



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs. S Wignarajah  
**Respondent:** John Lewis PLC  
**Heard at:** London South  
**On:** 14 June 2024  
**Before:** Employment Judge Cawthray

No parties were present – application determined on paper.

## COSTS JUDGMENT

The Claimant is ordered to pay a contribution to the Respondents costs. The total sum is £500.

## REASONS

### Background to claim and costs application

1. The claim from was submitted on 18 September 2022.
2. On 27 October 2022 Respondent submitted its response and set out its view that the claim lacked merits of success. It was expressly noted that the payments made to the Claimant were overpayments and that the Tribunal did not have jurisdiction to hear them.
3. The Respondent's position was that it had made over payments to the Claimant in error, and that it sought to recover the overpayments in a reasonable manner.
4. On 24 October 2022 the Respondent applied for the claim to be struck out on the basis that it had no reasonable prospects of success as the Tribunal did not have jurisdiction to hear the Claimant's claim of unlawful deduction from wages under section 14(1)(a) of the Employment Right Act 1996. The Respondent sought a deposit order in the alternative. The application was not dealt with.
5. On 28 October 2022 the Respondent sent the Claimant a costs warning letter. The letter sets out the Respondent's position on why it considered the claim to have no reasonable prospects of success and that continuing with the claim would be unreasonable and that a costs application would be pursued if the claim was continued or withdrawn at a very late stage.
6. The Free Representation Unit has supported the Claimant since 26 January 2023. The Claimant's representative made an application to amend the claim.

7. A case management preliminary hearing took place on 22 March 2023. At that hearing the application to amend the claim to include complaints for discrimination arising from disability and a failure to make reasonable adjustments was considered. The application was refused by Judge Aspinall.
8. There was a change in the representation within the Free Representation Unit at the end of October 2023.
9. On 30 October 2023 the Claimant's representative wrote to the Respondent's representative, and it was seemingly accepted there was not a victimisation complaint within the claim, and that her claim was solely one for unlawful deductions from wages.
10. The Respondent sent a further costs warning letter to the Claimant, via her representative, on 1 November 2023, and provided an update on the costs incurred to that date and invited the claim be withdrawn by 8 November 2023.
11. Without prejudice settlement discussions took place between 8 and 10 November 2023.
12. A two day final hearing was listed for 14 and 15 November 2023.
13. On 13 November 2023, at 14:13, the Claimant's representative wrote to the Tribunal and withdrew the claim for unlawful deduction from wages, accepting that the Tribunal did not have jurisdiction under section 14 Employment Rights Act 1996. However, they asked for the claim to not be dismissed. In the same email, the Claimant's representative made an application to amend the claim to clarify that it contains a whistleblowing detriment claim and for the claim to be consolidated with a claim that had been submitted to the Tribunal by the Claimant on 9 November 2023. The email stated the recent claim contains complaints of ongoing acts of whistleblowing detriment related to and continuing on from the facts raised by this case and that a further case management hearing be listed to consider consolidation of the Claimant's claims with her husband's claim.
14. On 13 November 2023, at 16:45, the Respondent emailed the Tribunal in short objecting to the application and stating that an application for costs would be made at the hearing the next day and at 21:14 the Respondent submitted a costs schedule and costs bundle. The costs schedule amounts to £12,937.50 inclusive of VAT.
15. At the Hearing held on 14 November 2023, the Claimant withdrew her claim, and the Respondent made an oral application for costs, in respect of which it submitted a skeleton argument.
16. Within the skeleton, the Respondent submitted:
  - a) *C's conduct is entirely unreasonable within the meaning of R 76. All of the grounds of 76 (1) are in effect met. It is R's position that -
    - a. C has behaved vexatiously and or other unreasonably in waiting until now to withdraw her complaint (vexatious - little or no basis in law – ET Marler, AG v Barker; unreasonable – Dyer v SOS – ordinary meaning, wide discretion)*

