



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MORTON

**BETWEEN:**

Mr Miljkovic

Claimant

AND

Drum Risk Limited

Respondent

**ON:** 4-5 December 2023

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Ms Crawshay-Williams, Counsel

## **COSTS JUDGMENT**

The Respondent's application for costs in this matter is refused.

### **Reasons**

1. An application for costs in this matter was made by the Respondent in writing on 22 December 2023. This was referred to me on 19 April 2024 and due to pressure of other work I have not been able to deal with it before now. I apologise to the parties for this delay.
2. The grounds on which the Respondent applies for costs were set out in written submissions, but in summary are as follows:

**The Respondent wishes to make an application for a costs order to be made against the Claimant under ET Rules 75(1)(a), 76(1)(a) and/or (b) and 78 on the basis that he has acted**

unreasonably in the way that the proceedings (or part) have been conducted and that it was clear that his claims had no reasonable prospect of success, at least from the 16 November 2023 when he was sent a costs warning letter from us setting out clearly the basis upon which his claims would fail.

In summary, if the Claimant had accepted the 2000 euros settlement offer made on 16 November 2023 by the 20 November 2023 deadline, this would have avoided the parties attending the 2 day hearing. The Claimant was put on notice that the Respondent would apply for costs if he was unable to “beat” this offer. We have set out our arguments in full in the attached costs submission and all relevant documents are contained in the attached Costs Bundle.

3. The Claimant gave his written comments on the application on 8 January 2024. He said:

Factors which the Tribunal may take into account are the claimant’s ability to pay, late costs warnings, this party has no legal adviser, this party is not represented, did not have sufficient time for reasonable settlement offer, and the nature of the evidence changed such that the merits of the case were not apparent until later in the proceedings by new bundle and change statements.

Rule 84 concerns ability to pay: “In deciding whether to make a costs, and if so in what amount, the Tribunal may have regard to the paying party’s ability to pay taking in the consideration that the paying party did not have ability to pay professional assistant to assist him in the case, and less ability to pay respondent costs

The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and regarding that especially that the claim is of public interest the claimant raised the case to this court jurisdiction indicated by respondent's require to be jurisdictioned at this courts and that the claimant was wrongly classified instead of a worker. There has been reasonable conduct by the claimant in bringing and conducting the case.

## The law

4. Costs are not the norm in employment tribunal proceedings. The grounds on which a costs application may be made are set out in Rule 76 of the Tribunal Rules, which provides as follows:

### 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; 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.

There are therefore two stages to considering a costs application. At stage one the Tribunal must decide whether the threshold for making a costs order has been

crossed. At stage two the Tribunal must decide whether to exercise its discretion to award costs. It is not obliged to do so in every case where the threshold has been exceeded.

5. I have also taken into consideration the guidance in the case law and in particular the approach set out in *Mc Pherson v BNP Paribas (London Branch) 2004 ICR 1398* and *Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420*.
6. I also remind myself that costs awards should be compensatory and not punitive (*Lodwick v Southwark London Borough Council 2004 ICR 884*), although it is not necessary in every case for there to be a precise causal connection between the factors that give rise to the costs award and the additional costs incurred. It is necessary, in light of the authorities, to look at the whole picture of what has happened in the case and ask whether there has been unreasonable conduct in bringing or conducting the case, if so what exactly the unreasonableness consisted of and what effects it had.

## **Conclusions**

7. The Respondent makes its application for costs on the sole ground that the Claimant's claims were dismissed and he had previously received from the Respondents' representatives a costs warning letter indicating that costs would be pursued if he did not secure compensation exceeding the amount offered on a "without prejudice save as to costs" basis. I note that the letter was sent shortly after the representatives in question were instructed and some three weeks before the hearing in the case. The claim is therefore a claim for the costs of preparing for a hearing that the Respondent submits could have been avoided if the Claimant had accepted the offer put forward.
8. In the employment tribunal costs are awarded at the discretion of the Tribunal. They do not automatically follow a failure to achieve a positive outcome in the case, whether or not a costs warning letter has been issued. The test for the employment tribunal in deciding whether or not to award costs is set out in the tribunal rules set out above. Costs do not follow automatically from failure to win a case and a tribunal will only make a costs award where the party against whom the award is made '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 behaved'. Even then they are made at the Tribunal's discretion.
9. In my judgment an unrepresented Claimant does not necessarily behave unreasonably in declining to accept the Respondent's characterisation of their case as weak and unlikely to succeed. In this case in particular I do not think it was unreasonable of the Claimant to ask that the merits of his case be decided by an impartial tribunal. His claims were not straightforward and involved the application of a number of different legal tests. The issues raised – the territorial reach of the claims on which he was relying and his employment status, are both

highly fact dependent issues. He was not, in my judgement, unreasonable in pursuing these matters to a hearing and ask that they be considered by a judge. The Respondent does not suggest that he acted abusively or vexatiously – this is purely an application about the merits of his claims. I do not agree with the Respondent that the matters in question were as plain as it set out in its letter, although in my decision I broadly accepted its analysis of the situation. The Claimant points to a number of factors that I could have taken into consideration in deciding whether I should exercise a discretion to award costs, but in this case, I do not think the first stage of the test has been met. It was not unreasonable conduct by the Claimant to ask that the facts be considered by the Tribunal and to decline to accept the Respondent's assessment of his claims.

10. There are accordingly no grounds for making an award of costs in this case.

Employment Judge Morton  
Date: 31 May 2024

Judgment sent to the parties and entered in the Register on: : 3 September 2024

For the Tribunal Office:

P Wing

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