# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Khan

**Respondent:** Chief Constable of Bedfordshire Police

**Heard at:** Watford Employment Tribunal (In Public; By Video)

**On:** **16 August 2024**

**Before:** Employment Judge Quill (Sitting Alone)

**Appearances**

For the Claimant: In Person
For the respondent: Ms V von Wachter, counsel
For Goodwyn Herrera Solicitors: Ms S Malik, solicitor

# WRITTEN REASONS

(1) Judgment with reasons was given orally on 16 August 2024. Written reasons were not requested in the hearing itself.

(2) The Respondent's representative's email of 16:28 on 3 October 2024 correctly states the position, and Ms Malik's arguments to the contrary are inaccurate as to the facts and misconceived as to the legal position under the rules.

(3) Any of the parties had the right to request written reasons within 14 days of the judgment being sent, and that is what I stated during hearing. Since the judgment document (which was sent for promulgation on 16 August 2024) had not yet been sent to the parties, the Respondent's representative's request (made at 16:04 on 2 October 2024) is in time.

(4) The reasons are below.

# REASONS

## Introduction

1. This is been a video hearing which continued today, having started originally on 3 July. I had several documents: 115 page bundle; supplementary bundle of 19 pages; the claimant's 3 page written submissions; 10 page written statement and from Ms Malik

2. Ms Malik gave evidence on oath and was the only witness.

3. I heard oral submissions from all of the parties.

4. The Respondent was applying for costs against the Claimant and/or for wasted costs against his former solicitors, Goodwyn Herrera Solicitors. The Claimant also applied that the Respondent pay costs.

## The Law

5. In the Employment Tribunals Rules of Procedure, the section "Costs Orders, Preparation Time Orders And Wasted Costs Orders" is Rules 74 to 84.

6. When an application for costs is made, there are potentially the following stages to the decision.

   6.1 Has one (or more) of the criteria (for costs to potentially be awarded) as set out in the rules been met.

      6.1.1 If not, there can be no order for costs.

      6.1.2 If so, which rule or rules contain the criteria which have been satisfied (and why)?

   6.2 Is the rule one which requires the Tribunal to consider making an award, or is it one which says the Tribunal "may" consider making an award.

   6.3 Either way, if the criteria for a costs order are met, that means that the Tribunal has discretion to make an award, not that it is obliged to. So what are the relevant factors in this case, and, taking into account all of the relevant factors (and ignoring anything which is irrelevant), should an award be made.

   6.4 If an award is to be made, what is the amount of the award? (And what is the time for payment, etc).

7. Rule 84 states:

> **84. Ability to pay**
>
> 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.

8. As per the rule, "ability to pay" is something that "may" be taken into account at each of the last two stages of the decision-making. That is: should an award be made at all; if so, what is the size of the award (and the timetable for payment). A tribunal is not obliged to take "ability to pay" into account, but should specify whether it has done so or not (and, if not, why not). Generally speaking, where a party wants the Tribunal to decide that they do not have the ability to pay, then the onus is on them to (i) raise the point and (ii) provide evidence to back up the argument. That being said, in accordance with the Tribunal's duty of fairness, and in accordance with Rule 2, it may be appropriate for the Tribunal to seek to ensure that a party (especially a litigant in person) understands that the onus is on them (at least, in cases where the order might be a large one): Oni v NHS Leicester City UKEAT/0133/14.

9. Rule 76, insofar as is relevant, states:

> **76.— When a costs order or a preparation time order may or shall be made**
>
> (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;
>
> (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.

10. So one set of criteria for a costs order to be made are those set out in Rule 76(2). The tribunal is not obliged to consider making an award in such circumstances, but it may make an order.

11. If the criteria set out in Rule 76(1) are met, the Tribunal must actively consider whether or not to make an award (though it is not obliged to decide to make the award). The three subparagraphs are each independent. It is sufficient that any one of (a), or (b) or (c) is met.

12. As was noted in Radia v Jefferies International Ltd [2020] UKEAT 7_18_2102:

> 63. … earlier authorities, about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure, are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.
>
> 64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?

