



# EMPLOYMENT TRIBUNALS

**Claimant:** Sundeep Dhiraj  
**Respondent:** Cambridgeshire and Peterborough NHS Foundation Trust  
**Heard at:** Watford by CVP  
**On:** 21 March 2024; Deliberations on 26 March 2024  
**Before:** Employment Judge Liz Ord  
Panel Member Eleanor Deem  
Panel Member Lizzie Davies

**Representation:**

Claimant: Ms A Fadipe (Counsel)  
Respondent: Mr M Islam-Choudury (Counsel)

## RESERVED COSTS JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Respondent's application for a costs order is granted.
2. The Claimant is ordered to pay the Respondent the sum of £5,684.40, being the costs of the hearing of 24 October 2023, on an indemnity basis.

## REASONS

### Application and Issues

1. During the course of the remedy hearing, the Claimant made several applications, which took a full day to hear and determine, thereby preventing the remedy hearing from progressing. The Respondent put the Claimant on notice at the hearing that they would be making a costs application, which they

subsequently did, claiming the sum of £5,684.40 on an indemnity basis.

2. The application is against the Claimant based on his conduct and that of his Counsel during the hearing of 24 October 2023. In particular it is for making unnecessary and detailed applications with little or no merit to run the clock down, and ultimately, having lost those applications, refusing to give evidence, and thereby necessitating an adjournment to 21 March 2024. In short the grounds are:

- 2.1. Unreasonable and/or vexatious conduct;
- 2.2. Late adjournment.

3. The issues for the panel to decide are:

- 3.1. Whether either ground was established;
- 3.2. If so, whether in our discretion we ought to make a costs order; and
- 3.3. If so, in what amount.

### **Evidence**

4. We had before us a costs bundle (178 pages) and the authority of *Habib v Dave Whelan Sprots Limited* [2023] EAT 113.

### **The Law**

5. Rules 75 to 84 of the Employment Tribunals Rules of Procedure 2013 deal with costs. The relevant parts provide as follows:

#### **Costs orders.....**

75(1) A costs order is an order that a party (“the paying party”) make a payment to—

- (a) another party (“the receiving party”) in respect of the costs that the receiving party has incurred while legally represented ...  
.....

#### **When a costs order....may or shall be made**

76(1) A tribunal may make a costs 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 ..... the way that proceedings (or part) have been conducted; ....
- (b) ....
- (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.

#### **The amount of a costs order**

78(1) A costs order may—

- (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; ....

.....

6. Rule 76(1) imposes a two-stage test; first the tribunal must decide whether the threshold has been reached for a party's conduct to fall within rule 76(1), and if so, it must consider whether it is appropriate to exercise its discretion in favour of awarding costs.
7. In deciding whether unreasonable conduct should result in an award of costs, the Court of Appeal held in **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] IRLR 78 that the tribunal should have regard to the nature, gravity, and effect of the conduct. Costs orders are the exception rather than the rule. As per Mummery LJ at paragraph 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....”.
8. **Haydar v Pennine Acute NHS Trust** UKEAT 0141/17/BA) set out a three stage procedure. The first stage is to decide whether the threshold has been reached for a party's conduct to fall within rule 76(1), whether by way of unreasonable conduct or otherwise; if so, the second stage is to decide whether it is appropriate to make an award; and if so, the third stage is to decide how much to award.
9. We have additionally considered all other authorities raised by the parties.

## **Background**

10. After giving liability judgment on 5 October 2023, the panel reconsidered part of it and gave a varied judgment first thing on 6 October. The Claimant's Counsel then asked for a short adjournment to take instructions, which was granted.
11. Thereafter, Claimant's Counsel asked for four things, namely, written reasons of the original judgment, written reasons why a reconsideration application was allowed when she had asked for an adjournment, written reasons as to why the Tribunal reconsidered, written reasons of the reconsidered judgment. The Respondent's Counsel submitted that there had been no application for an adjournment as the Claimant's Counsel had not pursued it.
12. There was then some discussion as to whether Claimant's Counsel had made an adjournment application at all. She had raised the issue after both Counsel had concluded their primary submissions on reconsideration and Respondent's Counsel was part way through his reply. The Judge adjourned in any event overnight for the panel to consider submissions, giving Claimant's Counsel time to consider any matters she wished to. Claimant's Counsel did not raise the matter again.

