



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Elliott

**Respondent:** Gateshead Health NHS Foundation Trust

## JUDGMENT

1. The claimant shall pay the respondent £187.50 in respect of the costs the respondent has incurred.

## REASONS

### Introduction

1. On 18 December 2023 Employment Judge Loy struck out the claimant's claim under rule 37 of the Employment Tribunal Rules.
2. On 16 January 2024 the respondent made a written application for an order requiring the claimant to pay its costs. The application was put on the following bases.
  - 2.1. That the claimant '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'.
  - 2.2. That the claimant has been in breach of an order.
3. The schedule of costs supplied with the application showed that the total amount sought was £3276.60.
4. Both parties asked that the application be considered by a Judge on written representations only and without a hearing.

### Legal framework

5. The Tribunal's ability to make costs orders is regulated by the Employment Tribunals Rules of Procedure, in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
6. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.
7. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".
8. The circumstances in which a Costs Order may be made are set out in rule 76 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*

....

9. The procedure by which the costs application should be considered is set out in rule 77. The amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.
10. Rule 84 concerns ability to pay. It says: "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."
11. It follows from these rules as to costs that the Tribunal must go through a two stage procedure. The first stage is to decide whether the power to award costs has arisen; and secondly if so, to decide whether to make an award and of what sum.
12. The case law on the costs rules confirm that the award of costs is the exception rather than the rule in Employment Tribunal proceedings: *Gee v Shell UK Limited* [2003] IRLR 82.

13. Whether a litigant was professionally represented is a relevant consideration. In *AQ Ltd Holden* [2012] IRLR 648 the Employment Appeal Tribunal said:

“A Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in Tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many pay people will represent themselves. Justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life... Lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in [the rules]... This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity...”

14. On the matter of what constitutes vexatious conduct, in *ET Marler Ltd v Robertson* [1974] ICR 72 the National Industrial Relations Court said:

“If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the Tribunal may and doubtless usually will award costs against the employee...”

15. In *Attorney-General v Barker* [2000] 1 FLR 759 it was said:

“‘Vexatious’ is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.”

16. It is a basic principle that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the party ordered to pay the costs. That said, a party seeking costs for unreasonable conduct does not have to show a causal link between specific costs and specific conduct.

## **Conclusion**

### ***Are any of the conditions set out in r76(1) or (2) met?***

17. It is clear that the claimant failed to comply with paragraph 6 to 12 of my Orders made at the hearing on 22 August 2023. Therefore, I have a discretion to award costs under r76(2).

18. As for r76(1), although the respondent’s position is not set out as clearly as it should be, I take it from the first sentence under the heading ‘Basis of the application’ that

it concerns the way the claimant conducted the proceedings, rather than his bringing the proceedings (and I note that the application is not made on the basis that the claim had no reasonable prospect of success).

19. In its costs application the respondent set out a chronology. However, the respondent has not clearly identified why it contends that, in the way in which the claimant conducted the proceedings, he acted:

- 19.1. vexatiously; or
- 19.2. abusively;
- 19.3. disruptively; or
- 19.4. otherwise unreasonably.

20. Indeed, the respondent has not distinguished in its application between unreasonable conduct, vexatious conduct, disruptive conduct and abusive conduct.

21. There is nothing in the application to support a finding that the claimant has acted vexatiously, disruptively or abusively in the way he has conducted the proceedings.

22. As for whether the claimant acted unreasonably, I have already noted above that the claimant failed to comply with the Orders I made on 22 August 2023. He then failed to respond to correspondence from the Tribunal with the consequence that Judge Loy decided he was not actively pursuing his claim and struck it out. In this respect I have concluded that the claimant acted unreasonably, for the following reasons:

22.1. The claimant knew of the existence of the Orders; he does not claim otherwise. He also knew of the reason for the Orders; that was something I explained at the hearing he attended. He knew that he was in breach of the Orders because he had been reminded of them and asked to explain his default.

22.2. The respondent was severely prejudiced by the claimant's failure to comply with those Orders. There could not be a fair hearing unless the claimant clarified his claims. That is why the Order was made and why the claim was ultimately struck out after the claimant had failed to comply with it.

