# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Mrs K Pilgrim** | **v** | **Jasmine Care (Holdings) Ltd** |

**Heard at:** Reading Employment Tribunal

**On:** 29 March 2023

**Before:** Employment Judge Eeley
**Members:** Ms C Baggs
Ms H Edwards

**Appearances**
For the claimant: In person
For the respondent: Mr J Munro, employment consultant

# RECORD OF A HEARING

**JUDGMENT** having been sent to the parties on 5 May 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. This was a reconsideration hearing in relation to the claimant's application for a reconsideration of the tribunal's previous determination of her costs application.

2. The original decision was dated 21 October 2021 and the tribunal decided not to make an award of costs in favour of the claimant. The decision was made on the papers following a written application by the claimant and the respondent's written response.

3. The reasons for that decision are set out in a written judgment and I do not propose to repeat them here. I refer to that previous document. The claimant sent in her application for reconsideration and the respondent responded.

4. The power to reconsider a tribunal's decision is contained in rules 70 to 74 of the Employment Tribunal Rules of Procedure 2013. In particular, according to rule 70: *"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."*

5. The applicable test for making a costs order is contained in rule 76 of the 2013 Rules of Procedure. It states:

*(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 prospects 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…"*

In determining whether to make a costs order on the basis of unreasonable conduct the tribunal should take into account the nature, gravity and effect of the party's unreasonable conduct. The tribunal should look at the whole of the picture in making such an assessment.

6. The reconsideration hearing was originally listed to take place on 13 January 2023. Unfortunately, that hearing was not effective because it became apparent that the tribunal had not received all of the relevant documentation in order to be able to consider the application properly. Consequently, I issued case management orders requiring the parties to cooperate in order to prepare for today's hearing.

7. During the course of today's hearing, we considered the contents of the claimant's written submission and the respondent's bundle, the claimant's documents (which were attached to the five emails that she had to send to Watford Tribunal yesterday) and we also heard oral submissions on behalf of both parties.

8. In essence, there are three elements to the application before us:

7.1 Firstly, the claimant says there were elements of unreasonable behaviour by the respondent in the lead up to the termination of her employment with the respondent. Those were matters which formed part of the substantive Employment Tribunal claim that the tribunal originally decided.

7.2 We also heard argument about whether there was unreasonable conduct of the proceedings by the respondent in the period up until the date that the costs application was initially decided by the tribunal.

73. We then had to consider the respondent's conduct over a third period of time. That was the time between the initial determination of the costs application up until today's date.

9. The parties are aware, but I state for the record, that the original tribunal was chaired by Employment Judge Vowles who has, sadly, since passed away. I have, therefore, been appointed by the Regional Employment Judge as a substitute in order to determine this reconsideration application. I am sitting with my colleagues (Ms Baggs and Ms Edwards) who were the other two members of the original tribunal in this case. My personal involvement in the case has been limited to the period leading up to the hearing in January 2023 and, of course, today.

10. I am going to deal with each of the categories of submission that the parties have addressed.

11. The first issue for consideration is the claimant's criticism of the respondent's behaviour towards her in the period of time whilst she was still employed by the respondent and in the lead up to the termination of her employment. On discussing the matter with the other members of the tribunal, and on considering the judgment of the tribunal on liability and remedy, the criticisms made by the claimant are effectively addressed and compensated for by the tribunal's prior judgments on liability and remedy in the substantive case. The submissions made by the claimant in this regard are intrinsically linked to the causes of action in the substantive proceedings rather than being a separate costs issue. I can see from the record that the claimant has already been given an award of compensation. The tribunal award will include an element to compensate her for the treatment that she is relying on in her costs application and which forms part of the treatment which led up to the termination of her employment. As a result, we have concluded that this is not a basis on which we can interfere with the previous tribunal decision on the issue of costs. That aspect of the respondent's behaviour has already been compensated for as part of the substantive compensation in this case, rather than as a matter of costs.

12. The second matter that we have considered is the conduct of the proceedings by the respondent between the liability decision up until the costs decision. The starting point for our deliberations is set out in the tribunal's previous costs decision. The tribunal had found, based on the documents that it had, that the respondent was tardy in its compliance and failed to respond several times to correspondence from both the claimant and from the tribunal. However, the net result of this was that the respondent did eventually comply with the case management orders in substance, albeit considerably after the time limits that had been set out by the tribunal. The upshot of that was that preparation for the remedy hearing (in terms of provision of documents for the final bundle) was complete by two months before the date for the remedy hearing. The record shows that the claimant received the counter schedule by 26 January 2021. The

counter schedule contained the respondent's factual and legal arguments. In the normal course of events receipt of this document would enable the claimant to prepare her case for the remedy hearing and represent her position appropriately. So, the tribunal previously concluded that there was substantive compliance by the respondent, but it was late. I have gone through the documents that had been provided for consideration today with my colleagues and there is nothing in those which suggests that the tribunal's earlier conclusion on this issue was factually wrong or incorrect in any way. There was late compliance but compliance, nonetheless.

