EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
A Akhtar	**v**	John Lewis plc

Heard at: Reading (by CVP) **On:** 13 November 2023

Before: Employment Judge Anstis
Mr P Hough
Mr G Edwards

Appearances:
For the Claimant: Written representations
For the Respondent: Mr D Hobbs (counsel)

JUDGMENT

The claimant must pay to the respondent **£13,250** in respect of costs.

REASONS

INTRODUCTION

1. This is a costs hearing listed on the application of the respondent following the dismissal of the claimant's claims at a final hearing on 5 & 6 September 2023.

2. We gave our decision on the respondent's application at the hearing, reserving our reasons. These are the reasons for our decision.

MATTERS ARISING AT THE HEARING

3. The claimant made an application to vacate or cancel this hearing on 10 November 2023. That is addressed in our second order of 13 November 2023, which incorporates written reasons for the decision.

4. The claimant did not attend today's hearing. It has been listed to be held by CVP following the claimant's previous objections to in-person hearings. The claimant did not attend by CVP. She says she could not connect to CVP on the web link provided, and that the appropriate guidance notes and FAQs had not been provided to her. The events of the morning are addressed in our first order of 13 November 2023, which incorporates written reasons. That order required that:

> *"The claimant must, by 12:00 today, either provide the tribunal with a telephone number on which she can be contacted, or attend in person at the Reading Tribunal Hearing Centre, 30-31 Friar Street, Reading RG1 1DX."*

5. In the time between this order being sent and the claimant's response, she was provided with the CVP guidance notes and FAQs.

6. The claimant replied around 12:00 as follows:

> *"In response to the order sent today by Tribunal in email correspondence, Claimant provides telephone number:* [number given]*.*
>
> *Claimant notes that Tribunal sent this order at 11:13am stating to either attend by call on in person by 12pm today ...*
>
> *Tribunal gives notice to attend in person today by 12pm. This is clearly not possible because Claimant needs to have a charged phone to attend. This order was sent 11:13am to attend by 12pm and phone does not charge this quickly. Phone does take few hours to charge.*
>
> *Tribunal now also sent the guidance notes less than hour notice before 12pm time given and FAQ today document at short notice, therefore confusing claimant and to cause stress in deciding to either choose between reading the guidance notes and FAQ document, or attend hearing in person. For claimant to make these decisions in the given time of 47 minutes is clear bullying and hardship and prejudice to claimant. Tribunal deliberately did not send guidance notes and FAQ in advance of hearing. Claimant is very upset and has not had opportunity to read through guidance notes and FAQ. Tribunal deliberately is putting pressure on claimant and to bully and harass claimant to prevent attendance at todays hearing because Tribunal wants to put a costs order to bully and harass claimant. The conduct of Tribunal is very upsetting and causes prejudice to claimant ..."*

7. At around 12:15 the tribunal sent an email to the claimant in the following terms:

> *"The tribunal will resume the hearing at 13:30.*
>
> *This is designed to give the claimant the opportunity to charge her phone and consider the guidance documents about CVP before joining the hearing. The tribunal considers that in most cases a phone can be used while it is charging, which may remove any requirement for the phone to be charged for several hours before use.*
>
> *The claimant may attend at 13:30: (i) by CVP, online using the link and log-in details provided, (ii) by CVP (audio-only) by calling* [number given]*, (iii) by CVP (audio-only) by making a request for the tribunal to call her,*

with such a request to be made before 13:25, or (iv) by attending in person at the Reading Tribunal Hearing Centre. If there is no attendance by the claimant it is anticipated that the tribunal will consider her application(s) and (depending on the outcome of those) the respondent's costs application in her absence, by reference to her written submissions."

8. At 13:30 the claimant replied as follows:

"… Tribunal now gives another short notice of one hour for claimant to decide how to attend hearing, to again continue to cause further stress to keep Claimant away from hearing.

A fair and impartial Tribunal does not send one hour notice that too on day of hearing which has caused significant inconvenience. The manner Tribunal is conducting this hearing is to make sure claimant cannot focus on defending her case for the hearing today and to cause hardship and prejudice.