13. Thereafter, in front of the parties and all observers, Claimant's Counsel said she was going to report Respondent's Counsel to the Bar Council, despite there being no reasonable basis for her doing so. The Judge called a short break.
14. The remedy hearing commenced at 11.20 and the Claimant started to give evidence. Claimant's Counsel asked supplementary questions on aggravated damages concerning matters that had not previously been raised. Respondent's Counsel objected and pointed out the line of questioning was not in accordance with the Case Management Order made. The Judge asked why the matters had not been dealt with in the documents and Claimant's Counsel said it was an oversight and she took responsibility.
15. Time was then taken hearing further submissions and Claimant's Counsel narrowed down the questions she wanted to put. The Judge allowed one specific question.
16. Cross examination then commenced and Respondent's Counsel asked whether the loss of earnings claim was still being pursued, referring him to his schedule of loss. Contradictory answers were given, making the situation totally unclear. The Tribunal rose for lunch.
17. After lunch, Claimant's Counsel said the Claimant had dyslexia and dyspraxia and had difficulty reading figures. The Tribunal offered him additional breaks as a reasonable adjustment. Cross examination continued but the Claimant was unable to give any meaningful evidence on the figures, often answering that he couldn't remember or was unsure. He said he had instructed Counsel to support him and he was struggling to read the document under pressure.
18. The Judge suggested that somebody assist the Claimant to find pages in the bundle and she rephrased a few of the cross examination questions, trying to assist the Claimant's understanding and put him at ease. However, it was apparent from his answers that he was confused as to whether he was making a loss of earnings claim at all. After a few further cross examination questions, at 13.55, the Judge called a 10 minute break and told Claimant's Counsel to go away and clarify whether there was a loss of earnings claim.
19. The Tribunal waited and eventually Claimant's Counsel returned at 14.45. Respondent's Counsel went through the figures and submitted that there could be no claim because the figures pointed towards an overpayment rather than an underpayment. The Judge said that the panel were having difficulty following the loss of earnings claim. Claimant's Counsel confirmed that the Claimant could not give any more evidence on this, and submitted that the panel could make a declaration that there was a loss of £567.18. It was agreed that the Respondent's Counsel would not pursue the line of questioning on financial loss any further and would leave it to submissions.
20. Cross examination commenced on injury to feelings. However, the Claimant only answered a few questions and then logged off at 15.15 after his screen froze. Both parties' Counsel agreed that remedy evidence would not be concluded that day, and the case was adjourned to 24 October 2023 with an early start of 9.00am to ensure the matter was concluded and did not go part heard again. The Judge recommended that the Claimant be provided with a paper copy of the bundle for the hearing and that someone be available to assist him with finding documents. The Respondent had no objection to this.

21. On 13 October 2023, the Claimant made a written application for further cross examination to be done by written questions. There was no medical evidence in support. No permission was sought to approach the Claimant to obtain his instructions, despite him being under oath and his evidence being part heard. On 18 October 2023, the Respondent objected in writing. The panel did not see the application prior to the resumed hearing on 24 October 2024.
22. At 9.00am on 24 October, Claimant's Counsel made the application orally and the Respondent replied. The application was refused.
23. At 9.35 Claimant's Counsel renewed the application, which took the rest of the morning. This time it was for the Claimant's oral evidence to be dispensed with altogether. Respondent's Counsel objected and asked on what basis the application was being made. He observed that the Claimant had already given evidence on liability and, as the Claimant was in the middle of giving evidence on remedy, Claimant's Counsel was not able to take instructions.
24. Claimant's Counsel made lengthy submissions, and made references to the Equal Treatment Bench Book (ETBB). The Judge asked for confirmation of whether the Claimant wanted to adjourn to get medical evidence. Claimant's Counsel initially said it was not necessary as there was enough evidence in the bundle.
25. However, she later requested permission to take instructions on medical evidence from her instructing solicitor, after saying she might, after all, require medical evidence. Following a short adjournment, Claimant's Counsel returned and confirmed there was no need for medical evidence. She had obtained the authority of *Habib v Dave Whelan Sports Ltd*, which she relied on, and she sent it to the Tribunal to consider.
26. Claimant's Counsel then made an application for the Claimant's sister to give evidence without the sister having submitted a witness statement, and without prior warning.
27. The hearing adjourned for lunch and for the Panel to deliberate. After lunch, the Judge gave the Panel's decision to refuse both the application to dispense with oral evidence and to hear evidence from the Claimant's sister.
28. Claimant's Counsel requested a short adjournment to take instructions from her instructing solicitors, which was granted. When she came back she made an application to obtain medical evidence, which she said would take some time to get (at least a couple of weeks). She said she had not understood that the relevance of the medical evidence was the impact on the Claimant.
29. Respondent's Counsel suggested that these applications were being made in bad faith and were an attempt to run down the clock. He asked for time to take instructions, which was granted, and on his return informed the Tribunal that he had instructions to object. He also opined that what the Claimant was doing was an abuse of process.
30. Submissions were heard and the panel deliberated and refused the application.
31. Claimant's Counsel asked for time to take instructions. Respondent's Counsel