- b. *Her claim has not had any reasonable prospect of success, based on the concessions now made*
- c. *That she effectively seeks to postpone the final full merits of her claim number 2303301 with less than 7 days' notice.*
17. In oral submissions, the Respondent stated that a further ground for costs being made was that 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.
18. As set out in my Orders dated 15 November 2023, following discussion at the hearing, it was agreed that I would make a determination on the costs application without a need for a further hearing.
19. The Claimant's representative submitted written submissions in relation to the application for costs on 28 November 2023. The full submission has been considered, and key points noted as below.
20. The Claimant submitted that the third ground regarding postponement or adjournment was not engaged.
21. The Claimant acknowledged that the claim within the ET1 did not have reasonable prospects of success but submitted that the Tribunal should not exercise its discretion to award costs on the basis that it was argued that the claim was not speculative or brought in bad faith, the Claimant was unrepresented until January 2023 and she had not sought legal advice before presenting her claims and the Claimant had reasonable grounds for believing that her claims could succeed in the Employment Tribunal. It submitted that some matters could have been successful as claims in other forums and that making a costs order would have a deterrent effect on litigants in person pursuing claims in the Tribunal.
22. It was further acknowledged by the Claimant that:
- "It was unreasonable conduct of the litigation to continue to pursue the wages claim in the ET once FRU had been instructed (r.76(1)(a)), but the ET's discretion to award costs should nevertheless not be exercised, or should only result in payment of a nominal/limited sum".*
23. The Claimant's representative stated that it could have been recognised at a much earlier stage in the litigation that the Claimant's wages claim could not continue and accepts that it was unreasonable conduct of the litigation to persist with that claim in those circumstances but asks the Tribunal to find that this was not done in bad faith and acknowledge that the Claimant was represented by inexperienced representatives.
24. The Claimant's representative also submitted:
- "It is also a relevant factor that C is a current employee of R with an ongoing, long-standing employment dispute against it. There was a disciplinary hearing against C held only yesterday. The complaints under claim 2303301/2022 are part of the fabric of that dispute. The making of a costs order in these circumstances would likely have a deterrent effect on the pursuit of her new tribunal claims and may prove to be a device by which R can compromise otherwise meritorious claims.*

*It is also particularly relevant that most, if not all, of the same factual issues have been pleaded by that new claim. If the substantive allegations under the present wages claim can properly be relied on as instances of detriment under C's new protected disclosure detriment claim, and are ultimately well-founded, then that may ultimately throw any later costs order into doubt."*

25. As at 28 November 2023, the Claimant was in employment at the Respondent and her gross annual salary £19,749.60 and she receives approximately £1,407 net per month.
26. The Respondent submitted its reply to the Claimant's submissions on 12 December 2023, which has been read alongside its outline skeleton argument and costs application dated 14 November 2023, and the oral submissions made by counsel for the Respondent at the hearing on 14 November 2023. The full reply has been considered, and key points noted as below.
27. The Respondent maintained that it relied on Rule 76(1)(c) in the alternative, noting that a final full merits hearing did not proceed. It sets out the only complaint within this claim was an unlawful deduction from wages complaint, and this was the complaint that was withdrawn, and it was not a claim about anything else. The Respondent repeated that costs warning in October 2022 was not acted on, that the Claimant had representation and the claim was only withdrawn the day before the final hearing and that the costs application is about the current claim, and the conduct of these proceedings.
28. It submits that bad faith is not an issue for consideration and that the Free Representation Unit is a well-respected and long-standing organisation and work of unqualified individuals is supervised by experienced individuals.
29. In regard to the fact the Claimant submitted a second claim, the Respondent submitted that this case is distinguishable. It is also submitted that it was the Claimant's choice to submit claims against the Respondent, and it has sought to improve the working relationship between them, but the ongoing relationship and a possible deterrent impact on the Claimant's second claim should not be a factor in exercising discretion.
30. The Respondent contends that the Claimant's concessions that the claim had no reasonable prospect of success and that it was unreasonable to continue with the claim following instruction of the Free Representation Unit should be a key focus.
31. The Claimant was dismissed by the Respondent on 12 January 2024. An appeal hearing took place on 26 February 2024 and the decision to dismiss was upheld.
32. On 16 April 2024 the Claimant's representative wrote to the Tribunal regarding the Claimant's position. The Claimant's representative submitted that the although it's position had always been that the Claimant was not able to pay more than a nominal or limited sum in costs, her dismissal reinforced that position.
33. On 8 May 2024 the application was chased by the Respondent and on 9 May 2024 sent to myself.
34. I directed that a Chambers day be listed on 14 June 2024 in order to consider the application.
35. The Claimant's representative provided an updated position on 7 June 2024. In short, it submitted that Claimant, and her husband's resources were very limited

and that if a costs order was made, it should be in a nominal amount. I have considered all of the information set out in the material provided on 7 June 2024, and note the key points as below.