13. The remedy hearing took place on 19 March 2021. Both sides were represented. At that stage the tribunal was told that the claimant could not attend due to ill health but had requested that the hearing proceed in her absence. That is what the tribunal quite properly did based on what it knew at the time and what the two parties' representatives said to the tribunal. Now we are told that there was more going on in the background than the tribunal was aware of at the time. In essence, between the deadline for the respondent's compliance and the date of the respondent's *actual* compliance with the case management orders, the claimant very unfortunately contracted Covid 19 and became severely unwell as a result. She tells us, and we have no reason to doubt this, that she was admitted to hospital on 21 January, was put into a form of induced coma on 24 January and a fully induced coma on 28 January. We are told that she remained in that situation for about three and a half months. What this meant for the purposes of these proceedings is that by the time the respondent's documents were received by the claimant's side, the claimant was not conscious and able to give instructions to her lawyers to prepare for the remedy hearing. However, we have reviewed our notes from the hearing that we had on 13 January this year, and during the course of that hearing the claimant's representations were that she had contacted her solicitor shortly before she was put into the induced coma and had asked the solicitor to liaise with her partner and go ahead with the hearing in her absence. That, in fact, is what happened. The decision in relation to remedy was, therefore, made in her absence.

14. The deterioration in the claimant's health was, on any view of things, a terrible turn of events. We have great empathy and sympathy for the claimant's predicament. However, in properly applying the law on costs in the tribunal we have to focus first on whether there was unreasonable conduct by the respondent which could then give the tribunal the discretion to make an award of costs. As unfortunate as the circumstances of the claimant's health were, and as significant as they were, that does not actually change the nature of the respondent's conduct. It does not render the respondent's conduct any more unreasonable than it would have been in the absence of the claimant's health problems. Rather, it does show the significance and the consequences for the claimant. She was 'out of the loop' (to put it in colloquial terms) when the relevant decisions were being made. However, she had already made a conscious decision that it should be managed by others in her absence (her lawyers and her partner.) What this means for the tribunal is that we cannot use that extra information about the claimant being in a coma to recalibrate and reassess the respondent's late compliance with case management orders. We cannot reassess what was previously considered to be late compliance (but not unreasonable

conduct) as now being (with the benefit of hindsight) unreasonable conduct. The nature of the respondent's own conduct remains unchanged whether or not we now know about the claimant's health situation. Plus, the claimant did make a conscious decision (at a point in time when she knew that she had not seen the respondent's documentation for the remedy hearing) to instruct solicitors and to ask them to proceed in her absence rather than to seek an adjournment of the remedy hearing. In the circumstances, the tribunal did as it was requested to do by the claimant's legal representatives. It determined the issue in her absence but when she was legally represented and submissions could properly be made in her interests and on her behalf. So, I am afraid that aspect of matters does not assist her.

15. I have also looked at some of the other aspects of the claimant's submissions in relation to this period of time. The claimant makes reference to a case called Mabey Plant Hire Ltd v Richens. In her submissions she says that the case law shows that in *that* case a further hearing was necessary in order to allow the appellant an opportunity to call a witness. She says that one party was therefore ordered to pay the other party the sum of £200 by way of costs to reflect the unnecessary additional hearing. I have to say there are problems with that on two counts: firstly, I have looked for the case law report and have obtained the case report for the Court of Appeal from 1993 ([1993] Lexis citation 4170) which does not, on the face of it, appear to deal with an issue of costs. So, I am not sure that it actually supports the proposition that the claimant makes. However, assuming for a moment that it does say that there should be an award of costs where there has been an unnecessary hearing (in order to allow another witness to be called), that is not what actually happened in Ms Pilgrim's case. We have not required a further hearing (that would not have otherwise been needed) as a result of the respondent's conduct and so there is no basis there for an award of costs.

16. I will come to the issue of the two hearings this year, January and today in a moment.

17. The claimant also says that there was a witness she proposed to call in her case and that that witness was threatened and was therefore unwilling to attend. There are two matters in relation to that which mean that we cannot really rely on it in order to make an award of costs or to reconsider the previous costs decision. Firstly, what we have been provided with is a redacted witness statement without the contact details of the individual. We do not know the person's name; we have not seen them here in the tribunal; and in the body of the witness statement it is made apparent that the witness is *still* not content to attend a hearing in the presence of the respondent's representatives. (The witness is apparently still employed by the respondent). This may well be the case but it does mean that we are not in a position to make a finding (or have it proved to us) that there *was* the witness intimidation that the claimant contends for. In the absence of that being established on the balance of probabilities, it cannot really form the basis for a costs award. In addition, it is something which apparently took place during the course of the liability stage of the proceedings. It does not seem to have been raised as a problem at any point prior to the current hearing. Certainly, my colleagues on this tribunal were unaware of this

having been an issue previously. That further strengthens our view that if this was going to form part of a costs application, it needed to be raised and addressed at an earlier stage and proper proof of the witness intimidation provided.

