



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Drayson

**Respondent:** ABM Catering Limited

**Heard at:** Manchester (in Chambers)      **On:** 16 January 2025

**Before:** Employment Judge Holmes (sitting alone)

## **Representatives**

For the claimant: Written representations

For the respondent: Written representations

## **JUDGMENT ON COSTS**

It is the judgment of the Tribunal that :

The claimant is ordered to pay to the respondent the sum **£250.00** towards its costs in connection with these claims.

## **REASONS**

### **The background and procedural history.**

1. By a claim form presented on 18 April 2023 the claimant, who is unrepresented, brought claims of unfair dismissal, for a redundancy payment, and for holiday pay and “other payments”. She was employed by the respondent between 11 May 2021 and 10 March 2023. The full procedural history is set out in the Tribunal’s judgment dismissing her claims following the hearing on 15 May 2024, sent to the parties on 30 May 2024 (which, for some reason, erroneously refers to May 2023 as the date, which is clearly incorrect)

2. At that hearing the respondent made an application for costs against the claimant. The Tribunal, however, did not proceed to determine that application, but made further directions for the determination of the costs application. The Tribunal indicated that no further hearing would be held unless either party asked for one. Neither party has, so the Tribunal has determined the application on the papers that have now been provided to it. Whilst this In Chambers determination was intended to be held much sooner, the absence of the Employment Judge on long term sickness absence last year has delayed this, for which he apologises to the parties.

3. The respondent subsequently by Submission sent to the Tribunal on 11 June 2024 set out its application, and attached a Schedule of Costs.

4. The claimant responded to the application by email of 17 June 2024, to which she attached a number of documents. Those documents run to some 189 pages, and, it seems, contain much that is repetition and duplication, making it hard to follow them.

**The application.**

5. The respondent has set out the basis for its application in its written Submission. The application is based solely upon the claimant breaching the Tribunal's orders.

6. In particular, the respondent relies upon the fact that at the hearing on 9th February 2024, orders were made as follows:

*"1.1 By no later than 23 February 2024, the claimant shall write to the Tribunal and the respondent to confirm whether:*

*1.1.1 She still pursues a claim for unpaid holiday pay. If she does, she must set out what sums of pay she is claiming, how she has calculated this and how many days of holiday pay she says are still owing.*

*1.1.2 She still pursues a claim for notice pay (wrongful dismissal). Does she accept that she has received her compensation for wrongful dismissal (i.e. her notice pay)? If not, how much notice pay does she say is still owed?*

*1.1.3 She still pursues any other claim of breach of contract. If she does, what term of the contract does she say was breached and to what compensation does she say she was entitled as a result? How has she calculated such compensation.*

*1.1.4 Some or all of her remaining claims are to be withdrawn (she should specify which). Does she consent to any withdrawn claims being dismissed by the Tribunal?"*

7. The claimant, the respondent contends, failed to comply with those orders at all, and, in fact never did.

8. The application, therefore, is quite straightforward. The claimant having failed to comply entitles the Tribunal to consider making an award of costs against her, regardless of questions of whether she acted unreasonably, which is a separate and distinct ground for making an award of costs.

**The claimant's response.**

9. From her email of 17 June 2024, the claimant does not appear to dispute that she did not comply with the Tribunal's orders. She seeks to explain, or excuse this, by reference to a number of factors.

10. Firstly she claims, though the respondent denies having sight of this, that she sent an email to the respondent on 19 April 2023 querying her final payslip, a copy of which she has provided to the Tribunal and the respondent. She did not receive a

reply. This caused her to struggle to understand her final pay, a struggle that continued up to and including the hearing on 15 May 2024.

11. She next refers to her mental and physical health issues from which she has suffered since her dismissal and its attendant effects upon her income and livelihood. She also cites her lack of familiarity with , or knowledge of Tribunal proceedings, and limited office skills and equipment.

12. She also cites that she was overwhelmed with paperwork, deadlines and lack of knowledge. She claims that she has provided medical evidence to support this.

