# EMPLOYMENT TRIBUNALS

**Claimant:** Miss T Vosper

**Respondent:** DPD Group UK Limited

**Heard at:** Bury St Edmunds Employment Tribunal (by CVP)

**On:** 7 March 2023

**Before:** Employment Judge Hutchings

**Representation**
Claimant: did not attend
Respondent: Mr Bownes, Freeths LLP

# RECONSIDERATION JUDGMENT ON COSTS

1. UPON APPLICATION made by the respondent in an email dated 4 October 2022 to reconsider the judgment dated 22 September 2022 under Rule 71 of the Employment Tribunals Rules of Procedure 2013; and

2. UPON detailed assessment of the costs claimed by the respondent and in accordance with Rule 78 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, and the Civil Procedure Rules Part 44 the Judgment dated 22 September 2022 is varied as follows**:**

3. The Claimant is ordered to pay the Respondent **£9,853.65** inclusive of VAT in respect of the Respondent's costs.

# REASONS

**The application**

1. The respondent has made a reconsideration application for the Costs Judgment dated 22 September 2022 to be varied by the amount of the award being increased on two grounds, submitting that I made am error on 2 grounds:

1.1. Reducing costs claimed by 50%; and

1.2. In calculating the costs of the hearing dated 20 September 2022 which the claimant failed to attend.

2. As to the first point, in its request for reconsideration the respondent submits that I reduced the sums claimed for correspondence, telephone calls and preparation without engaging with the respondent's representative at that hearing in an explanation of any of the amounts claimed. The respondent states that *"had there been any concern as to the amounts then the Respondent should have been given the opportunity to address these to assist the Tribunal"* and in not doing so the *"incorrect approach has been taken in reducing the costs claimed."*

3. As to the second point, regarding the costs the respondent claims for the hearing on 20 September 2022. The respondent considers my decision irrational and refers to my finding of fact that the claimant had, again, failed to comply with Tribunal orders and failed to attend the hearing. In its request for reconsideration the respondent submits that none of the costs it incurred in attending this hearing is its responsibility or fault and it should be awarded the costs of doing so.

## Hearing

4. Based on the grounds of reconsideration set out by the respondent, I considered it fair and just to consider this application at a hearing, mindful that the claimant is not represented, and applying the principles of access to justice. Therefore, despite my own findings of fact in the Judgment dated 22 September 2022 and Employment Judge Warren's findings of fact in the Written Reasons dated 4 April 2022 as to the claimant's conduct throughout her claim, I consider that she should be afforded the opportunity to respond to a costs award which the Tribunal has made against her.

5. The hearing was timetabled for 2pm. The claimant did not attend the hearing. The Tribunal clerk telephoned the claimant at 2.05pm to ask if she would be attending; there was no reply. The Tribunal clerk left a message for the claimant informing her that the hearing was going ahead, and she should join the hearing link she had received in the notice of hearing. I am satisfied that the claimant received the notice of hearing from the Tribunal, not least as on 27 February 2022 she sent a copy of the same to the Tribunal along with her statement which she asked to be placed before the Employment Judge at this hearing.

## Evidence

6. In advance of the hearing, I had received and considered:

6.1. Bundle for costs hearing on 20 September 2022.
6.2. Costs Judgment dated 22 September 2022.
6.3. Respondent's email application for reconsideration dated 3 October 2022.
6.4. A written statement dated 27 February 2023 from the claimant, attaching a statement of means. I note that this is the first time the claimant has engaged in the cost proceedings.

6.5. Written submissions from the respondent's representative and a bundle of authorities. I note these were copied to the claimant in line with Rule 92 of the Employment Rules of Procedure 2013 (the 'Rules'). It is noted that the written submissions state that they have been prepared in part to assist the claimant, as she is not represented, with the legal tests the Tribunal must apply.

**Preliminary matters**

7. First, I address the application. I agree with the first basis of the respondent's application for reconsideration and consider that a more detailed assessment of the respondent's costs should have been undertaken by me. Accordingly, this hearing will consider a summary assessment of costs. In doing so I am mindful that the starting point is that the Employment Tribunal is a no costs Tribunal, and it is for parties to make an application for costs. Where a party does so, the Tribunal is guided by the approach taken by the courts which is set out in the Civil Procedure Rules Part 44 and the accompanying Practice Direction and should apply this as guidance in undertaking any assessment of costs.