18. I have looked also at certain aspects of the claimant's written submissions where, for example, at paragraph 6, she says that the respondent said in writing that it would send the claimant another copy of the bundle. She shows this to us as evidence of their uncooperative, unhelpful and, therefore, unreasonable behaviour. However, when we looked at it in its proper context, the document actually shows the respondent replying to the claimant on the basis that the claimant had already signed to accept receipt of a copy of the bundle. The respondent was, therefore, not going to re-send a copy of the same document. It appears that further documents had been added or submitted by the claimant and these would need to be added to the bundle. What the respondent was saying was, essentially, that they would need time to update the bundle, add the documents to it and then send it to the claimant. So, when read in context, it was not actually a flat refusal to send documents to the claimant which she was entitled to see and which she had not seen. Consequently, it does not assist in showing unreasonable behaviour.

19. We remind ourselves of the law and principles applied in costs applications. They were summarised by Judge Vowles in his earlier decision, and I repeat and rely upon that summary of the applicable law. The costs do not just 'follow the event.' There has to be unreasonable conduct by one party and then the tribunal has to make a decision to exercise its discretion in favour of making a costs award. The tribunal has to look at the whole picture. What we have concluded, having looked at the whole picture again and taking into account the new documentation before us, is that there is nothing that we have seen within the documents now produced, which suggests that the respondent's non-compliance went above the threshold required for unreasonable conduct. We are unable to find, as a matter of fact, that there was the necessary unreasonable conduct up until the date of the application for costs and the determination of the costs application by Judge Vowles and the members of the tribunal. Consequently, we decline to vary the previous costs decision and therefore confirm the original costs decision.

20. However, that is not the end of the matter. As the parties will be well aware from our comments during the course of the hearing this morning, there is a third element to this case and that is what has happened in the time between the hearing in January of this year and today's date.

21. The hearing summary and case management order (which I issued and which was sent to the parties on 16 January) summarises a number of matters but makes it clear that the last hearing was not effective because we did not have a comprehensive bundle of documents. The claimant had done her best to provide us with the relevant documentation but it was not in a useable format and we could not be sure that it was comprehensive and included everything that we needed to see. So, we took the view that we should have a postponement and hear the application following proper preparation. I refer to paragraph 7 of the case summary where I noted that

the claimant would send a complete pack of all the documents she wished to rely on to the respondent's representatives. The respondent's representatives would then put the documents into an indexed and paginated bundle. I noted that the parties had disagreed about the relevance of some of the documents in the bundle and the claimant felt that the respondent had unfairly excluded documents from the reconsideration bundle. Rather than make a finding as to who was right about that, we instead made it clear that the respondent should include *all* the documents that the claimant submitted to them within the bundle. The respondent would then be in a position to make representations about the relevance of the documents at the hearing but the tribunal would have access to all of the documents in any event. I then went on to ask the respondent to include the following at the beginning of the reconsideration hearing bundle: all of the tribunal's prior judgments on liability, remedy and costs; the claimant's original written application for costs with supporting documents; the respondent's written response to the application for costs; the claimant's application for reconsideration (plus any accompanying documents); and the respondent's written response to the reconsideration application. I gave a timetable for that in the case management orders so that the claimant had to send her documents by 30 January. The respondent would then compile a hearing file to include the claimant's documents and anything that they were going to add. The respondent would then send a copy of the file to the claimant by 20 February and then send three copies of that hearing file to the tribunal to arrive no later than 7 days prior to today's hearing. That was all explained to the parties at the hearing. We made it abundantly clear what was required of both parties.

22. What we have heard today is that the claimant did in fact send her documents to the respondent by 30 January, thereby complying with the order. She then emailed the tribunal and the respondent on 1 March to note that there had been no compliance by the respondent, that she had not yet got a bundle, and that she would need a bundle by 7 March. The claimant emailed the tribunal and the respondent on 8 March and noted that she had *still* not got compliance by the respondent. The claimant asked the tribunal to prevent the respondent from making representations at the hearing today. These matters were not referred to me on the papers by the tribunal's administration, hence there was no response from the tribunal at that point in time.

