



# EMPLOYMENT TRIBUNALS

*Claimant*

Ms Y Zhang

v

*Respondents*

1. Greenland (United Kingdom  
Investment Limited  
2. Mr Ling Luan

**At:** London Central (In Chambers)

**On:** 7 September 2023

**Before:** Employment Judge Brown

## COSTS JUDGMENT

The Judgment of the Tribunal is that:

The Tribunal does not award costs against the Claimant arising out of the postponement of a Public Preliminary Hearing on 23 January 2023 and/or the postponement of the Final Hearing which had been due to commence on 2 February 2023.

## REASONS

1. The Respondents apply for a costs order against the Claimant in respect of:
  - 1.1. A postponed Preliminary Hearing in this case on 23 January 2023; and
  - 1.2. The postponement of the Final Hearing which had been due to commence on 2 February 2023.
2. The Respondents' applications were set out in their letters of and in detailed grounds dated 16 January 2023, pC274 – 276 and 25 January 2023, pC/418.
3. The parties had agreed in writing that those applications should be decided on the papers by me, following the Respondents and Claimant presenting submissions on them and replies.
4. I had the following relevant documents:
  - 4.1. The Respondents' Grounds for Costs Order Against the Claimant;

- 4.2. Hearing Bundle A and Hearing Bundle C;
  - 4.3. The Claimant's Response to the Respondents' Costs Order Application dated 28 July 2023
  - 4.4. Claimant's Bundle: Attachments of Claimant's Response dated 28 July 2023;
  - 4.5. The Claimant's medical records
  - 4.6. Certificate of Hospitalisation;
  - 4.7. The 823 page Bundle for the Preliminary Hearing on 23 January 2023 and the index to that Bundle;
  - 4.8. The Respondents' reply on law and fact to Claimant's Response to the Respondents Grounds for a Costs Order dated 11 August 2023
  - 4.9. The Claimant's further Response dated 31 August 2023
  - 4.10. The Claimant's email to the Tribunal dated 1 September 2023, in support of her response dated 31 August 2023
  - 4.11. The Claimant's emails of 6 September 2023 and the Claimant's email trail of 4 September 2023, incorporating previous emails from her and between the parties.
5. The Respondents' written Grounds for Costs Order Against the Claimant stated that they had other outstanding applications for costs orders, 4 of which the Tribunal had ordered would be dealt with at the full hearing and the remainder of which had not yet been addressed.
6. I did not have the detail of those other applications. I decided that I should consider the current costs applications narrowly, so as not to trespass on the subject matter of the other costs applications. This Judgment considers, strictly, whether to award costs arising out of the postponement of the 23 January 2023 hearing and the postponement of the 6 day Final Hearing due to commence on 2 February 2023.
7. The 16 January 2023 application for costs was in the following terms:

*" ... if the Tribunal is minded to postpone the full hearing despite our representations, in accordance with rules 30 and 77 of the ET Rules, we apply for a costs order against the Claimant in the sum of £15,840 ... from 20 December 2022 to date, in dealing with the Claimant's unreasonable conduct of these proceedings including (without limitation) the impact of the Claimant's conduct on the case management timetable resulting in the full hearing being postponed.*

*If the Claimant seeks to rely on ill-health as the reason for not exchanging her witness statement as ordered (which the Respondents do not accept), she should have applied to postpone the full hearing weeks ago, as otherwise she would have complied with the original directions for exchange of statements. The Claimant notified the Tribunal on 24 and 29 November 2022 that she was ill (email chain attached). She has recently relied on these communications as indicating the hearing may be in jeopardy due to her health, together with the fact that EJ Walker indicated this in her letter dated 10 November 2022 (attached). If it is the case that the Claimant cannot attend the hearing (which is not accepted), she would have known this weeks ago, particularly as this would involve arranging for and travelling from China to the UK. We submit therefore, that it would have been*

*reasonable for the Claimant to have made the postponement application in November 2022, enabling the Respondents to avoid incurring so many costs. It is not reasonable or proportionate for the Respondents to bear such costs.*

*Pursuant to Rule 78(1)(a) of the ET Rules the Respondents apply for the Tribunal to order that the Claimant pay the above specified amount to the First Respondent (plus any further sums reasonably incurred by the Respondents, should the Claimant continue to act vexatiously and/or unreasonably in her conduct of proceedings and fail to comply with any revised deadlines set by the Tribunal)."*