13. So there can be an overlap in the arguments about whether the party acted reasonably in bring the claim (or conducting the pursuit of the claim or response) [Rule 76(1)(a)] and about whether the claim or response had no reasonable prospects of success [Rule 76(1)(b)]. Both sets of arguments can (and should) be considered. See Opalkova v Acquire Care Ltd EA-2020-000345-RN at paragraphs 24 and 25.

14. As Radia makes clear (paragraphs 65 to 69), a tribunal deciding that the claim/response had no reasonable prospect of success for costs purposes is not conducting the same analysis as for a strike out application. The Tribunal is not necessarily obliged to take the paying party's case at its highest, but rather can assess what the paying party knew (or ought reasonably to have known), and when, about the strengths/weaknesses of its case. In terms of what they knew (or should have known), a party is "likely to be assessed more rigorously if legally represented": Opalkova para 26.

15. As Opalkova also make clear, when there are multiple claims/complaints, the issue of bringing, or continuing, with a claim or response which had no reasonable prospect of success must be analysed separately for each complaint.

    15.1 The fact that one or more of the complaints succeeded would not – in itself - prevent a respondent from persuading the Tribunal that there were other complaints that had no reasonable prospect of success.

    15.2 Correspondingly, the fact that one or more of the complaints failed – that is that the response to that part of the claim succeeded - would not, in itself, prevent a claimant from persuading the Tribunal that part(s) of the response which dealt with the complaint(s) which did succeed had no reasonable prospect of success

16. Where the argument is that the party has acted "vexatiously, abusively, disruptively or otherwise unreasonably" then the only conduct that is taken into account is that which is (either the bringing of the proceedings or) the way that the litigation has been conducted. This ground can potentially be established even where the paying party has been successful in the litigation. The precise details of the conduct in question will be relevant both the (a) whether the criteria in Rule 76(1)(a) are met and/or (b) whether, in all the circumstances, the Tribunal should exercise its discretion to make a costs order.

17. If the criteria to potentially make a cost order are met, then the factors which are potentially relevant to the decision about whether to make such an order (and, if so, how much the award should be) include, but are not limited to, the following. However, the Tribunal's primary duty is to follow the wording of the rules, and to make specific decisions on the merits of the case in front of it.

17.1 Costs are the exception rather than the rule. A party seeking costs will fail if they do not demonstrate that the criteria for *potentially* making such an order (in the Tribunal rules) have been met. However, the mere fact alone that the criteria have been met does not establish that the general rule is to make a costs order in such circumstances.

17.2 Costs, if awarded, must be compensatory, not punitive.

17.3 If the argument that there has been unreasonable conduct is made then the whole picture of what happened in the case is potentially relevant. However, it is necessary to identify the specific conduct, and decide what, specifically, was unreasonable about it and analyse what effects it had. Some causal link between the conduct and the costs sought by the other party is required. Yerrakalva v Barnsley [2011] EWCA Civ 1255.

17.4 Was the party warned that an application for costs might be made, and, if so, when, and in what terms.

17.4.1 The lack of such advance warning does not prevent an application being made (or the Tribunal granting it). Rule 77 gives a party up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. Furthermore, while the rule give the other party the right to a reasonable opportunity to make representations in response to the application, it does not impose a requirement that they were warned before the application was made.

17.4.2 However, the issue of whether a party (especially a litigant in person) was aware of the possibility of having to pay costs is likely to be relevant. This can be demonstrated by something other than a costs warning from the opposing party: for example, comments made at a preliminary hearing; the fact that they had been involved an earlier case in which there was a

costs application; the fact that they themselves had expressed an intention to seek costs from the other side.

17.4.3 If a warning has been made, its precise terms will be relevant. A simple boiler plate threat to apply for costs, which appears to a knee jerk response that the party (or its representative) always sends out is likely to be far less persuasive than a considered attempt to address the arguments raised by the other party, and explain why they have no prospect of success, or to explain why the particular conduct has been unreasonable, and what the rules or case management orders (specifically) require instead.

17.4.4 The timing of the warning will be relevant, as will the issue of whether the warning was updated and repeated at relevant stages.

