



# EMPLOYMENT TRIBUNALS

**Claimant:** Angela Hunter

**Respondent:** Northern Divers (Engineering) Limited

**Heard:** in chambers on the papers **On:** 25 June 2024

**Before:** Employment Judge Ayre, sitting alone

## JUDGMENT

The claimant is ordered to pay the sum of £1,155 to the respondent in respect of the costs incurred by the respondent.

## REASONS

### Background

1. The claimant was employed by the respondent as a payroll clerk, from 2 November 2015 until 5 May 2023. On 26 October 2023 she started ACAS early conciliation. Early conciliation ended on 7 December 2023 and the claim form was presented on 6 January 2024. On the claim form the claimant ticked the boxes indicating that she is making claims for age and sex discrimination and for 'other payments'. Her claim form appeared to include a complaint of equal pay, relying upon a comparator named Jake.
2. The respondent defended the claim. In its response it submitted that:
  - 2.1 The facts as set out in the claim form were misleading and materially inaccurate;
  - 2.2 The claims were out of time;
  - 2.3 Between August 2020 and April 2023 the claimant stole nearly £80,000 from the respondent;
  - 2.4 The claimant was dismissed for the theft, and subsequently pleaded guilty to the theft of nearly £85,000 from the respondent;
  - 2.5 Jake is not an appropriate comparator for an equal pay claim; and
  - 2.6 The claims are without merit and made maliciously and vexatiously.

3. The respondent also, in its Grounds of Resistance, indicted that it wished to apply for the claims to be struck out and that it would be making a costs application.
4. The case was listed for a Preliminary Hearing in public on 30 April 2024. The claimant did not attend the hearing. Attempts were made to contact her, but to no avail. The hearing went ahead in her absence and all of the claims were struck out. The reasons for the decision are set out in the Judgment sent to the parties on 7 May 2024.

### The costs application

5. At the end of the Preliminary Hearing the respondent's solicitor made an application for the costs of preparing for and attending the hearing, in the sum of £1,155. The application could not be considered during the hearing because Rule 77 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the Rules**") provides that no costs order can be made unless the paying party has had a reasonable opportunity to make representations in response to the application. As the claimant was not present at the hearing, she had not had a reasonable opportunity to make representations on the question of costs.
6. On 7 May 2024 the respondent made a written application for costs, which was copied to the claimant. In the application, the respondent applied for an Order that the claimant pay costs of £1,155.00 in respect of 3.5 hours' work by the respondent's solicitor in preparing for and attending the hearing on 30 April 2024, at an hourly rate of £275 plus VAT.
7. The grounds for the costs application, in summary, are that:
  - 7.1 Bringing the claims of age and sex discrimination was vexatious and/or unreasonable;
  - 7.2 The claims of age and sex discrimination were significantly out of time;
  - 7.3 The claim of equal pay had no reasonable prospect of success because the comparator identified by the claimant was flawed. Jake was a trainee diver and subsequently a qualified diver doing skilled work away from home in dangerous environments, whereas the claimant was a payroll clerk; and
  - 7.4 The claimant's conduct of the proceedings was unreasonable including because the claimant failed to attend the hearing.
8. The application was forwarded to the claimant for her comment. The parties were also asked for their views as to whether the costs application could be dealt with on the papers or required a hearing. The respondent indicated that it was happy for the costs application to be determined on the papers without a hearing. The claimant indicated that it would be impossible for her to attend a hearing of any format, and that no hearing was required.
9. In light of the representations of the parties, the costs hearing was listed to take place on the papers, in chambers, and the parties were informed that they did

not need to attend but could submit written representations if they wished to do so.

10. The claimant wrote to the Tribunal on 27 May 2024 setting out her response to the costs application. In summary, this was that:
  - 10.1 None of the claims were vexatious or untrue;
  - 10.2 Her actions were not vexatious or unreasonable;
  - 10.3 The claims were brought together with an equal pay claim that was in time;
  - 10.4 The equal pay claim did not rely on just one comparator and she compares herself also with “*other managers who work in the office and have no more experience*”;
  - 10.5 Jake was not a flawed comparator;
  - 10.6 Her current circumstances are overwhelming and she was unable to attend the Preliminary Hearing because she was in extreme distress;
  - 10.7 She is in severe financial hardship and currently unemployed;
11. The respondent sent written submissions to the Tribunal on the 5 June 2024. In those submissions, the respondent repeated the comments made in its application for costs, and also submitted that It was vexatious and unreasonable conduct on the part of the claimant not to inform the Tribunal that she was unable to attend a hearing, or to withdraw her claims.

