EMPLOYMENT TRIBUNALS

Claimant: **Ms O V Onwueneme**

Respondent: **Toynbee Hall**

Heard at: **East London Hearing Centre (via Cloud Video Platform)**

On: **14 May 2025**

Before: **Employment Judge Brewer**

Members: **A Berry**
J Houzer

Representation

For the claimant: In person

For the respondent: Mr P Hale, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant shall pay to the respondent costs in the sum of £6,602.50.

REASONS

Introduction

1. This case was heard that a substantive hearing in August 2023 and the judgment was sent to the parties on 30 August 2023. All of the claimant's claims failed.

2. The respondent made an application before costs and for various reasons it has not been possible to get the tribunal panel and the parties together before today and it is regrettable that it has taken 19 months or so to list this costs hearing.

3. Throughout the case the claimant was represented by a Mr. Brown. Correspondence from the tribunal and from the respondent has been with Mr. Brown and the notice of this hearing was sent to him. The respondent also sent a copy of the hearing bundle directly to the claimant in February 2024, before today's date was listed. However, that bundle although subsequently updated, did contain all of the relevant documents we considered today including a detailed response from the claimant to the costs application as well as financial documents.

4. At 10:00 this morning there was no appearance from Mr. Brown. The tribunal clerk contacted the claimant who said that she was not aware that the hearing was taking place, but she agreed to join the hearing.

5. They claim it explained that she had not heard from Mr. Brown for some time but also that she had received the bundle from the respondent which she had forwarded to Mr. Brown.

6. The tribunal asked the claimant whether she would like to make an application to postpone the hearing and she did. The application was short and based on the fact that she did not have and wanted a representative. For his part Mr Hale objected to the application. He confirmed that the claimant had received all of the relevant documents and indeed that she had written to him confirming that she had received those documents both electronically and by hard copy. Mr. Hill pointed out that there was a detailed response to the costs application in the bundle as well as financial information and more importantly that there have already been significantly delays in dealing with this matter and further delay was not justified in all of the circumstances.

7. The tribunal took time to discuss whether we should postpone and we remind ourselves of the overriding objective in the tribunal room. Part of the overriding objective is dealing with the cases in a way which is proportionate and of course avoiding delay so far as compatible with proper consideration of the issues. As far as the tribunal is concerned, we had sufficient information to deal with this matter even on the papers given the detail contained in the bundle and given the delay to date we determined that we should proceed with the hearing.

Law

8. We set out below a brief description of the relevant law relating to costs.

9. Costs are dealt with in Rule 74, the material part of which is as follows:

> **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…
>
> (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…

10. The fundamental principle is that costs orders are the exception rather than the rule — see the statement to that effect in **Yerrakalva v Barnsley Metropolitan Borough Council and anor** 2012 ICR 420, CA.

11. Where the conduct of a party (or of his or her representative) is 'vexatious, abusive, disruptive or otherwise unreasonable', rule 74(2)(a) provides that the tribunal must consider whether to make a costs order or PTO. Therefore, it has a duty to consider making an order but has discretion as to whether or not to actually make the award. In other words, the Tribunal Rules impose a three-stage test: first, the tribunal must ask itself whether a party's conduct falls within rule 74(2)(a) — in other words, is its costs jurisdiction engaged, if so, secondly, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party and the third stage is the determination of the amount of any award.

12. It is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented (see for example **AQ Ltd v Holden** 2012 IRLR 648, EAT).

Unreasonable conduct

13. The word 'Unreasonable' is to be given its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' — **Dyer v Secretary of State for Employment EAT** 183/83.

14. In determining whether to make an order under this ground, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — **McPherson v BNP Paribas (London Branch)** 2004 ICR 1398, CA. However, the tribunal should not misunderstand this to mean that the circumstances of a case have to be separated into sections such as 'nature', 'gravity' and 'effect', with each section being analysed separately (see **Yerrakalva** above).

No reasonable prospects of success

15. Under the Tribunal Rules, the focus is simply on whether the claim had reasonable prospects of success. The issue of whether it was the claimant or her representative who is responsible for the claim being brought or pursued is irrelevant. In other words, a party cannot hide behind the conduct of his or her representative for the purpose of deciding whether or not the 'prospects of success' ground is made out.

16. In **Radia v Jefferies International Ltd** EAT 0007/18 the EAT dismissed an appeal against an employment tribunal's decision to award the respondent employer the whole of its costs, potentially amounting to over £500,000, on the basis that the claim had no reasonable prospects of success. In so holding, the EAT gave guidance on how tribunals should approach costs applications under what is now rule 74(2)(b). It emphasised that the test is whether the claim (or response or reply) had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. Thus, the tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. In doing so, it should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time. The EAT went on to clarify that the mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not necessarily mean that the tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, or that the claimant could or should have appreciated this from the outset. That still depends on what the claimant knew, or ought to have known, were the true facts, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts. Applying that to the present case, the EAT was satisfied that there was sufficient evidence for the tribunal's conclusion that the claimant did not believe that there was genuine merit in his claims.

Discussion and conclusions

17. We turn now to our discussion and conclusions on the respondent's application.

18. We start by looking at the judgment we made after hearing all of the evidence in this case.

19. The claimant pursued claims for direct race and age discrimination, failing to make reasonable adjustments and victimisation. All of the claims failed.

