS ORDER**

20. The Respondent is claiming the sum of £3,120.00 excluding VAT in respect of costs which are said to have been thrown away in respect of the Preliminary hearing on 30<sup>th</sup> January.
21. The Claimant has not made any representations to suggest that the sums claimed are unreasonable nor have any representations been made as to his means and ability to pay any costs Ordered and I do not consider it appropriate to seek to make a case for him by dissecting the schedule of costs myself when, again, he has been given ample opportunity within the Orders that I made on the last occasion to deal with any challenges to the sums sought.
22. The Claimant is therefore Ordered to pay to the Respondent the sum of £3,120.00.00 in respect of the costs thrown away from the Preliminary hearing.

### **UNLESS ORDERS**

23. At the Preliminary hearing on 30<sup>th</sup> January on the application of the Respondent and without any apparent objection from the Claimant I made two Unless Orders. I considered those to be appropriate given the history of non-compliance with the Orders of Employment Judge Brewer and the fact that I had relisted the Preliminary hearing and was not confident that there would not be a repeat of the position with regard to attendance and a witness statement being produced even at that stage.
24. The Unless Orders were as follows:

***“UNLESS ORDERS – FAILURE TO COMPLY IN FULL AND ON TIME WILL MEAN THAT THE CLAIM WILL BE STRUCK OUT***

- 1.1 *The Claimant must, by no later than **13<sup>th</sup> February 2023**, write to the Tribunal with a copy to the Respondent to show cause why the claim should not be struck out in its entirety as a result of the fact that there has been a failure to comply with Tribunal Orders, a failure by him to attend at this Preliminary hearing and the claim therefore does not appear to be being actively pursued. **Unless the Claimant complies with this Order and provides a satisfactory explanation for those matters then the claim will stand as struck out without the need for further Judgment or Order.***

1.2 *The Claimant must, by no later than 13<sup>th</sup> February 2023 provide to the Tribunal and to the Respondent a witness statement(s) dealing with each of the issues to be determined at the Preliminary hearing as identified in the Orders of Employment Judge Brewer at paragraphs 2.1.1 to 2.2.4 inclusive.*

**Unless the Claimant also complies with this part of the Order in full and on time the claim will stand as struck out without the need for further Judgment or Order”.**

25. Mr. Beyebenwo was present when the Unless Orders were made. They were sent to him in a written record of the Preliminary hearing on 1<sup>st</sup> February 2023. I had elongated the normal period that I would have usually allowed for compliance because of what Mr. Beyebenwo had told me about him being unwell and potentially seeking alternative representation for the Claimant.

26. Neither the Claimant, Mr. Beyebenwo or anyone else on the Claimant’s behalf complied with either of those Unless Orders. As far as I am aware from the Tribunal no further contact has been made by the Claimant or anyone in his behalf after the Preliminary hearing. Other Orders made have also been ignored.

27. Given what is said in paragraph 25 above I can only conclude that a conscious decision has been made not to comply with the Unless Orders.

28. However, irrespective of that given the provisions of Rule 38(1) of the Regulations the claim was dismissed with effect from 14<sup>th</sup> February 2023 and nothing further remains before the Tribunal.

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Employment Judge Heap

Date: 28<sup>th</sup> February 2023

JUDGMENT SENT TO THE PARTIES ON

06/03/2023.....

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FOR THE TRIBUNAL OFFICE

**Notes:**

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