For in person attendance, Tribunal normally orders parties to bring a bundle to the hearing. In order for claimant to present her case and defence at the costs hearing in person, Claimant will have to print all relevant documents, opening submissions and evidence when speaking, referring to documents and defending claimant's case. It is not possible to print all documents and be able to reach the Tribunal hearing centre in less than one hour by the time given of 13:30pm short notice. By giving one hour short notice, this is evidently not enough time to arrange a legal representative for in person attendance.

For CVP hearing, Tribunal failed to send guidance notes and FAQ with the CVP link on 10th November 2023, to deliberately disadvantage claimant not prevent attending hearing and to not understand how CVP works. The CVP link was sent less than 24 hours working day before hearing day and was sent at short notice and should have been provided weeks in advance of hearing, to ensure claimant can ask any questions or email concerns about the hearing, taking into account claimant is the unrepresented party and would want to ask questions to understand the CVP process.

Tribunal sent guidance notes and FAQ at 11:19am today, less than hour notice where Tribunal made order to respond by 12pm, to cause hardship and prejudice to claimant.

Tribunal again provides option to call on 0207 number, which is expensive and claimant already stated that claimant cannot afford call costs.

Tribunal says to email to request to call claimant, 55 minutes from the time this email was sent which is short notice, taking into account time it takes to respond by email to this injustice and unfairness in the tribunal correspondences. It is not safe to use phone whilst charging when on call and phone would not be fully charged to last for the duration of hearing.

Tribunal is determined to conduct hearing only with Respondent …

The manner in which Tribunal wants to proceed with todays hearing in claimant's absence is same conduct by Respondent when dismissing claimant. Tribunal only wants to bully claimant by giving these one hour notices and not giving enough time for claimant to understand the correspondences and last minute orders made during todays hearing. All communications by Tribunal are not in accordance with overriding objectives and Tribunal only wants to put unfair costs order in claimant's absence without giving opportunity for claimant to present case and defence at todays hearing taking into account all circumstances detailed in claimant's correspondences. One hour short notice is only excuse for Tribunal to claim they are giving options to claimant but this is not correct at all and not in accordance with overriding objectives. It is unreasonable for Tribunal to expect claimant to make quick decisions about the hearing and the Tribunal correspondences received today has simply caused stress and preventing claimant to present case and defend at the hearing."

9. The claimant has previously criticised the tribunal for addressing an application that the employment judge thought had been implicitly made when it had not been explicitly made. We have reviewed the claimant's correspondence concerning her attendance at the hearing and while she has criticised various matters in relation to arrangements for the hearing she had not made any particular application for postponement or adjournment of the hearing, or for the hearing to take place in any particular way. Given the lack of any express application, and the claimant's criticism of us implying applications she has not made, we do not see in this correspondence any application made by the claimant that we are required to deal with. However, we do think that we need to consider, of our own motion, whether in these circumstances the hearing can proceed.

10. The CVP system is not perfect. There can be difficulties with connections, although in our experience they rarely go so far as someone being completely unable to connect to the CVP system. It is unfortunate that the claimant was not provided with the guidance note and FAQs at the same time as being given the link, but we do not accept her suggestion that this was deliberately done by tribunal staff to disadvantage her.

11. If there are difficulties with the CVP system, it is possible to fall back on other means of communication. Typically this will be by telephone link to CVP, which can be done either by the tribunal calling out to the party in question or by them dialling in using a phone number and conference ID. Both those options were presented to the claimant, and the first order indicated that if it was done this way all others would be audio-only in order to prevent her being at a disadvantage.

12. A further option was attendance in person at the Reading Tribunal Hearing Centre. The claimant is sensitive about matters relating to that, but there was reason to believe that this would be possible within the timescales suggested by the tribunal.

13. What is most striking in this case is the wide range of unusual reasons given by the claimant for why none of these options are possible. She cannot call out because of the cost. She cannot be called because her phone has low charge. She cannot speak on the phone while it is charging because she considers this to be dangerous. She cannot attend in person because either (in the case of her initial response) she would need her phone which was on low charge, or (in the case of her most recent response) it would require her to print out a bundle. She mentions questions of having a legal representative if attending in person, but this is the first time that has been suggested, and if there was any question of her instructing a legal representative that would have been as relevant for the intended CVP hearing as it would be for any in person attendance.