36. The Claimant currently works in a shop for 8 hours a week on Saturdays and Sundays. She earns £12.80 per hour and her basic pay is £443.73 per month (gross), although she occasionally works some overtime. The Claimant has held this post since May 2023.
37. The Claimant started work as a kitchen server at a school on 3 June 2024. She works 16 hours per week at £12 per hour during term time. She earns £680 gross per month (but it is anticipated that this year her salary will be less during the summer holidays).
38. It is anticipated that by September 2024 the Claimant's combined net pay will be approximately £1,100 per month.
39. The Claimant has taken significant amounts of sick leave in the past two years, in large part due to work-related stress and it is submitted by the Claimant's representative there is good reason to believe that her condition may deteriorate and impact her potential earning capacity in the medium term.
40. The Claimant's husband still works for John Lewis plc and earns around £1,740 net per month. He is presently off work awaiting surgery, presently scheduled for 24 June 2024.
41. The Claimant and her husband have claimed Universal Credit jointly and were paid £953.62 and £1,067.00 for their two most recent assessment periods. Once the Claimant's new income is factored into the assessment, their award will be reduced by 55p per £1 earned on all joint income above their work allowance. On a combined income of £2,800 from September 2024, it is anticipated that their Universal Credit award will be around £700 per month, although this may fluctuate.
42. The Claimant and her husband receive Child Benefit of £102.40 per month for their 15-year-old daughter. They do not own any property, and do not have any savings or investments.
43. In regard to expenditure, the Claimant lives with her husband and their 15-year-old daughter. They live in private housing and pay £1,100 per month in rent. They have been told that they will be evicted by January 2025.
44. The balance of the Claimant's current account stood at -£398 as of 27 May 2024. The Claimant has a £2,000 Next credit account in arrears. Her credit card balance is £1,000, and she and her husband have a debt to a family friend of £350. Mr. Wignarajah is currently paying off a £1,908 bank loan. On 4 June 2024 they were awarded a grant of £350 by the Household Support Fund, a payment from Richmond Aid to provide short term financial help.

### **Costs in the Employment Tribunal**

45. The general rule is that the Employment Tribunal is a 'costs neutral jurisdiction'. This means that the loser in proceedings does not automatically pay the winner's costs, which is a divergence from proceedings which run in most of the civil court jurisdictions.

46. The rules relating to costs are found in The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Key extracts from the rules are set out below.

### **Definitions**

**74.—**(1) “Costs” means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression “wasted costs”) shall be read as references to expenses.

(2) “Legally represented” means having the assistance of a person (including where that person is the receiving party’s employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates’ courts;

(b) is an advocate or solicitor in Scotland; or

(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) “Represented by a lay representative” means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

### **Costs orders and preparation time 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 or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual’s attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party (“the paying party”) make a payment to another party (“the receiving party”) in respect of the receiving party’s preparation time while not legally represented. “Preparation time” means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

### **When a costs order or a preparation time order may or shall be made**

**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 (or that party’s representative) 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;

*(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.*

*(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—*

*(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and*

*(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.*

*(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.*

*(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.*

### **Procedure**

*“77. A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.”*

### **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;*

*(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by the Tribunal applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 or by the Tribunal applying the same principles;*

*(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;*

*(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or*

*(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.*

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.”

### **Ability to pay**

“84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.”

47. It is, therefore, a multi-stage determination to awarding costs. First, at least one of the ‘gateways’ outlined by Rule 76(1) and Rule 76(2) needs to be found to have been opened. In other words, I must be satisfied in this case that I have the ability to award costs.
48. If one of the gateways to award costs is opened, then I *may* award costs. There is a discretion. The next stage, therefore, is to decide whether or not this is a case in which I exercise my discretion to award costs, having in mind the circumstances of the case and the nature of the conduct that has led to the ability to award costs if decided appropriate.
49. The final stage, if I decide to exercise discretion, is to decide the amount of the costs to award. Where evidence about means is provided, this should be taken into account so long as I am satisfied I have an honest and full picture of the financial position. I must also consider the amount of costs requested in the application and decide whether or not the amount is appropriate, before deciding what amount should be paid towards those costs, or ordering that the whole of the costs are paid.
50. The assessment of the amount of costs to pay is a broad brush exercise and does not take the form of any sort of detailed assessment of cost. The assessment is made broadly in all the circumstances using my judgment of what would be reasonable in this case. Generally, I am trying to consider the proportion of costs incurred because of the criticised conduct.

