



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. D. Lowry  
**Respondent:** Fleet Retail Packaging Limited  
**Heard at:** London South (on the papers) **On:** 4<sup>th</sup> October 2024  
**Before:** Employment Judge Sudra

*References in square brackets in the judgment are to pages in the costs bundle.*

## JUDGMENT ON COSTS

The Respondent's application for a Costs Order under Rule 76 is well founded. A Costs Order is made of 100% of the Respondent's overall costs and the Claimant is ordered to pay the Respondent's costs in the sum of £7,653.00p.

## REASONS

1. This was a Hearing to consider the Respondent's costs application of 25<sup>th</sup> April 2024, following the Tribunal's strike out judgment this case, sent to the parties on 28<sup>th</sup> March 2024.
2. The application was made under rule 76(1)(a) and (b) and rule 76(2) of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 (the 'Rules'). Rule 76 provides that if a party against whom an application for costs is made is considered by the Tribunal to have either, in bringing the

proceedings or in conducting them, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the claim or response had no reasonable prospect of success, then the Tribunal must consider making a costs order against that party.

3. The Respondent pursues its application on grounds of the Claimant's unreasonable conduct, that the claim had no reasonable prospect of success, and that the Claimant had breached Case Management Orders made by the Tribunal.
4. I had before me:
  - (i) The Respondent's costs application.
  - (ii) a 42-page costs bundle.
  - (iii) the Respondent's schedule of costs.
  - (iv) invoice number 2735 from Loch Law; and
  - (v) a breakdown of the sum claimed in invoice number 2735.

## **Issues**

### *Background*

5. The Claimant submitted an ET1 claim form on 16<sup>th</sup> October 2023, alleging that he had been unfairly dismissed. On 20<sup>th</sup> November 2023, the Respondent defended the claim on the grounds that the Claimant had been fairly dismissed for reason of gross misconduct.
6. On 12<sup>th</sup> January 2024 the Tribunal sent the parties a Notice of Hearing with Case Management Orders [23-25].
7. On 22<sup>nd</sup> January 2024 the Respondent advised the Claimant that he needed to comply with the Case Management Orders and must provide a Schedule of Loss by 9<sup>th</sup> February 2024. The Claimant failed to provide a Schedule of Loss or, indeed, comply with any of the Case Management Orders.

8. The Respondent made an application to the Tribunal for the claim to be struck out as the Claimant had failed to comply with Case Management Orders [30-34].
9. On 11<sup>th</sup> March 2024, the Respondent sent the Claimant a costs warning letter stating, inter alia, that,

*‘Your claims are fundamentally vexatious, and unreasonable and have no prospects of success for the reasons set out above. Furthermore, since lodging your claim, we have received no indication that you are actively pursuing your claim given your failure to comply with the Case Management Orders (the ‘CMOs’) and engage with the Respondent to finalise a Hearing Bundle.*

*We therefore put you on notice that should you pursue your claims, our client will make an Application to the Employment Tribunal for a costs order to be made against you under Rule 76 of the Employment Tribunal Rules of Procedure 2013 in respect of your vexatious and unreasonable conduct (Rule 76(1)(a)), claims having no reasonable prospect of success (Rules 76(1)(b)), and failing to comply with the CMOs (Rule 76(2)).*

#### **Settlement**

*In a bid to avoid our client spending further time and costs in this unmerited dispute, we are instructed to give you the opportunity to enter into a ‘drop hands’ agreement whereby you agree to withdraw your claim and, in consideration of this, our client will agree not to pursue you for their wasted legal costs, subject to a suitably worded COT3 Agreement.*

*This offer is open for acceptance until 18 March 2024 at which point it will be automatically withdrawn.*

*We strongly encourage you to seek independent legal advice on the contents of this letter.’ [21]*

The Claimant did not respond to the respondent’s letter.

10. On 16<sup>th</sup> March 2024 the Tribunal sent the Claimant an Unless Order requiring him to write to the Tribunal by 22<sup>nd</sup> March 2024 to confirm whether or not he was pursuing his claim and to explain why he had failed to comply with Case Management Orders. It was made explicit in the Unless Order that failure to comply with it, would result in the claim being dismissed **‘Without Further Order’** [36]. The Claimant failed to comply with the Unless Order.

11. On 28<sup>th</sup> March 2024, the Tribunal issued a judgment striking out the Claimant's claim [41].

12. The issues that I have to determine are:

- (a) Whether the threshold for a costs order has been met.
- (b) whether a costs order should be made; and
- (c) if so, in what amount

### **Has the Threshold for a Costs Order Been Met?**

#### *Unreasonable Conduct*

13. There were two aspects to this ground:

- (i) The Respondent contended that it was unreasonable for the claimant to pursue his unfair dismissal claim, as he had been fairly dismissed for gross misconduct and that all monies owing to the Claimant had been duly paid to him. I find, based on a proper reading of the ET1, that the Claimant's claim did not have a reasonable prospect of success and am satisfied that the Claimant's continued pursuit of the unfair dismissal claim was unreasonable.
- (ii) The Respondent also asserted that the Claimant persistently failed to comply with Case Management Orders. This allegation is incontestable. There has been no compliance with any Tribunal Orders by the Claimant. Nor has the Claimant pursued his claim; actively or otherwise.

14. I am satisfied that the matters at paragraphs 13(i-ii) (supra.) amount to unreasonable conduct by the Claimant and a failure to actively pursue his claim.

No Reasonable Prospects of Success

15. In addition, based on the matters at paragraph 13(i) (supra.), I find that the unfair dismissal claim had no reasonable prospect of success.
16. In all the circumstances, I am satisfied that the threshold for a costs order has been met.

**Should a Costs Order be Made?**

17. The case of Yerrakalva v. Barnsley MBC 2012 ICR 420 makes clear that there does not have to be a direct causal link between the unreasonable conduct and the costs awarded. Rather, in exercising its discretion, the Tribunal should have regard to the nature, gravity and effect of the unreasonable conduct. I am satisfied that the Claimant's pursuit of a claim that had no reasonable prospects of success and his repeated non-compliance with Case Management Orders resulted in additional work by the Respondent which would otherwise not have been required, resulting in increased legal fees. I am satisfied that those fees were more than 'de minimis'. In all the circumstances, I consider it just that a costs order should be made.

**How Much Should be Awarded in Costs?**

18. Rule 84 of the Rules provides that in deciding whether to make a costs order, the Tribunal may (my emphasis) have regard to the paying party's ability to pay. To that end, the Tribunal wrote to the Claimant on 21<sup>st</sup> June 2024, asking him to provide a response to the Respondent's application for costs. The Claimant failed to respond or provide any evidence of his means.
19. The respondent seeks costs in the sum of £7,653.00p and has provided a breakdown of those costs. Although I have not taken the Claimant's means into account, I have borne in mind that costs in this jurisdiction are discretionary, are still relatively unusual and are intended to be compensatory, not punitive.

20. In all the circumstances, I award costs to the respondent in the sum of £7,653.00p.

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**Employment Judge Sudra**

**Date: 4<sup>th</sup> October 2024**

Sent to the parties on:

14<sup>th</sup> October 2024

For the Tribunal Office:

P Wing