



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Thompson

**Respondent:** Power Up Manchester Limited

**Heard at:** Manchester Employment Tribunal (on the papers)

**On:** 14 August 2023

**Before:** Employment Judge M Butler

## JUDGMENT ON COSTS

1. The claimant is ordered to pay to the respondent the sum of £760 in respect of a Preparation Time Order.

## REASONS

### INTRODUCTION

2. This case came before me for a preliminary hearing to be held in public, on 09 May 2023. The claimant did not attend that hearing, and his claim was dismissed pursuant to Rule 47 of the Employment Tribunal's Rules of Procedure 2013. This judgment was sent to the parties on 16 May 2023.
3. The case was dismissed after having made enquiries of the claimant as to whether he was attending the hearing and having received no response. There was nothing on the file either that indicated that the claimant was not going to attend.
4. The respondent made an application for costs by email dated 07 June 2023. This was not copied to the claimant. However, I requested a copy for a copy to be forwarded to the claimant. This was accompanied with written directions.
5. My directions were sent to the parties on 04 July 2023. The claimant was invited to respond to the application by 28 July 2023. And also, to indicate whether he wanted his financial means to be taken into account when determining the application. This letter also informed the parties that my intention was to determine the application on the papers. However, this position may have changed, depending on what response the claimant provided.
6. The claimant did not respond to these directions. I have therefore proceeded with a paper-based decision.

## **THE GROUNDS OF THE COSTS APPLICATION**

7. The application is made under Rule 76(2). It is made on two grounds. First, it is said that the claimant's conduct was unreasonable and vexatious. And secondly, it is said that the claimant breached all tribunal orders that he was subject to. Although, these two are closely intertwined.
8. The respondent has made an application for both a costs order and a time preparation order. However, he is not able to be awarded both (see Rule 75(3)). This is addressed below.
9. In respect of the unreasonable and vexatious behaviour, it is alleged that:
  - a. The claim brought was unsubstantiated
  - b. There has been a lack of engagement by the claimant (no specifics provided in the application)
  - c. Requiring the respondent to produce a bundle, despite it being the claimant bringing the claim.
  - d. The claimant lied to the tribunal when he stated that he had provided requested information in January and failed to resend it when directed to do so by the tribunal.
10. In respect of the breaching of tribunal orders, the respondent raises the following matters in his application:
  - a. Failing to provide information by January 2023, as directed by EJ Slater at hearing on 08 November 2022.
  - b. Failing to resend the information that the claimant said he had sent in compliance with EJ Slater's direction, by 06 March 2023, as directed by EJ Porter (at Preliminary Hearing on 27 February 2023).

## **LEGAL PRINCIPLES**

11. The relevant Employment Tribunal Regulation is 74-76. Rule 76(1)(a) provides that: "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 vexatious, 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. Whilst Rule 76(2) provides that: "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."
12. Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party has acted unreasonably or been in breach in tribunal orders, such that it has jurisdiction to make a costs order. If satisfied, the Tribunal is required to consider making a costs order but has discretion whether or not ultimately to make one. 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.
13. Costs in the employment tribunal are still the exception rather than the rule (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA).
14. In determining whether to make an order under the ground of unreasonable

conduct, a Tribunal should take into account the “nature, gravity and effect” of a party’s unreasonable conduct (McPherson v BNP Paribas [2004] ICR 1398).

15. Tribunals must take into account all of the relevant matters and circumstances when deciding on costs applications. The fact that a party is unrepresented is a relevant consideration. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not (AQ Limited v Holden [2012] IRLR 648).

## **FINDINGS OF FACT**

This section sets out the contextual background of the proceedings.

### **Claim**

16. The claim form was presented on 23 January 2022. The claimant had been employed as an apprentice electrician for the respondent between 01 August 2020 and 07 September 2021. The claimant brought numerous heads of claim. These were unfair dismissal, age discrimination, and various money claims. The claimant provided little explanation as to the specific allegations of age discrimination.

### **Response**

17. The response was presented on 16 March 2022. The respondent had not listed any legal representative in this form, and none has ever been recorded as being on record for the respondent.

### **Case Management Hearing 08 November 2022**

18. A Preliminary Hearing for case management purposes was listed to take place on 08 November 2022. Neither party attended at this hearing.
19. EJ Slater at this hearing recorded that after she completed the hearing, she had been informed by Tribunal administrative staff that the claimant’s father had made contact to explain that they had not been aware of the hearing date. EJ Slater listed this case for a further Preliminary Hearing, this time in public, to consider and record the particulars of the claim, and to determine a time limit issues.
20. To help progress the case, and to prepare it for the next hearing, EJ Slater directed the following, amongst other things:
  - a. That within 28 days the claimant was required was to provide particulars of his age discrimination complaint, and information about his unpaid wages and holiday complaints.
  - b. By 12 January 2023, the claimant was to send to the respondent a witness statement setting out any evidence he wanted to give in respect of the time issue.