22.3. I am satisfied that the claimant was capable of complying with the Orders. The claimant did not say at the hearing on 22 August that he would be unable to comply. Nor did he say that at any time between September and December 2023 when he had an opportunity to explain his default. I note what the claimant has said in his written submissions about his mental health and family circumstances but he does not say how, if at all, those matters affected him (and specifically his ability to comply with orders or communicate with the Tribunal and the respondent) in September 2023 (or in October to December 2023).

23. For those reasons I have discretion to award costs, and a duty to consider whether to make such an order under rule 76(1).

24. As for the way that the proceedings were conducted prior to the claimant's failure to comply with the Orders I made at the case management hearing, I note that the respondent submits that the claimant 'inadequately particularised his claim for constructive dismissal' and that the claimant did not respond to the respondent's request for further information ahead of the case management hearing. The respondent appears to be suggesting that this constituted unreasonable conduct by the claimant in the way he conducted the proceedings. I do not agree. I accept that the claim form did not set out the factual basis of the claim in enough factual detail for the respondent to know the case it had to meet: that is why the case management hearing was arranged. However, the claimant was not professionally represented and, when it comes to setting out a claim, cannot be held to the same standards as if he were. As for the lack of response to the respondent's request for information, at the case management hearing the claimant gave a reason for this, saying he had not had access to his phone. The respondent has not sought to challenge that information. In the circumstances I am not persuaded that the way the claimant conducted the proceedings prior to his failure to comply with the Orders I made at the case management hearing was unreasonable.

***Should I exercise my discretion to award costs?***

25. The claimant's unreasonable conduct of the proceedings by failing to comply with the Orders I made on 22 August 2023 and then failing to respond to correspondence from the Tribunal was a serious matter. The failure to clarify the claim meant that the respondent could not properly respond to the claim. The fact that the factual basis of the claim remained unclear even on 18 December 2023 meant there could not be a fair hearing of the claim on the scheduled dates in February 2024.

26. On 18 March 2024 Judge Sweeney ordered the claimant to send in a statement explaining his current means. The claimant has not done so.

27. In all the circumstances I concluded that making a costs Order would further the overriding objective to deal with cases fairly and justly.

***Amount of the award***

28. The respondent sought costs by way of summary assessment in the sum of £3276.60 (excluding VAT).

29. The respondent has provided a breakdown of the total time spent by each fee-earner on activities such as 'drafting or preparing the case', 'email', 'meeting', 'perusing or considering papers', 'telephone attendance' and 'miscellaneous'. That breakdown does not tell me, however, what those activities concerned, for example who Ms Rodwell emailed on a particular occasion and for what purpose. As far as I can tell, those costs represent the entire costs incurred by the respondent in these proceedings.

30. It is not appropriate to order the claimant to cover the whole of the respondent's costs because I have not concluded (and nor was it suggested) that the claim the

claimant brought had no reasonable prospect of success or that the claimant had acted unreasonably in bringing the claim. The respondent does not suggest, and I do not find, that when the claimant brought these proceedings he had no genuine intention of pursuing them. Nor have I found the claimant acted unreasonably in conducting the proceedings before he failed to comply with the Tribunal's Orders made at the case management hearing.

31. The claimant's failure to comply with those Orders led the respondent to apply for an unless Order (email of 26 September from Sabine Rodwell). It was appropriate for the respondent to seek some form of Order from the Tribunal at that juncture. It was also appropriate for the respondent to follow this up with a further email (20 October from Sabine Rodwell). I expect Ms Rodwell will also have contacted the respondent to notify it of the claimant's initial default, advise on the options and seek instructions, and to notify the respondent of the application made to the tribunal, the tribunal's correspondence of 17 October and 27 November 2023 and the fact that the claim had been struck out. I consider an appropriate amount to award to compensate the respondent for costs wasted by the claimant's unreasonable conduct of the proceedings is an amount equivalent to one and a half hours of time at Ms Rodwell's rate (£125 per hour). In this regard I was satisfied that the hourly rates for work done by Capsticks were reasonable; they were below guideline hourly rates.
32. I do not know if the schedule of costs includes time spent making the costs application. In any event I do not order the claimant to contribute towards those costs. The respondent was not required to apply for costs; it chose to do so and in making that choice opted to take a course that it knew would increase its costs.
33. The total amount I Order the claimant to pay is therefore £187.50.

**EMPLOYMENT JUDGE ASPDEN**

**31 October 2024**