8. At the hearing I discussed with Mr Bownes the issues I consider are before the Tribunal in this reconsideration hearing. I noted the respondent's submission that, as the claimant has not previously engaged with the application by the respondent for a costs award and has not brought her own application for reconsideration of my Judgment dated 22 September 2022, she is *"is fixed particularly with the substantive findings that have already been made against her."* I agree she has not engaged previously with the cost's application; she did not provide any evidence before or attend the hearing on 20 September 2020. However, I disagree with the respondent that this automatically precludes her from engaging in this hearing for reconsideration.

9. By Rule 73 the Tribunal can reconsider a decision on its own initiative. I have before me a statement of means from the claimant which was not before the Tribunal at the hearing on 20 September 2022, the claimant having sent this to the Tribunal on 27 February 2023.

10. It is my view that in bringing the application for reconsideration of the costs award the respondent has opened the door to reconsideration of the Judgment as a whole. In keeping with the overriding objective of the Employment Tribunal I consider it just and fair, mindful that the claimant is not represented, to consider any evidence before me relevant to the reconsideration of the amount of that award; this includes the claimant's evidence of means. Therefore, by my own initiative, in addition to the points raised by the respondent, and accepted by me, in its reconsideration application, I will consider the claimant's ability to pay, applying Rule 84. In doing so I am mindful that I note that anything added by the Tribunal's own initiative must be reconsidered in accordance with rule 72(2).

**Issues to be determined**

10.1. Detailed assessment of the respondent's schedule of costs for work done by the respondent's solicitors for the period 13 July 2021 to 12 April 2022.

10.2. Re-assessment of the costs incurred by the respondent for the hearing on 20 September 2022. I note that Mr Bowens updated these costs to reflect the actual length of this hearing (the schedule of costs was prepared before and for that hearing and record estimated length of hearing).

10.3. Consideration of the claimant's ability to pay.

**Law**

11. Below is the law the Tribunal considers relevant to this application for reconsideration.

*Costs orders*

12. The Tribunal has the power to order the payment of costs and witness expenses. The Employment Tribunal Procedure Rules rule 75 sets out the nature of these orders:

*"75.—(1) A costs order is an order that a party ("the paying party") make a payment to—*
*another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative; […] or*
*another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal."*

13. The Employment Tribunal Procedure Rules rule 76 sets out when a costs order or a preparation time order may 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 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*
*any claim or response had no reasonable prospect of success;[…]*

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing."

14. The test for imposition of a costs order under rule 76(1) is a two-stage test: first, a tribunal must ask itself whether a party's conduct falls within rule 76(1); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

15. The decision to make a costs order is the exception rather than the rule. This was made clear in *Yerrakalva v Barnsley Metropolitan Borough Council* [2011] EWCA Civ 1255; [2012] ICR 420 (3 November 2011) by Mummery LJ giving the lead judgment in the Court of Appeal at paragraph 7 as follows:

*"The employment tribunal's power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill of the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs."*

16. "Costs" are defined in rule 74(1) as "fees, charges, disbursement 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).

17. Rule 84 provides that, in deciding whether to make a costs order and, if so, in what amount, the Tribunal may have regard to the paying party's ability to pay.

*Reconsideration*

18. Rule 70 Employment Tribunal Rules and Procedure. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

19. A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly'. Rule 2.

20. In Outasight VB Ltd v Brown 2015 ICR D11 Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances.

21. However, this discretion must be exercised judicially, 'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'.

22. The Tribunal has considered and where appropriate applied the rules of procedure, presidential guidance and authorities referred to in submissions from the respondent. The relevant principles to be considered are as set out in the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 and, particularly, Rule 78 which provides as follows:

78.—(1) A costs order may—

(a)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;

(b)order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and

Further Provisions) 1993, or by an Employment Judge applying the same principles; (c)order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d)order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (ofthe kind described in rule 75(1)(c)); or

(e)if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under subparagraphs (b) to (e) of paragraph (1) may exceed £20,000.

23. I have also considered the bundle of authorities to which the respondent's representative referred me during the hearing and reference the authorities I consider particularly relevant in my conclusions below.