8. The 25 January 2023 application was in the following terms:

*"In accordance with rules 30 and 77 of the ET Rules, we apply for a costs order against the Claimant in the sum of £11,230. ...*

*from 17 January 2022 to 23 January 2023, in preparing for and attending the preliminary hearing, which the Claimant did not attend. The Claimant only provided medical evidence which the Tribunal found sufficiently persuasive for it not to proceed with consideration of the Respondents' strike out application, at 8.52 a.m. on the morning of the hearing (the hearing commenced at 10 a.m.). This evidence was only provided in response to REJ Freer's email of 4.44 p.m. on Friday 20 January 2023, despite the Claimant first having notified the Tribunal that she was hospitalised on 10 January 2023.*

*Pursuant to Rule 78(1)(a) of the ET Rules the Respondents apply for the Tribunal to order that the Claimant pay the above specified amount to the First Respondent (plus any further sums reasonably incurred by the Respondents, should the Claimant continue to act vexatiously and/or unreasonably in her conduct of proceedings and fail to comply with the Tribunal's case management order dated 23 January 2023)."*

### **Relevant Chronology**

9. A 6 day Final Hearing had been listed in this case to commence on 2 February 2023.
10. In preparation for the Final Hearing, the parties had been ordered to exchange witness statements on 7 December 2022. That date was extended by the Tribunal to 20 December 2022 and then to 11 January 2023 by agreement. Statements were finally ordered to be exchanged by 16 January 2023. The Claimant did not comply with that deadline.
11. The Claimant had not provided her updated schedule of loss by 20 December 2022, in breach of an order by EJ Walker made on 10 November 2022.
12. Following the Claimant's failure to exchange her witness statement on 16 January 2023, the Respondents applied that day to strike out the Claimant's claim, and, in the event that the final hearing was postponed, applied for the Respondents' costs of that postponement, p C/274-276.

13. On 17 January 2023 the Tribunal listed a Public Preliminary Hearing on 23 January 2023 p C/21-22, to consider, amongst other things, whether the Claimant's claim should be struck out because the manner in which the proceedings had been conducted by the Claimant had been unreasonable and vexatious, and/or for the Claimant's non-compliance with an order of the Tribunal, and/or because the Claimant was not actively pursuing her claim.
14. The Claimant responded to that listing on 18 and 19 January 2023, asking that the Public Preliminary Hearing be cancelled, referring to evidence she had previously submitted in relation to her health condition p C/344-349. She submitted certificates of hospitalisation dated 12 and 19 January 2023.
15. The 19 January 2023 certificate was not on headed notepaper and did not provide contact details for the relevant hospital.
16. On 20 January 2023 REJ Freer considered the correspondence and commented that, in the absence of an official transcript, it was not possible for the Tribunal to confirm the content of the evidence submitted and there was no up to date evidence that the Claimant was and continued to be hospitalized, or that she could not attend the hearing and/or participate by video pC/23-24. He commented that the position might change following the receipt of further evidence.
17. On the morning of the Public Preliminary Hearing, the Tribunal received an email from the Claimant applying to vacate the hearing and attaching medical certificates written in Chinese, with certified translations of them.
18. The most up to date of the attached certificates, which was dated 22 January 2023, was signed by Dr Kai Li of Shanghai Huangpu District Geriatric Nursing Hospital. That certificate certified that the Claimant was hospitalised and said, "This is to certify that the patient is hospitalised after suffering movement disorders of both lower limbs and memory reduction for 5 months. ... Doctor understands that the inpatient has been dealing with tribunal case, considering the instable mood may be affected by the tribunal case. Doctor's instructions: 1. Full rest; 2. Need to be accompanied by family; 3. Avoid to irritate the patient's mood; 4. Need to be hospitalised and receive medical treatment. The patient is currently hospitalised and will continue to be hospitalised. Will strengthen psychological counselling, watch closely the patient's mood change."
19. A slightly earlier certificate, dated 19 January 2023 and also signed by Dr Kai Li of Shanghai Huangpu District Geriatric Nursing Hospital, certified that the Claimant was hospitalised. It said, "Diagnosis: 1. lacunar infarct movement disorders of both lower limbs, cognitive dysfunction; 2. atrophic gastritis; 3. recurrent esophagitis; 4. Depression. This is to certify that the patient is hospitalised after suffering movement disorders of both lower limbs and memory reduction for 5 months. At present, the patient has weak lower limbs, headache, memory reduction, gastralgia, normal defecation, sleeplessness, need medicine treatment. ... The Patient is currently hospitalised and receiving medical treatment."