13. She ends with a statement that she believed that once all the evidence had been gathered and submitted to the Tribunal it would be determined (presumably by the Tribunal) to “decide if any of the details was (sic) unlawful.” She considered that as she had submitted her claim and a hearing date had been given, her understanding was she had a case.

14. In terms of her financial position, the claimant has submitted that she is out of work, and in receipt of benefits as her sole income. She has, she says, no assets, and lives (or did at the time of her email to the Tribunal, she has not informed the Tribunal of any change) in rented accommodation, which, due to arrears, she was at risk of losing. She has disclosed a number of documents confirming her income from benefits, and the debts owed to various creditors , who have threatened enforcement action. This position, the Tribunal accepts, is only evidenced up to June 2024, but the respondent has not challenged the claimant’s contentions, or suggested in the interim that her parlous financial position has in any way improved.

15. That said, it is noted that amongst the debts for which the claimant is being pursued is one in respect of car tax, suggesting that she owns a vehicle (a 2002 Peugeot, it seems) , which presumably has some , if modest, value and could therefore be considered an asset. Quite what it is worth, however, is unclear, and it may be necessary for the claimant to keep it to enable her to find work.

### **Discussion and findings.**

16. The starting point, of course, is the Tribunal’s jurisdiction to award costs, which are, it is trite to say, the exception , as the Employment Tribunal is generally a costs free jurisdiction. Costs can , however, be awarded in certain exceptional circumstances, as set out in rule 74 (as it is now) which provides:

*74.—(1) The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of a party or, in respect of a costs order under rule 73(1)(b), a witness who has attended or has been ordered to attend to give oral evidence at a hearing.*

*(2) The Tribunal must consider making a costs order or a preparation time order 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 of it, or the way that the proceedings, or part of it, have been conducted,*

*(b) any claim, response or reply 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 that hearing begins.*

*(3) The Tribunal may also make a costs order or a preparation time order (as appropriate) on the application of a party where a party has been in breach of any order, rule or practice direction or where a hearing has been postponed or adjourned.*

17. The respondent relies upon rule 74(3). This is clearly engaged because the claimant did indeed breach the Tribunal's orders. That does not mean that the Tribunal must make a costs order, but it may do so, it has a discretion.

18. The respondent, at the hearing, submitted that there was no need for the Tribunal to be satisfied that the claimant acted unreasonably in breaching the Orders, breach was sufficient.

19. That , the Tribunal accepts, is correct, but the Tribunal still has a discretion, and the reasons why the claimant failed to comply with its Orders are relevant to the exercise of that discretion.

20. The claimant has given a number of explanations. That she is a lay person, and unfamiliar with Tribunal proceedings is not a good one. Many claimants are, but they still comply with the Tribunal's orders. The Orders in question in this case were clear, and discussed at a hearing.

21. The next matter relied upon by the claimant is her health, mental and physical. Whilst she has disclosed in her bundle some medical documents these are only copies (sometimes duplicated or triplicated) of prescriptions from December 2023 through to May 2024. The claimant has not even begun to explain what these medications are for, what conditions she suffered from, and how her health impacted in any way upon her ability to comply with the Tribunal's Orders.

22. This evidence falls way short of explaining her failure to comply with the Tribunal's orders. The Employment Judge in particular noted how, during the hearing before him, when given time and directed to consider the material that the respondent had produced some three months previously, she was able to do so, with the result that much of her claims fell away. It was hard to avoid the conclusion that the claimant had avoided giving this material the scrutiny it needed, because she did not want to see that it would not advance her case.

23. As noted in the respondent's application, the claimant was warned by the Tribunal in its letter of 23 April 2024 of the potential consequences of her failure to comply with its Orders, but , with three weeks still to go until the hearing, she did nothing.

24. Thus, the Employment Judge is not satisfied that there was any good excuse or explanation for the claimant's lack of compliance with the Tribunal's Orders. On that basis, the Employment Judge sees no reason why the claimant should not, in principle, be ordered to pay costs because of her failure to comply with the Tribunal's Orders.