### **Do I have the power to award costs?**

51. I am not able to award costs unless one of the ‘gateways’ set out at Rule 76 is engaged.
52. Here, two are so engaged. The primary submissions are that the Claimant acted unreasonably and or vexatiously in bringing and conducting the claim and there was no reasonable prospect of the defence success succeeding.
53. Consequently, Rule 76(1)(a) and Rule 76(1)(b) are engaged and I have the power to make a costs order if I choose to exercise my discretion.
54. An alternative submission in relation to Rule 76(1)(c) was made. The final hearing was not postponed or adjourned in the usual sense, but it did not take place. It did not take place because the Claimant withdrew the complaint the day before, but a preliminary hearing was still required to consider the Claimant's applications. As, Rules 76(1)(a) and Rule 76(1)(b) are clearly engaged, I have proceed with determined the application on the basis of this two rules being engaged.



**Do I exercise the discretion to award costs?**

55. In considering whether or not to exercise my discretion, I have considered the entire situation, but consider there to be several key factors.
- The Claimant was unrepresented when she submitted her claim.
  - The Claimant obtained representation from the FRU on 26 January 2023.
  - The Claimant was given clear warning of the Respondent's view of the claim and warned about costs.
  - The Claimant did not withdraw her claim until the day before the final hearing.
56. A proper consideration of the Claimant's position, by her and indeed her representative upon appointment, should have enabled the Claimant to form the view that there was no reasonable prospect of her unlawful deduction from wages claim being successful, and that pursuing such a claim would be unreasonable and vexatious.
57. I have reminded myself that costs are for exceptional instances. Litigants in person, on both sides, are common in the Employment Tribunal. Not understanding key aspects of complex legal claims and tests is equally common – as is an inability to make a judgment about the merits of a particular argument or case. However, this case did not involve complex allegations of discrimination or legal matters, it was about money owed to the Claimant. The Respondent set out a clear account of its view at a very early stage.
58. In this instance, I consider that the Respondent has been put to cost directly as a result of the Claimant pursuing a response that had no reasonable prospect of success and because she acted vexatiously and unreasonably in bringing and pursuing the claim.
59. In my judgment, it is appropriate in relation to this issue to award the Claimant to pay a proportion of its legal costs.

**What means do I take into account?**

60. It is noted that as at the date of the application for costs the Claimant was employed by the Respondent. It is not the fault of the parties that there has been delay in the application being decided.
61. However, the Claimant was dismissed from the Respondent's employment and now has two part time jobs.
62. I have noted the information regarding the Claimant's financial information, and that of her husband, as set out above. It is noted that there are no assets or savings and the Claimant earns a modest amount.
63. Consequently, I have taken means into account when considering the amount to be paid.

**What is the amount of the costs awarded?**

64. The Respondent has set out the sums that it has incurred in a Schedule of Costs. I have noted that the Respondent's solicitor charged a fixed fee of £5,500 excluding VAT and £750 excluding VAT preparing for this costs application. Counsel's fee relate to hearings, or indeed scheduled hearings, and amount to a total of £4,367.50 excluding VAT.

65. I consider the that the incurred appears proportionate and reasonable.
66. In my view, in the very least, the costs associated with the instruction of Counsel for hearings and the time spent preparing the costs application could have been avoided entirely by a much earlier withdrawal of the claim.
67. Deciding the amount of costs to be paid, having decided to exercise discretion to award costs and taken into account any means appropriate, is necessarily a broad brush assessment. Summary assessment of costs is not designed to be a detailed or forensic affair and is instead an approximation of costs which flow from the gateway identified.
68. I have considered what I deem reasonable in all the circumstances using my judgment of what would be reasonable in this case, noting the limited means of the Claimant.
69. In my judgment, that broad brush assessment leads me to make a costs award of £500. This must be paid by the Claimant to the Respondent.
70. Although the sum of £500 is only a small proportion of the legal costs incurred, and the Respondent's cost are significantly more, I have taken into account accessible income and joint commitments and noted that at the outset the Claimant was a litigant in person. I have also kept in mind that that costs are not designed to be punitive, and are an exception to the general rule.

---

Employment Judge Cawthray  
Date: 21 June 2024

Sent to the parties on  
Date: 5 July 2024

### **Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

### **Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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