*Summary assessment: Civil Procedure Rules Part 44*

24. Rule 44.4 sets out the factors to be taken into account in deciding the amount of costs as follows:

(1) The court will have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the standard basis –

(i) proportionately and reasonably incurred; or

(ii) proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

(2) In particular, the court will give effect to any orders which have already been made.

(3) The court will also have regard to –

(a) the conduct of all the parties, including in particular –

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done; and

(h) the receiving party's last approved or agreed budget.

(Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert.)

## Conclusions

25. First, I make a general finding on the claimant's evidence. In considering the claimant's ability to pay, and assessing the weight I will give the claimant's evidence as to her statement of means, I take into account:

    25.1. The statement in the Order of Employment Judge Warren dated 5 July 2022 that: *"If the claimant fails to comply with this order in any way, including the supply of insufficient evidence as to her means, the Employment Judge hearing the application may draw adverse inferences, including that the claimant has sufficient means to meet the liability of any costs order. "*

    25.2. My own conclusion in the Judgment dated 22 September 2022 that: *"There is no evidence before me as to Miss Vosper's financial means, despite being clearly and precisely directed to provide such evidence; this draws me to the conclusion that she is able to pay otherwise she would have submitted evidence to the contrary."*

    25.3. That the claimant did not send any evidence to the Tribunal for consideration at nor did she attend the hearing the hearing on 22 September 2022. Further, she did not provide the Tribunal with any explanation as to the reason for her non-attendance.

    25.4. That the claimant's statement of means sent on 27 February 2022 is not accompanied by any documentary; therefore, the figures set out in her statement are not supported by any evidence.

    25.5. By her non-attendance of the hearing on 6 March 2022 neither Mr Bowes nor the Tribunal could ask questions about the figures in the claimant's statement of means.

26. For these reasons, while I have taken account of the claimant's statement in reaching my conclusion as I am required to do by Rule 84, I have afforded it less weight than the other documentary evidence before me and the submissions made by Mr Bownes in response to my questions about the respondent's schedule of costs.

27. With the exception of the amount of the costs award, the findings made in my Judgment dated 22 September 2022 are confirmed even if they are not referred to or repeated in this Judgment. Accordingly, it remains the case that it is fair and just based on the application made and evidence presented to me at that time, that a cost order was made in favour of the respondent.

28. The matter I must reconsider is the amount of that award. I set out my conclusions by reference to the issues identified at the hearing.

*Level of costs award*

29. In assessing amount, I apply the rule that costs are compensatory not punitive. Given this rule, and mindful of the request to reconsider the level of award made, I examined in more detail than I did at the hearing on 20 September 2022 the costs incurred by the receiving party. My examination is based on the figures provided by the respondent in its schedule of costs at page 12 of the

hearing bundle, updated by Mr Bownes at the hearing in respect of the hearing on 20 September 2022.

30. First, I consider the rates charged by the respondent's legal advisors by reference to the guideline figures for carrying out an assessment of court costs, listed by pay band and grade for different parts of the country. My assessment of rates is based on the information provided to me by Mr Bownes at the hearing.

31. Mr Bownes is based in the firm's Birmingham office, which is classified by the guidance as national band 1; the other advisors are all based in the firm's Leicester office, which is classified by the guidance as national band 2. Comparing the fee earner's hourly rates in the schedule with the guidance rates for the relevant band for each fee earner, based on Mr Bowes information as to the year of qualification of each fee earner, I set out below the actual rate and guideline rate

    31.1. Rena Magdani: solicitor over 8 years qualified charged at £345 per hour. National 2 guideline rate: £255. Charged above guideline rate.
    31.2. Emma Batten: solicitor over 8 years qualified charged at £270 per hour. National 2 guideline rate: £255. Charged above guideline rate.
    31.3. Paul Bownes: solicitor over 8 years qualified charged at £250 per hour. National 1 guideline rate: £261. Charged above guideline rate.
    31.4. Alex Reid: solicitor 4-8 years qualified, charged at £189 per hour. National 2 rate £218. Charged below guideline rate.
    31.5. Cleo Phillips: trainee Solicitor charged at £149 per hour. National 2 guideline rate £126. Charged above guideline rate.

32. As there are discrepancies, in both directions, I consider it fair and just to account for these in the final award and have done so below.