14. Difficulties even logging on to CVP are unusual, although we accept that the claimant did not originally have the usual guidance notes and FAQ document.

15. A reluctance to call a landline from a mobile phone on costs grounds is unusual in days when most mobile phone contracts contain inclusive minutes.

16. A reluctance to be called because the phone has low battery is not a good answer to not trying the call at all – even if it may or may not last, some sort of contact is helpful in moving on a case or hearing.

17. A reluctance to speak while a phone is charging on the basis that it may be dangerous is unusual, particularly when most modern phones can operate on a speaker or via some hands-free mode.

18. Reluctance to travel to a tribunal hearing centre when a phone is on low charge is not easy to understand and does not make sense to us.

19. Thinking that attending a tribunal hearing in person would require printing out a long bundle is also not easy to understand, particularly when the claimant's opening submissions criticise the provision of the respondent by a bundle and point out that no order was made for a bundle.

20. Taking all of this into account, we come to the conclusion that the claimant is doing everything possible to avoid this hearing. She has made an application to vacate or cancel it the working day beforehand, and is now taking every opportunity to avoid attending. Where options for her to attend on alternative bases have been given, these have been refused by her on the basis of a series of reasons that while individually at least unusual taken together become highly improbable, and suggest to us that she is simply trying to avoid this hearing.

21. In those circumstances, and in the absence of any express application by the claimant, we are not minded to postpone or vacate the hearing of our own motion, and have proceeded in the claimant's absence.

THE APPLICATION

22. The respondent's application was made in writing. We understand it was made one working day later than permitted by our order but do not see that that invalidates it. As will appear below, we are taking account in this hearing of submissions made by the claimant seven days out of time.

23. The application starts with a summary:

> *"The broad summary is that:*
>
> - *this was a hopeless claim from the outset;*
> - *the Claimant made repetitious applications of little merit;*
> - *the Claimant breached essential orders including a failure to file and serve a witness statement;*
> - *the Claimant failed to turn up to the final hearing; and*
> - *defending the claim has cost the Respondent over £20,000.*

24. The respondent relies on rule 76(1)(a), (b) and (2), saying:

> *"The Claimant acted unreasonably in bringing and thereafter pursuing the claim. It was unreasonable to bring the claim because it had no reasonable prospects of success. The claims for victimisation and harassment were never developed into a cohesive argument. There was no evidence to support either. The unfair dismissal claim was exposed as being nothing more than a weak argument about the procedure followed and accordingly was deemed to have had little or no value even if it had succeeded (which it did not). In addition, the manner in which the Claimant made repeated applications for case management orders that failed to further the case amounted to unreasonable conduct. Lastly, it was also grossly unreasonable (as well as a breach of Tribunal Orders) not to file and serve a witness statement or attend the final hearing."*

25. They go on to talk through the merits of the claim, and the tribunal's decision. They recite various applications made by the claimant and her non-attendance at the hearing, concluding: "*This is the clearest case for making a costs award. The claims were hopeless, the case management process was littered with pointless applications, the Claimant failed to serve a witness statement (in breach of the Order of 9th August 2023) and then didn't turn up to the final hearing. If costs are not awarded in this case. It is hard to conceive of a case in which a costs order would be justified.*"

THE RESPONSE

26. The claimant was to respond to this application by 20 October, although this deadline was extended to 6 November 2023 by the order of 1 November 2023.

27. Although it is clear that during the relevant time the claimant has engaged in considerable correspondence with the tribunal, there is nothing that seems to have been submitted as her response to the costs order. As on previous occasions we regret to say that the claimant seems to have preferred to argue about points of procedure rather than address the substance of matters. The closest she has come to a substantive response to the costs application is in her "opening submission", sent to the tribunal on the morning of the hearing. Although this is outside the time limit allowed, we have taken this into account in our decision.

28. From the middle of the second page of that document the claimant addresses the merits of her claim. She talks of harassment of the claimant by Kate Inns hand delivering a letter to her. Her point seems to be that there is documentation to suggest that she knew before the hand delivery that the relevant letter had been signed for through the post, so there was no need for any hand delivery. The claimant says "*She* [Kate Inns] *wanted claimant to have enough time to 'digest the notes'. This is exactly how a person speaks who discriminates partners on the basis of race.*" She says Kate Inns later lied about the posted letter having been signed for. She refers to her grievance and says "*The disciplinary process was initiated by Kate Inns as she had received details of grievance against her.*" She accuses Kate Inns of interfering in her appeal, and of an offence of criminal harassment.