20. The procedure for applying for a postponement is set out in the 'Presidential Guidance on Seeking a Postponement of a Hearing' (PG-SPH) issued by the President of Tribunals for England and Wales on 4 December 2013. It indicates that, when applying for a postponement for medical reasons, “ *all medical certificates and supporting medical evidence should be provided together with an explanation of the nature of the health condition concerned. The medical evidence should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease.*”
21. At the 23 January 2023 hearing, I considered that the medical evidence provided on behalf of the Claimant in support of the postponement application did not satisfy all these requirements, in that there was no prognosis. Nevertheless, I noted that the 22 January 2023 certificate advised that the Claimant was currently hospitalized for medical treatment. It also said, “Doctor understands that the inpatient has been dealing with tribunal case... the instable mood may be affected by the tribunal case.” It stated that the Claimant required “complete rest”. I therefore considered that that amounted a statement that the Claimant was not fit to deal with the tribunal case, including attending the Open Preliminary Hearing on 23 January 2023.
22. I decided that I should postpone the Open Preliminary hearing because the Claimant was not fit to attend and it would be unfair to proceed with a strike out hearing in her absence.
23. When I postponed the hearing I did note that the Claimant the Claimant had been corresponding at considerable length with the Tribunal and the Respondents very recently.
24. On 23 January 2023 I also decided to vacate the 6 day Final Hearing, which had been due to commence on 2 February 2023, because it would not be fair to either party to proceed with it. I gave my reasons as follows: “ ... the Respondents had not received the Claimant’s witness statement for the Final Hearing and would therefore be unable fully to prepare for it. The Claimant was unwell and in hospital and, apparently, unable to engage with her claim, very shortly before the final hearing was due to start.”

### **Observation**

25. Having read the very lengthy submissions from both sides in respect of these costs applications, I observed that the parties’ submissions went far beyond the scope of the postponement of the 23 January 2023 Public Preliminary Hearing and the 2 February 2023 Final Hearing. Both sides went into considerable detail about their disputes concerning disclosure, Bundle preparation and exchange of witness statements.
26. As set out below, the reasons for both postponements included the Claimant’s lack of fitness to participate in the proceedings. That being so, I did look primarily at the Claimant’s conduct in relation to the postponements for ill health, rather than the wider conduct of the litigation.

## Relevant Law

27. The Respondents make this application under *Rule 76 Employment Tribunal Rules of Procedure 2013*. *Rule 76* provides in relevant parts:

“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 ... has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that proceedings or part have been conducted; 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.

28. Under *r76(1)* therefore, the Tribunal must consider making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.

29. A Tribunal must therefore consider making a costs order where a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins, *r 76(1)(c)*. However, the decision whether or not to make an order under *r 76(1)* is discretionary.

30. A Tribunal's discretion to award costs under *r 76(2)*, is distinct from its discretion under *r 76(1)*, and is not linked to vexatious or unreasonable conduct (*Ladbroke Racing Ltd v Hickey* [1979] IRLR 273, [1979] ICR 525, EAT). The purpose of the order is compensatory, and not punitive, and ought only to be made in respect of costs incurred *as a result* of the adjournment or postponement; it should not, therefore, cover the general costs of preparing the case, as these will be costs attributable to the adjourned or postponed hearing when it takes place (*Cooper v Weatherwise (Roofing and Walling) Ltd* [1993] ICR 81, EAT).

## Submissions – Costs of Postponement of Preliminary Hearing

31. The Respondents contended that the Claimant's application to adjourn the Preliminary Hearing was insufficiently evidenced until further evidence was submitted on the morning of the hearing, p C/391-395. They criticised the Claimant for providing self-translations of her medical certificates.

32. They contended that the lateness of the application led to the Respondents incurring further unnecessary costs which they should not have to bear.

33. In her Claimant's Response to the Respondents' Costs Order Application dated 28 July 2023, the Claimant said that she had provided sufficient medical evidence to support her application for suspension of the Tribunal proceedings and postponement of the final hearing initially on 10 January and 13 January 2023.
34. She said that it would have been impossible for her to predict when she would be hospitalised in advance as this would be her doctor's decision based on her health condition at the time.
35. The Claimant contended that the Respondents had provided self-translations of their documents in their proposed final hearing bundle, so it was unreasonable for the Respondents to criticise the Claimant for the same.