said that if she was going to speak with the Claimant then the Tribunal needed to know what she was speaking about and permission was necessary, as the Claimant was still under oath.

32. Claimant's Counsel then turned her camera off, although it was apparent that she was still logged onto the call. The Judge asked her to turn it back on. She did so, and asked for an adjournment for a comfort break, which was granted.
33. Upon resumption, the issue of Claimant's Counsel speaking to the Claimant was heard and eventually she clarified that it was about his state of mind. The Judge gave permission.
34. When Claimant's Counsel returned she told the Tribunal that the Claimant would not be giving evidence. He would rely on his witness statement and submissions. The Claimant's case was closed.
35. It was then about 16.15 and the Tribunal had been sitting since 9.00. In light of the time and the long day everybody had had, Respondent's Counsel sought an adjournment to go part heard and hear the Respondent's evidence another day. The Tribunal were already of that mind and granted the application. Respondent's Counsel gave notice that the Respondent would be making a costs application.
36. Claimant's Counsel proposed dispensing with cross examination of the Respondent's witness and relying on closing submissions only. Respondent's Counsel objected. The Tribunal confirmed that the case was to be re-listed to hear the Respondent's evidence, closings and the costs application.

### **Discussion and Conclusions**

37. The Claimant made several applications, which had little or no merit and were unsubstantiated, and some of which were made at inappropriate times.
38. The application of the 13 October (presented on 24 October) for the Claimant to be cross examined in writing, was poorly prepared and was not substantiated by medical evidence. We had no medical report or any recent GP notes before us. Consequently, the application failed.
39. The application which immediately followed, for the Claimant not to give evidence at all, was totally unmeritorious and was made after the previous less draconian application. It was disproportionate to the situation and, without supporting medical evidence, was bound to fail. It was unreasonable to make the application in this way.
40. The Claimant sought to rely on the case of Habib v Dave Whelan Sports, to avoid obtaining medical evidence. This concerned a Tribunal's findings, without reference to the ETBB, with respect to credibility of a dyslexic Claimant. It was not on point.
41. When the application was refused, the Claimant then sought an adjournment to obtain medical evidence, despite having confirmed earlier on to the Tribunal that no medical evidence would be relied upon. This was an abuse of process.

42. Applying for the Claimant's sister to give evidence without having presented a witness statement and without any prior warning was unreasonable.
43. The Claimant refusing to give evidence once all his applications had failed was unreasonable. It appears that he never intended to give evidence, and if that had been made clear to the Tribunal at the start of the day, the Respondent's evidence would have been heard and the case concluded that day.
44. Overall, the manner in which the Claimant and his Counsel conducted the hearing caused considerable delay, and necessitated another day's hearing. One application after another was made, and what the Claimant was asking for was constantly changing. This was an abuse of process.
45. The Claimant criticises Respondent's Counsel's behaviour. However, we found Respondent's Counsel to be nothing other than professional, firm and helpful, intervening only when appropriate to fulfil his duty to his client and the Tribunal. He did not act improperly at any stage of the proceedings.
46. Taking all the circumstances into account, we find that the high threshold for awarding costs has been met, in that the Claimant and his Counsel acted abusively and unreasonably in the way proceedings were conducted, as set out above.
47. Using our discretion, we have determined to award costs. We have considered the Respondent's schedule of costs and we make the award on an indemnity basis in the sum of £5,684.40

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Employment Judge Liz Ord

Date 9 April 2024

JUDGMENT SENT TO THE PARTIES ON  
11 April 2024

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FOR THE TRIBUNAL OFFICE

Notes

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