33. First, I have considered the value of each work type in the schedule of loss based on Mr Bownes answers to my questions. I find that the key date for determination of the costs award is 15 November 2021. Prior to this date, the majority of the work undertaken by the respondent's solicitors involved taking instructions on and drafting the ET3. I make a general finding that work undertaken prior to this date was done in the normal course of litigation proceedings when a party receives a claim against it; this finding is subject to the specific exceptions I have identified in the calculations below.

34. I have identified the date of 15 November as I find from the email correspondence at pages 13 to 15 of the hearing bundle evidence, and Judge Warren and I have found, that from this date the claimant engaged in a vexatious approach to the claim, which continued until judgement was issued in March 2022. Indeed, I find that this approach continued in relation to the September costs hearing; the claimant failed to engage with the directions of the Tribunal in respect of this hearing or attend.

35. Therefore, my assessment is based on an exploration with Mr Bowes at the hearing as to the proportion of each work type fee that relates to the period before 15 November 2022. In providing this information to the Tribunal Mr Bownes identifed a percentage figure based on his analysis of the firms records of the breakdown of work done. Mindful of Rule 2 and the need to dealing with cases in ways which are proportionate to the complexity and importance of the

issues, I am satisfied that this is a fair and just approach for the Tribunal to take in the time available at this hearing, and accords with summary assessment.

Costs incurred for the period 13 July 2021 to 12 April 2022

36. Correspondence: Mr Bownes told me, and I found in the absence of any evidence to the contrary, that 25% of time charged for correspondence related to the period before 15 November 2022. 25% of £3,660.40 is £915.10. Therefore, the amount of correspondence time I find attributable to the approach taken by the claimant in this claim is **£2,745.30**.

37. Telephone calls: Mr Bownes told me and I find that the first telephone call which is costed was 29 November 2022 and that the solicitors have not charged for any calls before this date. The telephone calls charged were due to the respondent's solicitors having to contact the Tribunal as the claimant repeatedly failed to comply with Rule 92 [Where a party sends a communication to the Tribunal … it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise)]. I have seen the correspondence on the Tribunal file between the claimant and the Tribunal, which is repeatedly not copied to by the claimant to the respondent, despite the Tribunals reminders that she must do so. I have also seen correspondence sent to by the respondent's solicitors to the claimant repeatedly reminding her that she must comply with this rule, and copy them to her correspondence, yet she continued not to do so. In making this finding I have taken into account the finding of Judge Warren at paragraph 36 of the written reasons dated 5 April 2022 that:

    *"Miss Vosper herself stated today that she has deliberately not been replying to the Respondent's Solicitor's correspondence, saying that it was the tribunal that needed to know about her circumstances, not the Respondent's solicitors. This is conduct which is not in accordance with the overriding objective; it is not helpful and it is unreasonable conduct."*

38. Based on these findings I conclude that it was reasonable for the respondent's solicitors to have to repeatedly contact the Tribunal to establish the claimant's response to correspondence to and from the Tribunal. Accordingly, I conclude that the amount of **£405.30** is directly attributable to the claimant's conduct of her claim.

39. Attendance with witnesses: Mr Bownes told me that alongside the hearing listed to consider the strike-out application the final merits hearing remained scheduled, so the respondent's witnesses had to prepare witness statements in anticipation of this going ahead given the relatively short timeline between the 2 hearings. Mr Bownes told me that had the claimant engaged in responding to correspondence, or copying correspondence she sent to the Tribunal to the respondent's solicitor, as she was required to do by rule 92, the strike out application would have been dealt with earlier. Based on my reading of the Tribunal file, I agree. I consider that the respondent's solicitors continued in the proper course of preparing witnesses for the final hearing and that the costs incurred in doing so resulted in the main part from the delays and obstructive approach, about which Judge Warren and I have made findings in the April written reasons and September Judgment respectively. I have seen in the bundle copies of the witness statements prepared. I consider that as a matter of good practice preparation of witnesses is on-going. Therefore, I

consider it proportionate and reasonable to take account of this practice and award the amount of **£595.00.**

40. Preparation: based on Mr Bownes analysis of fee records I find that 40% (the figure he submitted to the Tribunal) of £6,311.70 was incurred in preparation before 15 November 2022. Therefore, I find that £2,524.68 of time costs for preparation was incurred before 15 November 2022,

41. Mr Bownes told me that some of the work undertaken by the respondent's solicitors before this date involved early preparation for the final hearing following the Tribunal issuing a case management order. I have seen in the hearing bundle the list of documents prepared by the respondent's solicitors. Mr Bownes submits that of the time incurred before 15 November 2022 45% was preparation for the hearing by reference to the case management dates.