### **Decision – Costs of Postponement of Preliminary Hearing**

36. I noted that I had decided to postpone the Public Preliminary hearing because the Claimant was not fit to attend and it would be unfair to proceed with a strike out hearing in her absence.
37. The reason for the postponement was therefore the Claimant's ill health.
38. I accepted the medical evidence at face value at the time of the postponement and the Respondents do not now seek to go behind it.
39. The Public Preliminary Hearing was only listed on 17 January 2023, 6 days before 23 January. It therefore was inevitable that the Claimant's application to postpone it was made within 7 days of the hearing. While I was required to consider making a costs order under r76(1)(c), the timing of her application was not the fault of the Claimant, so the short notice of the postponement application was not a reason, in itself, for making a costs order.
40. In exercising my discretion, I considered that the Claimant, a litigant in person, had acted promptly to apply to postpone the hearing. I did not find that she was at fault in providing self translations of medical certificates in the first instance. It may take a litigant in person, in particular, a period of time to arrange an official transcript. Providing the certificates in advance, with a self-translation, could be helpful to the Respondents and was, in my view, not unreasonable. I noted the Claimant's submission that the Respondents have themselves provided self-translations of documents in other Bundles.
41. I noted also that the Claimant's first certificate of hospitalisation was dated 12 January 2023. This was shortly before the hearing on 23 January. I agreed with the Claimant that she could not have known when a medical doctor would decide to admit her to hospital.
42. I did not consider that she was significantly at fault in failing to notify the Respondents and Tribunal of her hospitalisation until 18 January – only 6 days later.

43. I did not exercise my discretion to make an award of costs in relation to the postponement of the 23 January 2023. I considered that the Claimant had acted with reasonable promptness and diligence in applying for the postponement and in providing the Tribunal and Respondents with supporting evidence. It would not be fair to award costs against her in those circumstances.

#### **Submissions – Costs of Postponement of the Final Hearing**

44. On 23 January 2023 I decided to vacate the 6 day Final Hearing, which had been due to commence on 2 February 2023, because it would not be fair to either party to proceed with it. I gave my reasons as follows: “ ... the Respondents had not received the Claimant’s witness statement for the Final Hearing and would therefore be unable fully to prepare for it. The Claimant was unwell and in hospital and, apparently, unable to engage with her claim, very shortly before the final hearing was due to start.”

45. The Respondents contended that the application to adjourn the Final Hearing was also submitted unreasonably late, in circumstances where the Claimant knew of her deteriorating health in November 2022 and waited until shortly before the date listed for the Final Hearing to apply for the adjournment, on 10 January 2023 [C/222].

46. The Claimant contended that she had provided reasonable notice to the Tribunal and the Respondents, 20 days before the final hearing date.

47. She said that the Respondents’ statement in their Grounds for Cost Order that “the application to adjourn the final hearing was also submitted unreasonably late” was unreasonable and unjust.

48. Both parties went into considerable detail about the conduct of the litigation between October 2022 and January 2023.

#### **Decision – Costs of Postponement of Final Hearing**

49. I noted that part of the reason for the postponement was that the Claimant was unwell and in hospital and, apparently, unable to engage with her claim, very shortly before the final hearing was due to start.

50. That, in itself, was sufficient reason to postpone the final hearing.

51. That being the case, the failure to exchange witness statements made no difference to the decision to postpone.

52. As I have already indicated, I accepted that the Claimant could not have known, in advance, that she would be hospitalised. I have also found that she acted with reasonable promptness and diligence in bringing her hospitalisation to the attention of the Tribunal and the Respondents.



53. I took into account that there is no requirement for the Claimant to have acted unreasonably, in order for costs occasioned by a postponement to be awarded against her.

54. Nevertheless, I did not exercise my discretion to award costs where I have accepted that the Claimant was not fit to engage in the litigation and had notified the Respondents and Tribunal of this promptly. Again, it would not be fair to do so.

55. I make clear that I have made no decision on the reasonableness of the parties' conduct in relation to the exchange of witness statements.

56. I am conscious that other costs applications have been made and are yet to be dealt with. I do not intend to bind any other Judge regarding the costs of the litigation in other respects. My decision relates solely to postponement of hearings in January and February 2023 on medical grounds.

Employment Judge Brown

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7 September 2023

Judgment sent to the parties on:

07/09/2023

For the Tribunal Office