



EMPLOYMENT TRIBUNALS

Claimant: Ms Nasreen Jafry

Respondent: Primark Stores Ltd

COSTS JUDGMENT

1. The Tribunal makes an award of costs under Rule 76(1)(a) of the Tribunal Rules 2013 of £400 including VAT against the Claimant and in favour of the Respondent.
2. The costs are payable by the Claimant to the Respondent within 42 days of the date of this judgment.

REASONS

BACKGROUND

3. The Claimant's claim was dismissed under Rule 47 (non-attendance) on 13 July 2023. A separate Judgment explains the reasons for the dismissal of the claim under Rule 47.
4. The Claimant's claim having been dismissed on 13 July 2023, the Respondent made an oral application for £10,000 in costs pursuant to 74 – 84 of the Rules. There was not time for the cost application to be determined at the hearing. I therefore issued case management orders which provided as follows:

9. If the Respondent still pursues an application for cost it shall make the application in writing within 28 days after the date on which the Judgment was sent to the parties. Any such application shall:

9.1 Set out:

9.1.1 The reason and basis for the application;

9.1.2 The amount sought;

9.1.3 Evidence of the costs incurred and when they were incurred.

9.2 Be sent to the Tribunal and copied to the Claimant.

10. The Claimant shall have 28 days from the date of receipt of a costs application, made in accordance with paragraph 3 above, to send to the Tribunal and to the Respondent in writing:

10.1 any representations that the Claimant makes in response to the application (e.g. to explain why it should not be granted);

10.2 any representations as to the Claimant's ability to pay a costs award (Rule 84); and

10.3 any evidence of the Claimant's ability to pay which is relied upon by the Claimant (Rule 84).

Tribunal shall consider the application and the Claimant's response on the papers and without a further hearing.

5. The Judgment and case management orders were sent to the parties on 28 September 2023.
6. On 12 October 2023 the Respondent submitted a written costs application. The Claimant had not responded to the costs application as directed by the case management orders by 9 November 2023.
7. On 28 November 2023 I wrote to the Claimant as follows:

On 12 October 2023 the Respondent in these proceedings made an application for cost against you and I understand that you were copied on their application. I have asked the Tribunal administration to attach it with the email sending you this Tribunal correspondence.

I understand that you have yet to respond to the application. Please could you put any comments that you wish to make on the application in writing to the Tribunal within 14 days of the date on which this correspondence being sent to you by the Tribunal. I have as yet made no determination of the Respondent's application and you may want to refer to:

- The Employment Tribunal Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No.1237 (as amended) (in particular Rules 74, 75, 76, 77, 78 and 84); and*
- The Presidential Guidance – General Case Management, in particular Guidance Note 7: Costs.*

You will see that 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. Please therefore included in your comments any detail you would like me to take into account as to your financial position and ability to pay a costs award. I reiterate, I have not yet made any decision on the Respondent's costs application.

8. To my knowledge, by 12 January 2024, no response had been received from the Claimant so I went on to consider the Respondent's costs application on the papers but without knowing why the Claimant says (if she does) that no costs award should be made or what her finances are.

THE COSTS APPLICATION

9. The application was made under Rule 76(1)(a) of the Tribunal Rules 2013. The Respondent summarised its application at page 5 with the following points:

1. She issued a claim raising numerous spurious allegations that were irrelevant to her claim for unfair dismissal and for which the Employment Tribunal had no jurisdiction.

2. Her claim on its face lacked merit.

3. She sought compensation in the wholly unreasonable and unjustified amount of £33 million.

4. She refused a very reasonable settlement offer of £1,000 (made on a commercial basis with no admission of liability), having been warned of the costs consequences of doing so.

5. Her conduct at the hearing as described by Employment Judge Woodhead was unjustified and unreasonable.

10. In terms of the amount of costs sought, the Respondent said:

“Given the conduct as outlined above, and the significant costs expended by the Respondent, which were wasted by reason of the Claimant's conduct, the Respondent asks the Tribunal to order the Claimant to pay the Respondent's costs in the amount of £12,910. This amount represents the Respondent's costs attributable for the final hearing, namely representation at the hearing by its counsel (£8,500 exclusive of VAT) and solicitor (£4,410 exclusive of VAT).”

THE LAW

11. Rules 74-84 of the Tribunal Rules 2013 are applicable here.
12. Costs in the Employment Tribunal are the exception rather than the rule and there is a high threshold.
13. The Respondent in its application pointed me to ***Hossaini v EDS Recruitment Ltd [2020] ICR 49*** in which the Employment Appeal Tribunal stated that:

“It is common ground that there are three stages involved in the determination of a costs application: (1) the ET needs to determine whether or not its jurisdiction to make a costs award is engaged - here,

whether in the circumstances provided by Rule 76...1) existed; if so, (2) it must consider the discretion afforded to it by the use of the word "may" at the start of that rule and determine whether or not it considers it appropriate to make an award of costs in that case; only then would it turn to question (3), that is to determine how much it should award."