### **Preliminary Hearing 27 February 2023**

21. Both parties attended at this hearing.

22. The hearing was converted to a private hearing, as the case was not ready to have the time issue determined.
23. In reaching this decision, EJ Porter heard from the claimant and the respondent. In short, the claimant explained that he had not received copies of any documents from the tribunal. He had only received EJ Slater's orders a couple of weeks ago, that he had complied with that required of him, and that he had not seen a bundle for this hearing.
24. EJ Porter recorded the allegations of age discrimination as best she could at paragraph 20 of her Orders, although these were to be supplemented with further information by the claimant (and were made subject to a direction).
25. The respondent made an application to strike out the claim for failure to comply with tribunal direction in advance of this hearing and maintained it at the hearing. EJ Porter explained that this application could be determined at the next hearing. In terms of failures in complying with tribunal directions, the following was raised in the application (email dated 03 April 2023):
  - a. A failure to comply with EJ Slater's direction to particularise the age discrimination complaint
  - b. A failure to comply with EJ Porter's direction to re-send the above email
  - c. A failure to comply with EJ Porter's direction to particularise the age discrimination complaints
  - d. A failure to send a witness statement as directed by EJ Porter.
26. EJ Porter directed that the claimant was to send a copy of the email that the claimant says he sent in compliance with EJ Slater's directions, to both the tribunal and the respondent by 06 March 2023. The claimant was also directed to provide further particulars of his claim by 27 March 2023. And he was directed to send to the respondent a copy of a witness statement that included all the evidence he wanted to give at the next preliminary hearing, again by 27 March 2023.

#### Preliminary Hearing 09 May 2023

27. The claimant did not attend the hearing on 09 May 2023. The claims were dismissed pursuant to Rule 47, EJ Butler having consulted the tribunal file and having made enquiries as to whether the claimant was intending on attending the hearing.
28. It was recorded at this hearing that the respondent was likely to pursue costs in this case. This put the claimant on warning of this possibility.
29. The application for costs was made on 07 June 2023. The claimant was given the opportunity to respond to this application by 28 July 2023. However, provided no response.

### **CONCLUSIONS**

30. I have born in mind that an award of costs is not something that is routinely imposed in Employment Tribunal proceedings and that the discretion given to an Employment Judge under the relevant Rules is focused upon whether the behaviour of the parties and representatives in the proceedings falls below the standard that one would reasonably expect in litigation of this nature.

#### **Has the power to award costs arisen?**

Unreasonable conduct and failure to comply with tribunal orders

31. I am satisfied that the respondent has established that the claimant has conducted these proceedings unreasonably. This appears to have arisen since a failure to comply with directions laid down by EJ Slater at the Preliminary Hearing on 27 February 2023. Up until that point, there does not appear to be anything which would lead me to a finding of unreasonable behaviour. However, the claimant (or at least his father on his behalf) explaining to EJ Porter that there had been compliance with the directions of EJ Slater, where there is no record of such, in my opinion is the start of the unreasonable behaviour. Especially given that had such compliance existed then it would have been easy for the claimant to simply re-send the email in question as directed by EJ Porter on 27 February 2023. It is providing this explanation to EJ Porter, without then re-sending the email as directed that is unreasonable behaviour by the claimant.
32. The claimant's failure to take any steps to particularise his age discrimination complaints or to produce a witness statement in accordance with that directed by EJ Porter was also unreasonable behaviour, especially in circumstances where this was the second occasion that the claimant had been directed to do this and where they were necessary for there to be a meaningful hearing on 09 May 2023.
33. I therefore conclude that from the date of non-compliance with the directions set down by EJ Porter, that being 27 March 2023 (I have taken the later of the two dates), the claimant had acted unreasonably in the way he conducted the proceedings, and therefore that the power to award costs from that date had arisen under rule 76(1)(a).
34. Similarly, those recorded above were also breaches of tribunal orders, and the power to award costs under Rule 76(2) has similarly arisen as at that date.

**Should an award be made?**

35. I reminded myself that costs awards in the Employment Tribunal are the exception rather than the rule.
36. The claimant was made aware of the costs application. And was given sufficient time to respond. However, the claimant made no submissions in respect of the application. In respect of the claimant's means to pay any costs, there was no information before me to consider. This was despite the claimant having been afforded the opportunity to provide such information. I therefore decided not to take into account the claimant's financial means.
37. The claimant failed to attend the hearing on 09 May 2023. The claimant could quite easily have informed the respondent that he was not intending on attending or could have applied to postpone the hearing. He did neither.
38. There appears to have been no engagement by the claimant with the respondent since the Preliminary Hearing on 27 February 2023, at least from what is present on the tribunal file.
39. In these circumstances I decided that I would be making a costs award against the claimant.

**Type of award?**

40. As the respondent does not have any legal representation on record, I consider that it would be appropriate to make a time preparation order rather than an award for costs. The respondent cannot be awarded both.

**Amount of Award?**

41. The final question is what amount to award.
42. I have limited this to what would be a reasonable period of time that Mr Jackson would need to prepare for the 09 May 2023 hearing only. This is because I have found that the conduct of the claimant did not become unreasonable until he failed to comply with the directions of EJ Porter, with these being directions effectively being for preparation for that hearing.
43. The hourly rate for a Time Preparation Order is set by statute. This is currently at £38 per hour.
44. The respondent has not presented a document explaining how much preparation time he has spent on this case. However, Mr Jackson did produce a document on 05 July 2023 explaining that between 08 March and 03 April 2023 he incurred costs of £372, and for the period 12 April to 09 May 2023 he incurred costs of £537. However, this appears to take into account work being cancelled to address tribunal matters.
45. I have considered these figures, and also undertook my own assessment as to what I would consider to be a reasonable and proportionate amount of time to spend on preparatory work.
46. I consider that a reasonable and proportionate amount of time preparing for the hearing on 09 May 2023 would be 20 hours. The hearing of 09 May 2023 did involve two fairly complex matters, especially for unrepresented parties. Namely a strike out application and a time issue. Mr Jackson will have had to try to understand and process the legal matters concerning these areas. He also produced a bundle of 70 pages.
47. In conclusion, I make a time preparation time order in favour of the respondent in the figure of £760 (£38 x 20 hours).

Employment Judge **Mark Butler**  
Date\_14 August 2023\_\_\_\_\_

JUDGMENT SENT TO THE PARTIES ON  
24 August 2023

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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