20. In relation to the claims for race discrimination we found that Did not shift the burden of proof in respect of any allegation and that even if she had, it was perfectly clear from the contemporaneous evidence that none of the things complained about either took place or if they did take place did not take place because of the claimant's race. We stress this is not a case where there was a balance to be drawn between what the respondent said and what the claimant said. Even if we accepted the claimant's case at face value that is to say on the facts as she presented them, there was simply no evidence that she suffered less favourable treatment that alone let's raise will treatment because of race.

21. There was no evidence that the claimant was required to have a meeting with her manager with another colleague being present. This was a mere assertion by the claimant with no supporting evidence.

22. The evidence in relation to the allegation that the claimant lacked support from her managers is directly contradicted by the contemporaneous documents in which it was clear that she along with her colleagues were given the same support in the form of precedent documents, updates to those documents, cascading of information and online resources.

23. The claimant led no evidence on her allegation that, as she put it, “Caucasian colleagues” were praised more than she was.

24. We see no need to go through all of the other allegations because in each case the issue is the same, either there was no difference in treatment or even if a difference in treatment could be discerned from the fact, which in fact was not the case according there is no evidence to support the contention that this had anything to do with race and everything to do with the circumstances at the time. For example, the claimant complained that it was race discrimination but when her manager was out of the office, she asked a colleague other than the claimant to manage the team, but even if that was the case the claimant gave no explanation as to why she says that was because of race.

25. The mindset of the claimant is exemplified by the last two allegations of race discrimination. These are that the claimant was demoted and suspended neither of which happened. The claimant was off work because she failed to perform with her role putting her job at risk and indeed putting the respondent at risk as we set out in our judgement. In order to get her back to work the respondent offered her the opportunity to do a slightly different job. There was no demotion. The claimant was not suspended she took extended leave whilst the respondent tried to get her back to work in a meaningful role.

26. All of this was in the claimant's knowledge before she brought her claim.

27. The position in relation to age discrimination is, if anything, even more egregious.

28. There was an allegation that the claimant’s manager gave more attention and support to less experienced colleagues, but no evidence was provided of this.

29. The second allegation related to support emotion to mental health issues which had nothing whatsoever to do with an allegation of age discrimination allegation was that the claimant’s manager did not ask her about what she referred to as her “condition” without any evidence or indeed without saying what condition she was referring to and without connecting this to age.

30. As with all of the allegations of direct discrimination whether in relation to race or age the claims were doomed to fail from the start because they were based on mere assertion and were either factually incorrect, lacking in specificity and in each case lacking the necessary evidence of any connection between what the claimant was complaining about and either race or age.

31. In relation to the claim for failure to make reasonable adjustments no PCP was pleaded and in cross examination it also became clear that the claimant could not articulate a substantial disadvantage. However, on the facts it was clear that the respondent did in fact provide adjustments for the claimant including auxiliary aids and home working and again this claim was doomed to fail from the start.

32. The final claim of victimisation was wholly unparticularised with a general reference to the claimant being harassed without any detail whatsoever the claimant was demoted which we have done with above. There was no demotion.

33. In the circumstances we find that this claim had no reasonable prospects of success from the very beginning. All of the matters referred to above all work within the claimant's knowledge at the time and indeed well before she made her complaint to the employment tribunal.

34. For very much the same reason we also find that the embers behaviour in bringing and continuing with this claim was unreasonable. She was warned a number of times by the respondent that she may face an application for costs if she persisted in continuing with her claim. Nevertheless, she carried on regardless which, as we say, was unreasonable conduct.

35. We should add for the sake of completeness that the claimant's position set out in a response to the application for costs seems to us to amount to a rather bizarre argument that it was the respondents fault that the case went to an employment tribunal because the respondent failed to pay the claimant a sum of money to settle the case. It is bizarre because the respondent was entirely correct in its assessment and cannot be blamed for defending itself against wholly unmeritorious allegations of race and age discrimination.

36. We therefore conclude that the threshold test is met.

37. That leaves the question of whether we should exercise our discretion to make the award of costs.

38. The respondent is a charity, and its principal purpose is to assist people in financial difficulty with for example debt problems. The evidence we saw shows a supportive work environment for staff of various ethnicities. The respondent was put to not insignificant cost in terms of legal fees but also in terms of management time taken up with dealing with these complaints including a number of members of staff having to spend 3 days in an employment tribunal.

39. As to the nature and gravity of the unreasonable behaviour, given that much of what the claimant said took place did not in fact take place and given the impact or potential impact on the respondent we have no doubt that we should exercise our discretion in making an award of costs.

40. In relation to the amount of costs we questioned the claimant on her finances to update the information contained in the bundle the claimant is now in receipt of a state pension, she has savings in excess of £10,000. She does not have a mortgage, but she is paying rent. She lives with her husband who is also in receipt of a state pension. The claimant has several bank accounts, and her husband has his own separate bank accounts.

41. We are satisfied that the costs sought by the respondents are reasonable in all the circumstances and given the financial information we have and all of the other matters we have set out above we are satisfied that we should make an award for the full sum sought by the respondent and as set out above in our judgement

Employment Judge Brewer
Date: 14 May 2025

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/