THE LAW

29. Rules 76-77 provide that:

> *"76 (1) A Tribunal may make a costs 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 the proceedings (or part) have been conducted; or*

> *(b) any claim or response had no reasonable prospect of success; or*
>
> *…*
>
> *(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.*
>
> *77 … No such order may be made unless the paying party has had a reasonable opportunity to make representations … in response to the application."*

30. Rule 78 addresses the amount of any costs order, in respect of which the tribunal's jurisdiction is limited to £20,000.

31. Rule 84 provides:

> *"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."*

32. In principle there are therefore three stages to the making of a costs award. The first is to consider whether the criteria in rule 76(1)(a), (b) or (2) are met. If criteria in rule 76(1) are met, we have to consider making a costs order. Under either rule 76(1) or (2) the second stage is considering whether, as a matter of discretion, we should make an award. The third stage is what the amount of that award should be. Rule 84 can be relevant to both the second and third stages of the process.

DISCUSSION AND CONCLUSIONS

The principle of a costs award

Unreasonable bringing of the claim, and no reasonable prospect of success

33. Did the claimant act unreasonably in bringing her claim, and did it have any reasonable prospect of success?

34. In our judgment we have been critical of the merits of the claimant's claim, finding, for instance, that the hand delivery of the letter "*was not racial harassment as it had nothing to do with the claimant's skin colour and, beyond that, it did not have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant nor could it reasonably have been considered by her to have this effect.*"

35. We also found, on the question of victimisation "*we are … at a loss to see what should have triggered an approach from management, and do not see any*

basis on which it could be said that such an omission was anything to do with any alleged protected acts."

36. On the question of dismissal, we say, "*we are at something of a loss as to how the claimant could have considered her dismissal to be unfair, still less anything to do with her alleged protected act(s)*".

37. The consideration at this stage is whether the bringing of the claim had been unreasonable or whether the claim had no reasonable prospect of success. This does not seem to us to be a case in which the respondent had produced during the course of preparation for the final hearing some unexpected or surprising evidence which has changed the direction of the case. The claimant's complaint of harassment was added by amendment and had not originally been contained in her claim, so it appears at least from the claimant's point of view that her claim improved as matters went on, not that it unexpectedly got worse. If the claim had no reasonable prospect of success at the final hearing or was considered to have been unreasonably brought at the time of the final hearing it must be because it had no reasonable prospects or was unreasonably brought at the start, not because something had changed during the course of the litigation.

38. The claimant's dismissal is at the heart of her claim. Her original claim form summarises her position on this in the following way:

> *"I believe I have been unfairly dismissed. I believe I was unfairly dismissed because I had raised grievance on race discrimination … before my grievance was to be heard, Kate Inns contacted her regional manager to assign disciplinary manager to dismiss me. There was no case for unauthorised absence as I was in contact with* [named individuals] *discussing bereavement support and return to work in email."*

39. The first element of this is addressed by the claimant in her response to the costs application. She says:

> *"Dale Warne was the dismissing manager. Kate had requested PPA that Dale should hear the Claimant's appeal against first disciplinary. As PPA already selected manager to hear first disciplinary appeal, Dale was then intentionally assigned for second disciplinary …"*

40. Para 62 of the claimant's original claim says that "*evidence to support this is Kate Inns statement taken in grievance investigations in which she admitted contacting regional manager to assign formal disciplinary manager*".

41. As far as we can tell, that is a reference to the following passage at p996 of the tribunal bundle for the final hearing:

> *"LE Are you aware of why Dale was the disciplinary manager.*

> *KI Yes that was my request again we were having someone neutral, practically it was standard, I reached out to my RM in Waitrose and he was nominated."*

42. The problem with this is that even if it bears the interpretation contended for by the claimant – that Kate Inns nominated the disciplinary officer – there is no basis on which to say this was anything to do with her grievance or made her dismissal unfair.