17.4.5 The fact that a costs warning was made, even one which is clear and detailed and well-timed, and which identifies the precise basis on which the application was later made, does not guarantee that an order will be made.

17.5 What advice did the party have? Who from? When? It can be a double-edged sword that a party has taken legal advice. On the one hand, they might seek to argue that since a lawyer advised them that the claim had merit, it was not unreasonable to pursue it. On the other hand, the opposing party might seek to argue that (even if the paying party was a litigant in person at the Final Hearing) the fact that they had legal advice available shows that they ought to understood the claim was hopeless, and/or that their conduct was inappropriate, and/or that a settlement offer that had been made was a good one. To rely on the former argument, the paying party might have to waive privilege over the advice in question. However, there is no obligation to do so to defend itself against the latter inference; where privilege is not waived, the Tribunal will not make assumptions that the party specifically received advice that they were acting unreasonably, but the fact that advice was available to them is likely to undermine an argument that, as a litigant in person, they could not reasonably have been expected to anticipate the arguments being raised by the costs application.

18. Rules 80 to 82 deal with wasted costs orders against representatives rather than the party

19. The Court of Appeal in Ridehalgh v Horsefield 1994 3 All ER 848, CA, set out a three-stage test in respect of wasted costs orders, and the guidance is applicable to employment tribunal cases (subject to the Tribunal being sure to take account of the fact that costs regime as a whole differs in the Employment Tribunal rules, compared to that in, what are now, the Civil Procedure Rules).

19.1 first, has the legal representative acted improperly, unreasonably, or negligently?

19.2 secondly, if so, did such conduct cause the applicant to incur unnecessary costs?

19.3 thirdly, if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

20. Even is satisfied that the first two stages of the test are satisfied (i.e. conduct and causation), the Tribunal must nevertheless consider whether to exercise the discretion to make the order and, if so, to what extent.

21. The Tribunal has a discretion at stage 3 to dismiss an application for wasted costs where it considers it appropriate to do so. This includes, but is not limited to, considerations, for example, of whether the costs of the applicant would be disproportionate, whether issues would need to be relitigated, whether questions of privilege would arise.

22. A legal representative is not to be taken to have behaved improperly, unreasonably or negligently simply by acting for a party who pursues a claim or defence which is plainly doomed to fail.

**Background and findings of fact**

23. In this case, there was a hearing before Employment Judge Manley on 12 April 2023. At that hearing, she set dates for a final hearing, commencing February 2024.

24. She ordered a further preliminary hearing. That took place before Employment Judge Hanning on 29 June 2023

25. As EJ Hanning noted in paragraph 2 of the summary, that hearing had been listed for case management purposes (only), even though the parties had apparently anticipated that the respondent's application for strike out - which had been made on 9 May 2023, so after the first preliminary hearing - was going to be dealt with at the 29 June hearing.

26. EJ Hanning made orders to deal with that application including setting a date for a hearing for that application to be decided, namely 2 November 2023.

27. He ordered that that preliminary hearing would also make decisions about jurisdiction, which was an issue which the Respondent had raised. It is clear from the orders made by EJ Hanning that any claims for which there was no jurisdiction would be dismissed as a result of the decisions made at the 2 November

preliminary hearing, but if there were any for which there was jurisdiction then they would potentially continue

28. When EJ Manely set a final hearing date for February 2024, she had been unaware that the respondents would make an application on 9 May 2023 or that a preliminary hearing to deal with that application would not be scheduled to take place earlier than 2 November 2023.

29. Had the 2 November 2023 proceeded, the judge at the hearing would have had the ability - if it was necessary in the interests of justice – to postpone the final hearing. That is a point was made expressly clear by paragraph 7.2 of EJ Hanning's orders. More generally, his orders made clear that any appropriate case management issues related to the final hearing could be addressed at the 2 November hearing.

30. The parties were directed to prepare for the issue of jurisdiction to be determined and that included by sending documents to each other by preparing a bundle and exchanging witness statements for the preliminary hearing.