14. It also made reference to the following passage of **Brooks v Nottingham University Hospitals NHS Trust (UKEAT/0246/18/JOJ)**:

"The test of reasonableness is an objective one which will encompass a wide range of matters, one of which would be deliberately dishonest conduct, but which might also include an unreasonably distorted perception of matters. It is for the Tribunal to judge whether that perception was unreasonable in the circumstances and such that the discretion to award costs should be exercised."

15. Rule 76(1)(a) provides that a costs order may be made where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings or the way the proceedings have been conducted.
16. The Tribunal may (but is not required to) take into account the paying party's ability to pay in deciding whether to make a costs order and if so in what amount (Rule 84).
17. **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420** requires the Tribunal to consider all the circumstances as a whole and **McPherson v BNP Paribas [2004] IRLR 558** establishes the need to consider the nature, gravity and effect of the claimed unreasonable conduct. There is no need to show a precise causal link between the claimed unreasonable conduct and the costs incurred. In **Yerrakalva v Barnley MBC [2012] ICR 420** Mummery LJ said:

"41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances".

18. In **AQ Ltd v Holden 2012 IRLR 648** the EAT stated that the threshold tests governing the award of costs are the same whether a litigant is or is not professionally represented, but that the application of those tests should take this factor into account. However, a litigant in person can be found to

have behaved unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

19. There is also Presidential Guidance on costs (Presidential Guidance; General Case management – Guidance Note 7 Costs) which I have taken into account.

ANALYSIS AND CONCLUSIONS

Is the jurisdiction to make a costs award is engaged?

20. As I recorded in my Judgment dismissing the claim, the Respondent's arguments in respect of the prospects of success of the Claimant's case were 'persuasive'. I also now note that the Claimant was made a without prejudice save as to costs offer of settlement which she rejected and that she had sought an unreasonable level of compensation for "Damage, Hurt, Stress, Upset, Pain, Suffering" which she could not have recovered with the claim she brought (ordinary unfair dismissal). However, not having heard the case I have put little weight on this aspect of the Respondent's application.
21. I do however consider that her conduct in respect of the hearing in July 2023 which led to her claim being struck out under Rule 47 does amount to unreasonable conduct in the way she conducted the proceedings. As highlighted by the Respondent in its application I recorded:

"I was satisfied that the Claimant did not have a valid reason for refusing to come into the hearing" - paragraph 4 Judgment Reasons

"I decided that the Claimant's claim should be dismissed under Rule 47 for her failure to attend the hearing because she had not provided a good reason for not attending, having been given a number of opportunities to do so." - paragraph 17 Judgment Reasons.

"I had made allowances for the Claimant's concerns and the reasons she had given for not attending, I had explained the position to her in correspondence and had given her a number of opportunities to attend and warned her that if she did not then her claim might be struck out. She had refused to attend for two days during which time the Respondent and its witnesses had been at the Tribunal. Whilst there remained 4 days of the listing the following week we had lost 3 days because of the Claimant's conduct." - paragraph 7 Case Management Orders

22. I therefore find that the jurisdiction to make a costs award is engaged.

If there is jurisdiction should I exercise my discretion to do so?

23. Whether I should exercise my discretion to make a costs award is far less clear and of course I do not have the benefit of knowing what the Claimant would say about this.
24. I conclude that the high threshold is met for a costs award to be made and that I should exercise my discretion to award costs against the Claimant. I have taken into account that the Claimant is a litigant in person and that, as the Respondent

alludes to in its application, the Claimant appeared to have an unreasonably distorted perception of matters at the hearing in July.

25. However, given the extent of the opportunities I gave her to participate in the hearing (and the impact it had on the Respondent, albeit the Respondent is a large employer with substantial resources) I consider that her conduct was sufficiently unreasonable to warrant a costs award.

If I exercise my discretion how much should I award?

26. I can only take into account the Claimant's ability to pay to the extent that I am aware. The bundle I was provided with in July 2023 for the merits hearing included a December 2022 schedule of loss which suggested that she had anticipated getting a new job by the date of the schedule but did not make clear whether she had been successful and another document suggested that a trial for a new job in December 2022 had not been successful (203-205, 218).
27. A payslip in the bundle dated 11 March 2022 (192) suggested she earned £9.45 per hour working 20 hours per week. The Claimant does not appear to have significant earning power (having been a retail worker) and having, on her claim form, indicated that she earned £771.33 per month in take home pay.
28. On the balance of probabilities I consider that the Claimant is now in new employment, does not earn significantly more in hourly than she did in the Respondent's employment (albeit I anticipate that rates of pay will have increase) and that she could now be working more than 20 hours per week.
29. I have taken into account that the Presidential Guidance (referred to above), provides:

21. When considering the amount of an order, information about a person's ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings.

30. I do not doubt the level of the Respondent's legal fees but taking into account my assessment of the Claimant's ability to pay, I consider that a much lower award is appropriate here. I consider that an award of £400 (including VAT) is in the interests of justice in the circumstances. I will give the Claimant longer to pay these costs than I might otherwise give (42 days rather than 28 days).

Employment Judge Woodhead

Date 12.01.24

Sent to the parties on:

12/01/2024

For the Tribunals Office

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>