43. The second element is that "*there was no case for unauthorised absence as I was in contact with*" other managers within the respondent. As explained in our judgment, even if the claimant was in contact with others we do not see how this makes the claimant's dismissal unfair.

44. The claimant's race harassment and victimmisation claims have always suffered from the fundamental flaw that there is nothing from which the tribunal could conclude that the actions had anything to do with her race or her complaints of race discrimination. The claimant's suggestion that "*digesting the notes*" is "*how a person speaks who discriminates*" is not right and has never had any supporting basis.

45. The claimant's claims had no reasonable prospect of success and she acted unreasonably in bringing them.

Vexatious, abusive, disruptive or unreasonable conduct of the claim

46. The claimant's recent persistent applications, often being repetition of the same application with no new material, is vexatious and unreasonable conduct of her claim.

Breach of order

47. The claimant has breached tribunal orders, both concerning provision of a witness statement and attendance on the first day of the hearing.

Conclusion

48. The threshold requirements for consideration of a costs award are met. The question is whether we should exercise our discretion to make a costs award.

49. It might be argued that taken individually none of these matters require an award of costs. The claimant has not provided a witness statement and did not attend the first day of the hearing, but in general there is no obligation on a party to provide evidence or attend a hearing in support of their claim. It may be that she preferred simply to put the respondent to proof on, for instance, her unfair dismissal claim.

50. The difficulty with this case is that when taken in combination, the various problems become too much to overlook.

51. The claimant has started with a claim which she ought to have known was weak. Even if she were not objectively able to see that it had no reasonable prospects of success she should have realised that it would not be an easy case to win.

52. Instead of putting her effort into bolstering the substance of her claim, or acknowledging where the respondent may have good points, the claimant has, particularly recently, adopted a practice of elevating points of procedure above the substance of her claim. Where matters have not gone her way, she has resorted to baseless allegations against the individuals involved in her case. We cannot help but observe that this is very similar to how she seems to have conducted herself during the respondent's various procedures.

53. When the opportunity has arisen for her to address the substance of her claim or, for instance, the substance of the respondent's costs application, she has gone out of her way to avoid taking that opportunity, yet continued to criticise the respondent and the tribunal itself by way of further applications. She has failed to recognise the underlying difficulties with her case and instead caused considerable difficulties for the respondent with persistent meritless applications.

54. In those circumstances we do consider it appropriate to make a costs award, and will exercise our discretion to do so.

The amount of the costs award

55. The respondent has applied for the full amount of its costs across the whole of the claim (although we were told by Mr Dobbs that in fact the schedule of costs he had submitted was less than those actually incurred). On the facts of this case we consider it appropriate to make an award based on the whole costs of the claim, rather than picking individual elements or, for instance, confining ourselves to the costs of hearings.

56. We accept that we should award the "Burges Salmon Fixed Fee", which appears to be entirely reasonable for a case of this nature.

57. Mr Dobbs was not able to explain to us the scope of the "Burges Salmon Additional work" or "Additional Counsel work", so we will not make any award for this.

58. We are parepared to award £1,500 in respect of counsel's fee for preliminary hearings and the costs hearing (to include any associated such as drafting the costs application). There will have been substantial work associated with each hearing, such as, for instance, initial preparation of the list of issues. However, we do not see that there is any basis on which the fee should be higher for the 21 June 2023 hearing than it was for the 24 October 2022 hearing. In each case the fee will be £1,500.

59. We consider the brief fee of £7,500 for the final hearing of the case to be more than was necessary in this case, and will reduce it by half to £3,750.

60. The amount of costs awarded is therefore £13,250, comprising:

Burges Salmon Fixed Fee	£5,000
Counsel's fee 24 Oct 2022	£1,500
Counsel's fee 21 June 2023	£1,500
Brief fee for final hearing	£3,750
Counsel's fee for costs application and hearing	£1,500

61. The claimant has been given the opportunity to make represntations or produce evidence in relation to her means, but has not done so. On that basis we make no reduction under rule 84 on the basis of means, and there is nothing in relation to means for us to take into account in considering whether to make a costs award in the first place.

62. No award is made in respect of VAT as Mr Dobbs accepted that could be reclaimed by the respondent.

Employment Judge Anstis
15 November 2023

Sent to the parties on: 30 November 2023..

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For the Tribunal Office