31. The claimant did not comply with any of those orders

32. The fact that the claimant's solicitor was on holiday in July and August is not a good enough reason for the Claimant to breach the orders. If the claimant was not going to be able to comply with EJ Hanning's proposed orders then that is a point which should have been raised on the 29 June at the hearing. The whole point of having that 29 June hearing was to make case management orders and it is a waste of the employment tribunal's time and of the other party's time if counsel conducting the hearing on behalf of one of the parties (the claimant in this case) has not been given sufficient information about what to can be agreed as dates for compliance with orders. The dates set out in orders at a preliminary hearing are not merely suggestions, that the parties can think about later, and decide if they are happy with them. Any objections should be raised orally at the time, and either the objection will be accommodated, or the judge will give reasons that the objection was not good enough.

33. In any event, once the orders were made it was the responsibility of the claimant's solicitors firm to ensure that the Claimant knew what the orders were and that he could comply with those orders. If the Claimant and his solicitors had agreed that they were going to act for him to do the work to comply with the orders, then they had a responsibility to delegate work accordingly within the firm so that the orders could be complied with (which means, complying by the dates stated in the orders). If they were not going to be able to do the work on the Claimant's behalf so that the Claimant could comply with those orders on time, they had the obligation to tell the claimant that he would have to comply with the orders himself without their assistance.

34. Potentially an option existed to try to agree new dates with the respondent but that needed to be done before the compliance dates arrived, and would only have been appropriate if only a short extension of time was being requested.

35. As a last resort, if the Claimant genuinely could not comply with the orders on time, there needed to be an application made to the tribunal to vary the dates. That might have needed to be accompanied by an application to postpone the preliminary hearing, and the final hearing. If postponement of such hearings was not going to be ordered, then that would – of course – have been a relevant factor in relation to whether any extension of time for compliance with case management orders was granted. However, in any event, it is unreasonable conduct by a party to simply fail to comply with the orders without seeking any extension of time (and without supplying good reasons for the request).

36. Witness statements had been due by 21 September; that would only have been possible if the bundle had been finalised previously; in turn, finalising the bundle would only have been possible if the parties had disclosed documents to each other previously.

37. Thus the Claimant was already in breach of the orders by the time the orders made by EJ Hanning were (on his case) overtaken by events. On 28 September, the Claimant interpreted the information given to him by the respondent as meaning that he was suspended from duty and was potentially at risk of dismissal.

38. The events of 28 September changed things in several important ways from the Claimant's perspective.

39. I have received no medical evidence, and I am not going to place weight on the submissions that there was a clinical psychological effect on him. However, I do accept that resolving the suspension/potential dismissal issue (as he interpreted it) became a priority for him. It became the focus of how he spent his time, and it became the focus of the financial resources he had available for legal assistance.

40. The Claimant formed the opinion (having taken legal advice) that there might need to be an application to amend the existing employment tribunal claim, or else a new separate claim form, to seek to make new allegations based on the developments (as he saw it) which occurred around 28 September and subsequently. He prioritised this above preparations for the preliminary hearing.

41. At the hearing today, it initially seemed to me that there was a disagreement (about which I might have had to find facts, and resolve) between the claimant and his former solicitors about whether and when the claimant gave unequivocal instructions to withdraw the existing claim.

42. By the end of the evidence and submissions, I was satisfied that, in fact, there is no difference of substance between the Claimant's position and that of Goodwyn Herrera.

43. In any event, my findings of fact about that issue are as follows:

    43.1 In late September, the claimant gave instructions to his solicitors that they should cease incurring further costs in in preparation for the 2 November hearing

    43.2 It was the claimant's first preference that the hearing date would be vacated, without a withdrawal of the claim by him.

    43.3 However if the hearing could not be vacated then he was (i) not going to pay for Goodwyn Herrera to prepare for it and (ii) not going to prepare for it himself and (iii) he was going to withdraw the existing claim, without attending the 2 November hearing.

    43.4 The discussions between the claimant and his solicitors included about whether there should be an attempt to make an employment tribunal claim in connection with the suspension from duty and or any subsequent dismissal.

    43.5 It is not of the utmost importance for the decisions which I need to make to address in detail what pros and cons the Claimant and his lawyer discussed between the options of (i) presenting a new claim form and (ii) seeking to amend the existing claim. However, it was the solicitors' opinion that it was more in the claimant's interests to seek to amend the existing claim rather than issue a new claim.