**Ability to pay.**

25. The Tribunal, however, before making any award of costs can have regard to the paying party's ability to pay, as provided in what is now rule 82, which provides:

*82. In deciding whether to make a costs order, preparation time order, or wasted costs order, and if so the amount of any such order, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.*

**The amount sought, and summary assessment of the amount of costs.**

26. The respondent has limited its application to the period from 9 February 2024 to 15 May 2024. The former date is that of the previous hearing, when the claimant was provided with the statement of Samantha Kilgour, from which the claimant was, or should have been, able to see how her final pay had been calculated, and the latter, of course, was the hearing date.

27. In terms of the sums claimed, the respondent is seeking (by implication) summary assessment of its costs. The claimant has not challenged any elements in the Schedule, but that does not mean that the Tribunal should simply accept it.

28. The Tribunal has no quibble with the hourly rate claimed for the fee earner, which is within the Guideline Rates, nor the work done in terms of emails in and out, nor the time spent on attendances and preparation, which it would allow.

29. Turning to Counsel's fees, these are claimed in the sum of £1,850.00. Ms M Bouffé is 2019 Call. The claims, by the time of the hearing on 15 May 2024 had been reduced considerably. The unfair dismissal claim had been dismissed at the hearing in February 2024. Whilst they were still unclear, the remaining amounts at stake, it now transpires were, in total £300, from the claimant's last email. Whilst the use of counsel is justified, and there remained some difficult issues, even without clarification from the claimant, it must have been clear that the amounts at stake were now quite modest.

30. With all due respect, and not wishing to begrudge Counsel their due, a Brief Fee of £1,850 is disproportionate in the circumstances. The Employment Judge would disallow £600, and allow a Brief Fee of £1,250.

31. Additionally, VAT is sought on Counsel's Fees (though not, curiously, upon the Solicitors' Costs). The Employment Judge would expect that the respondent was VAT registered, and hence any VAT paid would be reclaimable.

32. On that basis , the Employment Judge would assess the respondent's costs at £2,312.00

**The award to be made against the claimant.**

33. The final question, however, is whether that, or indeed, any sum should be paid by the claimant. The claimant has relied upon a number of factors, but it must not be overlooked that she was quite capable of seeking reconsideration of the Tribunal's judgment from the hearing of 9 February 2024, and, further that she had 3 months from the date of that hearing in which to assess the position from the information and evidence that had then been produced by the respondent. She failed to do so, and only really did so in the hearing on 15 May 2024. As she is out of work, and this was not a big exercise, she could and should have undertaken, as the Tribunal urged her to, this exercise much earlier.

34. The most compelling argument against the claimant being ordered to pay any , or the full, amount of the costs is her ability to pay. She has produced evidence of arrears in paying her council tax, car tax, credit union repayments, and her rent, resulting in the threat (not it seems carried out) of eviction.

35. On the face of it, she has little or no ability to pay any sum. That is on the basis that there has been no material change in her circumstances since her email of 17 June 2024. As indicated, however, the Tribunal may not have a full picture, especially as it seems likely that the claimant owns, and is presumably able to run it, paying road tax , for MOTs, and, presumably, car insurance, albeit doubtless with some difficulty. That may be a luxury she can no longer afford. Further , the evidence she has disclosed covers the period from late 2023 into early or mid 2024, but the Tribunal has no more up to date picture. On balance, in the absence of any challenge or evidence to the contrary, the Tribunal does accept that the claimant is in a poor financial position, and does not have spare income or capital from which to meet an award of costs.

36. Ability to pay , however, is a factor which may be taken into account, but lack of ability to pay is not of itself a ground for not making an award of costs (see **Arrowsmith v Nottingham Trent University [2012] ICR 159**).

37. In the circumstances, taking all these factors into account , the Tribunal orders the claimant to pay the sum of £250.00 towards the respondent's costs.

Employment Judge Holmes  
Date: 16 January 2025

JUDGMENT SENT TO THE PARTIES ON

Date:29 January 2025

FOR THE TRIBUNAL OFFICE