42. Therefore, I find that the amount of £1136.11 (45% of £2,524.68) was getting ahead on the bundle before 15 November 2022 attributable to preparation. The remaining time cost of £1,389.57 (55% of £2,524.68) was preparation of the ET3; time spent doing this is a necessary consequence of being on the receiving end of a claim. Therefore, I have deducted it from the preparation time amount as, in my judgment, it is not fair, reasonable or proportionate to attribute the preparation of the ET3 to the claimant. At this time there are no findings on her behaviour.

43. Based on these findings the amount of preparation time costs attributable to the claimant's conduct of these proceedings is **£4,922.13** (£6,311.70 less £1,389.57).

44. Hearing: I consider that the full amount of **£1,000** is attributable to my findings on the conduct by the claimant. This amount relates to the hearing before Judge Warren on 28 March 2022. The hearing was listed for the whole day. It is a matter of the Tribunal record that the claimant failed to attend on time and that the Tribunal clerk contacted her a number of times. I note that in the written reasons dated 5 April 2022 Employment Judge Warren finds about this hearing that:

*"This morning too, I have to say, Miss Vosper's conduct has in my view been unreasonable. She knew that today's hearing was scheduled to start at 10 o'clock and she did not turn up. She had the information on how to join. In my view she was probably hoping to get away with an adjournment if she did not appear."*

Costs incurred for costs hearing on 22 September 2022

45. Based on my Judgment that the respondent is entitled to a costs award I conclude that it is reasonable to award the amounts incurred by the respondent for the hearing on 22 September 2022 in full. This includes:

45.1. Travel time of £1,540.00. While this amount may seem large, Mr Bownes had to travel from and back to Birmingham to attend the hearing in person at Cambridge Employment Tribunal. I consider this was an unnecessary journey. This hearing could and should have been held in a virtual forum. But for the claimant's failure to engage in any correspondence relating to this hearing, it may have been converted to a

virtual hearing. Furthermore she did not attend; the inperson hearing in Cambridge was scheduled to accommodated the hearing. For these reasons I consider that the respondent is entitled to recover Mr Bownes travel time of **£1,540.00.**

45.2. The hearing lasted one hour. The time awarded for this is **£250.**

46. Mr Bownes submits that the claimant has not attended either costs hearing or challenged the basis on which the respondent seeks to recover its costs. I accept this submission; in doing so I am mindful of Rule 2 that I must approach all applications to ensure the parties are an equal footing. In this application I consider it incumbent on the Tribunal that the award made is fair and relevant factors are considered in the absence of a party. The national guidelines are such a factor. Some hourly charge out rates before me exceed the national guideline. I consider it just and fair to account for this in an adjustment to the award made so that it reflects, as far as I am able to do so on the evidence before me, costs in line with the government's guideline on hourly rates. I emphasize these guidelines do not relate to the fees a firm charges; that is a matter for the firm. They are guideline figures for carrying out a summary assessment of costs.

47. The respondent had not provided a detailed breakdown as to which fee earner undertook which aspect of work. In the absence of forensic evidence I consider it fair and just to apply a percentage reduction to reflect that 3 of the 5 charge out rates are above the national guidelines, 2 below, to the percentages set out below.

47.1. Rena Magdani: solicitor over 8 years qualified charged at £345 per hour. National 2 guideline rate: £255. Charged above guideline rate. This is a rate of 35% above the national guideline.
47.2. Emma Batten: solicitor over 8 years qualified charged at £270 per hour. National 2 guideline rate: £255. Charged above guideline rate. This is a rate of 35% above the national guideline.
47.3. Paul Bownes: solicitor over 8 years qualified charged at £250 per hour. National 1 guideline rate: £261. Charged above guideline rate. This is 4% below the national guidelines.
47.4. Alex Reid: solicitor 4-8 years qualified, charged at £189 per hour. National 2 rate £218. Charged below guideline rate. This is 13% below the national guidelines.
47.5. Cleo Phillips: trainee Solicitor charged at £149 per hour. National 2 guideline rate £126. Charged above guideline rate. This is 18% above the national guideline.