    43.6 In any event the solicitors did not consider it to be in the claimant's best interests to unconditionally withdraw the claim at the stage when the Claimant informed them of his decision in relation the 2 November hearing (that he was not going to attend, and would withdraw the claim rather than attend); they instead attempted to get the hearing of 2 November postponed. This was not contrary to the Claimant's instructions, because his first preference was to have the date vacated, without the need to withdraw the claim.

44. An application in relation to postponing the preliminary hearing was not made until 9 October.

45. As per [Bundle 57], the Claimant's solicitors had written to the respondents' representative on 29 September. It referred to the Claimant's suspension and potential dismissal. It said the Claimant was under "tremendous pressure". It did not suggest that there would be an application to postpone the preliminary hearing, but rather sought an extension of time for witness statements (until 9 October). It also stated:

> my client considers this is a continuation of his existing claim and we may be instructed to issue a further ET1

46. This was a reply in a chain of emails which included:

    46.1 The Claimant's representative's email of 29 August asking what dates the Respondent proposed for the orders that had not been completed on time.

    46.2 The Respondent's representative's email of 31 August, with draft index for hearing bundle (and comment that the Respondent was "currently" reviewing documents to consider redactions).

    46.3 The Respondent's representative's email of 22 September stating that witness statements were overdue, and proposing 29 September

    46.4 The Respondent's representative's email of 28 September stating that it could now exchange on 29 September and stating that if there was no reply from the Claimant, it would make application to the Tribunal.

47. The Respondent replied on 2 October. The reply makes a fairly obvious point that if there were to be a new claim (and I interpose to say it would make no difference whether it was by way of amendment or by way of new claim form) then the final hearing date in February was unlikely to be effective. It also stated:

> If you want to withdraw your client's current claim and look at issuing a new claim, that is a matter for you.

48. There was then a delay until 9 October before the postponement application was made. There was no good reason for that delay.

49. The application [Bundle 62-63] referred in express terms to vacating the preliminary hearing only rather than postponing the final hearing too, although that was potentially implied to be necessary by the request that *"the proceedings are held in abeyance for the following reasons*".

50. It referred to the Claimant's mental health, but without supplying medical evidence. The main thrust of the application was that the Claimant's representative claimed (i) that there would be a further claim and (ii) that that could not be presented until after the disciplinary investigation was concluded and (iii) that:

> We submit that the hearings listed for 2 November 2023 and 26 February 2024 to 1 March 2024 will be meaningless and would waste costs and resources of the parties and the Tribunal if they proceed before the Claimant issues further proceedings to add these allegations to the claim. We submit that it would be within the overriding objective to accept this request.

51. It is not necessary for me to quote from each piece of correspondence in October between the parties and each other or between the parties and the tribunal. I have

read it and taken it into consideration. It suffices to say that the Tribunal's orders were not complied with by the claimant side even belatedly and there was no unequivocal withdrawal of the claim by the claimant.

52. The claimant side refer to two emails on the morning of 31 October as indicating an intention to withdraw if the application to postpone or vacate the 2 November hearing was refused.

53. [Bundle 66] is timed at 8.21am. Even assuming it was without prejudice at the time it was sent, that makes no difference because [Bundle 65] was timed at 8.41am and was not stated to be without prejudice. In any event neither side has alleged that either of the emails should not be seen by me and taken into account.

54. Neither email expressly said that the claim as a whole would be withdrawn. They were open to the interpretation that the claimants solicitors would be ceasing to act, but without the claim coming to an end. Obviously, if Goodwyn Herrera Solicitors withdrew by ceasing to act, but the claim was not withdrawn by the Claimant, then that would be no reason for the Respondent's representative to cease their preparation for the hearing.

55. I do note that the Respondent's representative's email of 8.34am (so in between the two) stated:

> if you do not withdraw by midday today we will be going for costs as we are about to prepare the paper copy bundles for the hearing.