23. In response to the claimant's email the respondent emailed the tribunal and the claimant and on 8 March acknowledged that the claimant had sent documents and they had acknowledged safe receipt. They noted that they were only one day outside the agreed extension of 7 March. They said that they were busy getting instructions and requested an extension of time from the tribunal as an alternative to striking out the respondent's defence to the application. The claimant (quite understandably) emailed the tribunal and the respondent and noted that there was still no compliance by the respondent. She remarked that the respondent only responds to correspondence if there will potentially be adverse consequences for the respondent. She also noted the adverse impact that the whole matter had had on her health and her ability to prepare properly and fairly for today's hearing.

24. On 15 March (i.e. a week later) the claimant emailed the tribunal and the respondent. (I note that the respondent had provided no further correspondence to either the claimant or the tribunal, as far as I can see from the records.) The claimant pointed out that there was still no compliance. There was still no response, and she wanted a strike out.

25. The matter was referred to me on the papers at the beginning of this week, (on 27 March). Unfortunately, it was then too late and too close to today's hearing for me to do anything meaningful on the papers. So, I indicated that the case would go ahead today and in the absence of the respondent providing the hearing bundle, the claimant would have to ensure that she brought the documents with her that she wanted us to consider as part of the reconsideration application. We arrived at the hearing this morning and the respondent presented the tribunal with a hearing bundle which it says was emailed to the tribunal late yesterday and to the claimant yesterday. The claimant says she saw it for the first time this morning. I have been unable to verify whether it was actually received by the tribunal. The net result is that the tribunal got it this morning and the respondent's document bundle does not include all the claimant's documents. It was not sent to the claimant or the tribunal seven days in advance of the hearing. We only had it this morning. It does not comply in any way with the very clear case management orders which we gave on the last occasion. We gave the respondent the appropriate opportunity to explain the position before us this morning and we have to say that we find that explanation wholly inadequate and unsatisfactory. The respondent has acted in flagrant disregard of our earlier case management order which was designed to avoid exactly this sort of problem. Despite her ill-health, the claimant has had to spend time emailing, chasing correspondence, worrying about the issue, getting her documents together, compiling her own document bundles, attaching them to emails and sending them to the tribunal then printing off the documents for her own use and organising her thoughts in preparation for today's hearing. She has had to spend that extra time and effort. She should not have had to do this. The tribunal then had to spend extra time this morning obtaining the said documents and ensuring that all three members of the tribunal had copies to consider. This was a waste of the claimant's time and effort, without any good explanation, and in circumstances where her health is exceedingly poor, as is apparent to everybody in the tribunal room.

26. The respondent's explanation (at best) seems to be that the task of complying with the case management orders was passed between various fee earners at the respondent's representatives. We are unclear and unsure as to whether it was overlooked or whether a certain fee earner did not do what they were instructed to do: we just do not know. In any event, it is not a good explanation. Indeed, the respondent's representative then tried to indicate that the claimant was in breach of the directions and had sent her documents to him late. However, the email chain (including the respondent's own email) suggests that she was not late. Even on the respondent's own case they had the relevant documents by 8 March and yet still failed to provide the bundle in time.

27. There was also a submission by the respondent which suggested that only the relevant documents had been included in the bundle and that this explained why the bundle that we received from the respondent is

considerably slimmer than the claimant's email attachments documents. However, I refer to (and reiterate) the order that we made. The order was issued for a purpose and that purpose was to ensure that all the documents were present and available for consideration and that the parties would make any necessary representations about their relevance at the hearing. This was supposed to be instead of the claimant being deprived of the opportunity to put the documents before us for consideration and to give the tribunal the opportunity to draw its own conclusions as to the relevance and weight to give to them. There was certainly no explanation as to why (notwithstanding the problems that the respondent says it had) the bundle was not sent to both the tribunal and the claimant seven days before the hearing or why the claimant's documents were not all included in the hearing bundle.

28. All of this leads us to conclude that this behaviour (in the face of clear tribunal orders, clear explanations of the orders and a clearly explained rationale for the orders) amounts to unreasonable behaviour on the part of the respondent. This unreasonable behaviour is not something that the tribunal feels able to take into consideration as part of the claimant's reconsideration application (as it post-dates the application). However, we do believe that it amounts to unreasonable behaviour and that this forms the basis on which we can make a separate costs order on our own initiative. We have given the respondent's representative and the claimant the opportunity to make representations on the issue. Thus, this is not a reconsideration of the previous decision, it is a separate and distinct costs order for unreasonable conduct by the respondent between the date of the hearing in January 2023 and today's date. We have considered the fact that at this point in time the claimant is unrepresented. This means that it has to be a preparation time order rather than a costs order. The applicable rate is £42 per hour. We consider, given the amount of to-ing and fro-ing in correspondence and the extra work that the claimant has had to undertake, that to compensate her for 10 hours of work is not unreasonable. We therefore make a preparation time order in the sum of £420. The respondent will be ordered to pay that sum accordingly.

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Employment Judge Eeley

Date: 8 August 2023

Judgment sent to the parties on
9 August 2023.....

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For the Tribunal office