48. Based on these percentages the average charge is 14% above the national guidelines [(35% + 35% + (-4%) + (-13%) + 18%) / 5]. I consider it fair and just to reduce the award by 14% to bring the costs claimed in line with national guidelines. In making this conclusion I note that I referenced these guidelines to Mr Bownes at the hearing and sought information form him as the category of each fee earner on the costs schedule. He did not suggest that these guideline rates are not applicable or that some other rates should be applied.

49. My findings result in an initial total award of £11,457.73. Applying the 14% deduction to adjust the amount to accommodate the extent to which charge out

rates exceed or are below the national guidelines, the amount is reduced to **£9,853.65**

*Rule 84: claimant's inability to pay*

50. Mindful of rule 84 I have considered the claimant's schedule of costs. It does not change by conclusion in the Judgment dated 22 September 2022 that the claimant has the ability to pay these costs. In confirming this conclusion, I have taken account of the respondent's written submissions. In particular I note the case of *Kovacs v Queen Mary and Westfield College and another* [2002] ICR 919 in which the Court of Appeal considered the position in relation to the Tribunal taking a party's ability to pay into account and the following statement of Simon Brown LJ (paragraph 13)

*"It does not appear, on the face of the relevant Regulations, that it was intended that poor litigants may misbehave with impunity and without fearing that any significant costs order will be made against them, whereas wealthy ones must behave themselves because otherwise an order will be made."*

51. I have also taken account of the EAT in *Jilley v Birmingham and Solihull Mental Health NHS Trust and Others* UKEAT/0584/06 & UKEAT/0155/07 which identifies that if a Tribunal takes into account a parties ability to pay in making a costs order it should set out (indeed the EAT considers it *'essential'*) in its reasons a succinct statement of how the Tribunal has dealt with the matter and why it has done so. To this end, I have considered the claimant's means schedule, mindful of the weight I have attached to this evidence in the absence of supporting documents and the fact the claimant's absence at hearing has meant neither the Mr Bownes nor the Tribunal can examine its contents in oral evidence. I consider the following relevant to her ability to pay:

    51.1. The claimant has submitted outline evidence on means only; there are gaps. There is no evidence to support the statement that her employment has been terminated.
    51.2. The claimant has disclosed the existence of a property from which she receives a rental income. There is no evidence of the value of this property, the amount or the amount of the mortgage to which she refers.
    51.3. Part of the income relates to a loan that will be paid off in 2026. I note this mindful that future income can be take into account in considering a party's ability to pay.
    51.4. She did not provide any evidence, nor did she attend the hearing on 20 September 2022.

52. The evidence before me does not sit with someone who is impecunious. By not attending this hearing the claimant has not afforded herself the opportunity to explain otherwise, nor afforded Mr Bownes or the Tribunal to explore the figures she has provided.

53. Therefore, there is no evidence before me which leads me to reduce the costs award of £9,853.65, which I consider reasonable and proportionate for the respondent to recover given the findings made throughout this matter as to the claimant's conduct of the litigation.

54. In reaching this conclusion I am also mindful of the guidance to which the respondent's representative referred me in the case of *Howman v The Queen*

*Elizabeth Hospital Kings Lynn* UKEAT/0509/12. If the Tribunal decides to have regard to someone's ability to pay in deciding what order for costs it should make, *'what it needs to do is to balance the need to compensate the litigant who has unreasonably been put to expense against the other litigant's ability to pay. The latter does not necessarily trump the former, but it may do so.'* [paragraph 13]. Given the claimant's conduct throughout this case it is my judgment that the balance on the findings of facts made and evidence before me today is in favour of the respondent.

55. I conclude that the Tribunal, in reaching its decision to make a Costs Order on 22 September 2022, made errors namely:

    55.1. Failing to engage in a summary assessment required by the guidelines; and

    55.2. Not accounting for the actual time spent at the hearing on 20 September 2022.

*Amount of award - assessment*

56. The respondent is awarded costs of **£9,853.65.**

…….
Employment Judge Hutchings

8 March 2023

JUDGMENT SENT TO THE PARTIES ON

27/3/2023

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FOR THE TRIBUNAL OFFICE