56. I take that as being a reference to the whole claim being withdrawn by the Claimant.

57. In any event, the two emails from the Claimant's representative were early on the Tuesday morning, with the hearing due to start on the Thursday.

    57.1 They communicated that the Claimant's representative would not be doing any preparation for the hearing, and that they were awaiting a decision from the Tribunal before taking the next steps.

    57.2 I do accept that the Claimant and his solicitors had agreed that those next steps would be to withdraw the claim (if postponement was refused) even though, as I have said, that is not an intention that had been unambiguously communicated to the Respondent.

    57.3 Even if I am wrong that they are ambiguous, and even if they unambiguously stated that the whole claim would be withdrawn if postponement was refused, they could not have enabled the Respondent to avoid the costs that it had already incurred during October to prepare for the hearing.

57.4 Even if I am wrong that they are ambiguous, and even if they unambiguously stated that the whole claim would be withdrawn if postponement was refused, they could not have enabled the Respondent to cease to prepare for the hearing, because the Respondent had to be ready in the event that (for example) no decision from the Tribunal arrived, or else it arrived, but no formal withdrawal of the claim was sent by the Claimant.

58. On 1 November 2023, the postponement application was refused and the claim was withdrawn. No actual application to amend the claim was submitted before it was withdrawn. As far as I am aware, no further claim form was presented.

59. The Respondent argues that it should receive costs given the lateness of the withdrawal, and the work it had to do to prepare for the hearing. The Claimant and Goodwyn Herrera Solicitors argue that the Respondent did not have to prepare for the hearing (and therefore did not have to incur costs) because

59.1 the hearing was not going to go ahead one way or the other, it would either be postponed, or the claim would be withdrawn and

59.2 it had made that clear enough, soon enough, to the Respondent.

60. My decision, however, is that even assuming that the first of those two propositions is true, the second is false.

61. I do not accept the submission that the extract from the Respondent's representative's 2 October email that is quoted above demonstrates that the Respondent was aware that the claim would be withdrawn (if postponement was refused). The email plainly does not say that. The email as a whole plainly disputes that there is a connection between the matters mentioned in Goodwyn Herrera Solicitors' email of 29 September and the contents of the existing claim. In context, it is suggesting that even if there were to be a claim brought about the new events, then that would have to be a separate claim. It is disputing that preparation for the hearings that were listed for the current claim should be put on hold. The email is, in effect, inviting the Claimant to withdraw the existing claim, and it is not responding to any suggestion from the Claimant or Goodwyn Herrera Solicitors that the existing claim would, in fact, be withdrawn. There had, in fact, been no such suggestion by 2 October 2023.

62. There was no such suggestion between 2 October and 30 October either. On the contrary, the Claimant's representative's emails are inconsistent with any such position. For example, on 12 October, they wrote to the Respondent and the Tribunal stating, amongst other things (my emphasis):

> We therefore maintain our position and ask that the hearing is vacated to avoid duplicate consideration of the same facts or to avoid consideration of the facts in part.

> The Claimant has no other option but to **add the new allegations to the existing claim**

63. Further, on 19 October, as well as chasing the postponement application, it wrote:

> In the alternative, as this is a preliminary hearing to discuss limited jurisdictional issues we ask that the Tribunal varies the Order to allow parties to exchange 3 working days before the hearing which is sufficient time to allow parties to prepare for the preliminary hearing.

64. On 31 October, after the emails mentioned above, there was an exchange of lengthy emails which were sent by the two parties to the Tribunal and each other. [Bundle 72 to 69].

    64.1 The Respondent's representative's email of 10:04am used the phrase "*they should withdraw*". I do not need to quote the full sentence. In context, it clearly is a suggestion that "if" the proposition suggested in the email is true, then Goodwyn Herrera Solicitors should withdraw from the proceedings.

    64.2 The Claimant's representative' 10.48am reply included: "*In the circumstances, we submit it would be against the overriding objective to expect the Claimant to withdraw his claim as his further proceedings could be prejudiced by this*."

65. The Claimant did not withdraw on 31 October 2023 (by the midday deadline mentioned on [Bundle 65], or at all). However, as mentioned already, he did withdraw the following day.

**Analysis and Conclusions**

66. The Claimant made an application for the Respondent to pay costs. It is for the costs incurred in the month of October 2023 in relation to Goodwyn Herrera Solicitors' activities in seeking postponement of the 2 November hearing.

67. The application to postpone was refused. Thus the Respondent's objections to it were not objections that had no reasonable prospect of success. I do not consider that the Respondent acted unreasonably by declining to agree to postpone the preliminary hearing. For one thing, that would have required postponement of the final hearing too, and the Respondent's position was that decisions at the preliminary hearing would mean that the matter was fully disposed of, without the need for a final hearing. However, in any event, I do not see how declining to agree to a postponement application that the Tribunal also believed should not be granted could be unreasonable conduct. As the Respondent's representative correctly said in the correspondence at the time, even if the judge on 2 November decided not to deal with everything that the hearing had been listed for, it was still an opportunity to make orders for the final hearing, or to discuss postponing it.

68. The requirements of Rule 76 are not met in relation to the Claimant's application.

69. The Respondent made an application for the Claimant to pay costs.

70. I am not satisfied that the Claimant personally acted unreasonably. I am satisfied that the events of 28 September were a significant change of circumstances from his point of view. While I do not ignore that he was already behind with the orders by then (as was the Respondent), I am satisfied that he was not always (from the date the claim was issued, or from the date of the 9 May strike out application, or form the date of the hearing before EJ Hanning) intending to abandon the claim without attending the final hearing, or without attending the public preliminary hearing. He intended to pursue the claim that he presented on 14 December 2022 until, around 28 September 2023, there was – what he regarded as – a change in his circumstances. He believed that he was under threat of dismissal, and that his time and financial resources needed to be devoted to that, rather than to the existing tribunal claim. As I have said above, in the findings of fact, he did not wish to end the claim unconditionally and immediately; he wanted to see if it could be put on hold until after his disciplinary proceedings, and then continue it with, if appropriate, any new matters added that arose from the events of 28 September and subsequently. He was, however, willing to end the current claim unconditionally and immediately if he could not put it on hold; in particular, he was willing to end the current claim unconditionally and immediately if he could not otherwise avoid the 2 November hearing going ahead. He did not wish to incur any expense of preparing for that hearing, and he told his solicitors that.

71. The Claimant (and Goodwyn Herrera Solicitors) did act promptly after the events of 28 September to write to the Respondent's representative. Although, the email itself (of 29 September) did not suggest vacating the hearing, I am satisfied that that was not the Claimant's fault. He had been clear to his solicitors.

72. There is no good reason that the Claimant's solicitors waited until 9 October to apply for the postponement. Again, I am satisfied that that was not the Claimant's fault. He had been clear to his solicitors.

73. While it can be argued that it would have been more reasonable for the Claimant to simply withdraw the claim straight away (rather than risk the Respondent having to incur unnecessary expenditure), if the application had been made promptly on or soon after 29 September 2023, then it would not have been unreasonable for a party to believe that there might be a decision long enough in advance of 2 November so that either, as the case may be, the Respondent would not incur further costs because it was told of postponement, or else Respondent would not incur further costs because it was told of withdrawal (after receiving notice of refusal of postponement).

74. It is not the Claimant's fault that the postponement decision was not made until 1 November 2023.

75. I therefore do not award costs to the Respondent based on its argument that there was unreasonable conduct by the Claimant in relation to the lateness of the withdrawal.

76. I have also not been persuaded that the claimant pursued a claim that had no reasonable prospects of success. The jurisdiction argument that the respondent is relying on it is an argument that would potentially have been dealt with at the preliminary hearing had that preliminary hearing gone ahead. I have no doubt that the respondent strongly believes that it would have been successful, but the Respondent's opinion about the merits of its defence does not mean that the claim had no reasonable prospects of success, or that there was no reasonable prospect of a judge at the preliminary hearing, deciding that the tribunal did have jurisdiction for at least some of the matters raised by the claim form. I am satisfied that the reason for the withdrawal was not that the Claimant had come to agree with the Respondent's position that there was no jurisdiction.

77. Even had I been persuaded (which I am not) that there was no reasonable prospects of success, I would then have had to go on to consider my discretion as to whether to award costs and I would not have done so. The Respondent's argument is that the type of allegation made by the Claimant was a complaint that had to be pursued in the County Court, not the Employment Tribunal. Even if the Respondent's argument is correct, then I do not consider it to be the type of point that should have been obvious to the Claimant or his solicitors.

78. Finally, then, turning to the issue of the wasted costs against the claimant's solicitors, this was much more borderline as to whether or not I was going to grant this application.

79. I think the claimant's solicitors have behaved badly in the way that this litigation has been conducted and my assessment is that it has been Goodwyn Herrera Solicitors' bad conduct rather than the claimant's. The bad conduct has included: failure to comply with the tribunal's orders (during July and August, and prior to 28 September, when the Claimant was relying on them to do so) and failure to give any realistic indication that they were trying to comply with the orders, or had partially completed the necessary work. Further, once they knew that the claimant had decided that he was definitely going to withdraw, come what may, and once they knew that the postponement decision had not been made promptly after 9 October (and still had not been made close to the end of October), they failed to make clear to the Respondent that there should be no further preparation because the Claimant would withdraw rather than attend the hearing. In addition, Goodwyn Herrera Solicitors is responsible for the delay from 29 September to 9 October in applying for postponement.

80. I do not necessarily agree with the theory, set out in correspondence, that the Claimant could not apply to amend the claim until the conclusion of disciplinary hearing. The truth of the matter is that the Claimant did not wish to incur the expense, at that time, of any Employment Tribunal proceedings (existing claim or amendment to it). He wanted to focus on the disciplinary proceedings themselves.

81. I agree that it is not necessarily unreasonable conduct (even by a party, still less by their solicitors) to decide not to withdraw an existing claim when there is potentially a new dispute. There are tactical considerations about (a) applying to amend the current claim; (b) issuing a separate claim form and possibly carrying on with separate litigation (c) abandoning claim 1, and relying entirely on claim 2. It is not unreasonable, when considering withdrawing the first claim, to be wary about acting too quickly, and prejudicing the potential new claim.

82. Even though I reject many of the submissions put forward on Goodwyn Herrera Solicitors' behalf as to why they acted reasonably (and even though several of the submissions seemed to be an attempt to argue that the Respondent's representatives had acted unreasonably which (i) is not correct, in my opinion and (ii) not relevant), my reason for not ordering wasted costs is that the postponement application was made on 9 October (later than it should have been made) but not decided until 1 November. Had the application been decided sooner, I am satisfied that the claim would have been withdrawn sooner.

83. Goodwyn Herrera Solicitors had received the Claimant's instructions to withdraw the claim if postponement was refused, and would have acted on those instructions. I do not think it was improper, unreasonable, or negligent for Goodwyn Herrera Solicitors to comply with the Claimant's instructions to see if the hearing could be postponed before withdrawing. The claim was withdrawn within a few hours of the notification of the refusal of postponement. I do not think that it would be just, in those circumstances, to order Goodwyn Herrera Solicitors to pay wasted costs.

84. For the avoidance of doubt, the argument that it was unreasonable for the Respondent to continue to prepare for the hearing after a postponement application was made is totally without merit, and, if anything, the fact that Goodwyn Herrera Solicitors relied on that argument made it more likely, not less likely, that I would deem their conduct to have been unreasonable. However, any unreasonable comments made in response to this wasted costs application was not a reason for me to grant the Respondent's application.

85. Furthermore, as I said during the hearing, there were a number of reasons for the adjournment on 3 July, which I set out in the orders after that hearing. I do not agree with the Respondent that the Claimant or Goodwyn Herrera Solicitors were mainly responsible for the adjournment. In particular, my finding is that the

Claimant did not lie during that hearing. I do not think that there is a proper basis to award the Respondent costs in relation to that hearing.

86. In summary, then, all 3 applications fail.

**Employment Judge Quill**

Date: 11 October 2024

WRITTEN REASONS SENT TO THE PARTIES ON

01/11/2024

FOR EMPLOYMENT TRIBUNALS