## The Law

12. The rules governing applications for costs are set out in Rules 74 to 78 and Rule 84 of Schedule 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 (“**the Rules**”). The relevant rules for the purpose of this application are:

### 12.1 Rule 77 (Procedure):

*“A party may apply for a costs order... at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

### 12.2 Rule 76 (When a costs order or a preparation time order may or shall be made):

*“(1) A Tribunal may make a costs 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....”*

12.3 Rule 78 (The amount of a costs order):

*“A costs order may –*

- (a) Order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;*
- (b) Order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles...”*

12.4 Rule 74 (Definitions):

- (1) “Costs” means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing)....*
- (2) “Legally represented” means having the assistance of a person (including where that person is the receiving party’s employee) who –*
  - a. Has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in country courts or magistrates’ courts;*
  - b. Is an advocate or a solicitor in Scotland; or*
  - c. Is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.*
- (3) “Represented by a lay representative” means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.*

12.5 Rule 75 (Costs orders and preparation time orders):

*“(1) A costs order is an order that a party (“the paying party”) make a payment to –*

- (a) Another party (“the receiving party”) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*
- (b) The receiving party in respect of a Tribunal fee paid by the receiving party; or*
- (c) Another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual’s attendance as a witness at the Tribunal.”*

12.6 Rule 84 (Ability to pay):

*“In deciding whether to make a costs...order, and if so in what amount, the Tribunal may have regard to the paying party’s...ability to pay.”*

13. Costs remain the exception rather than the rule in Employment Tribunal proceedings (***Gee v Shell UK Ltd [2003] IRLR 82***). This does not, however, mean the facts of the case have to be exceptional in order for a costs order to be made (***Power v Panasonic (UK) Ltd UKEAT/0439/04***).
14. In deciding whether to make an order for costs, the Tribunal must first consider whether the conduct of the claimant falls within Rule 76. If it does, the Tribunal must then go on to consider whether to exercise its discretion to make an award of costs and, if so, how much. The mere fact that a party’s conduct has been unreasonable or that a party has pursued a claim which did not have reasonable prospects of success does not mean that a costs award will automatically follow.

## Conclusions

15. In reaching my decision on whether to make a costs order in this case, I have taken account of the fact that the Tribunal has a wide discretion when it comes to making costs orders, but also that costs do not normally ‘follow the event’ in Employment Tribunal litigation.
16. The first question I have had to consider is whether the claimant’s conduct falls within Rule 76, and specifically whether the claimant has acted vexatiously or unreasonably in the bringing or conducting of the proceedings and/or whether any claim had no reasonable prospect of success.
17. At the Preliminary Hearing on 30 April I found, for the reasons set out in the Judgment sent to the parties on 7 May 2024, that the complaints of sex and age discrimination were both vexatious and had no reasonable prospects of success. I also found that the equal pay claim had no reasonable prospects of success. The discrimination complaints were presented significantly out of time, and no explanation was provided for the delay. Although the equal pay claim was presented in time, the defence submitted by the respondent appeared robust.
18. In her response to the costs application the claimant suggests that in the equal pay claim she is relying not just on Jake as a comparator, but also on other managers. This allegation does not appear to be contained in the claim form, however, and is now being made for the first time. The assertion does not bring into question the conclusions I reached at the hearing on 30 April about the merits of the equal pay claim.
19. Whilst non attendance at a hearing is not, in itself, grounds for making a costs order, it can be taken into account when considering the claimant’s conduct overall in bringing and conducting the proceedings. The claimant in this case, having been dismissed for stealing almost £85,000 from her employer, issued proceedings seven months after that dismissal and, having filed her claim on 7 December 2023, took no further part in the proceedings until she wrote to the Tribunal on 29 May 2024 objecting to the costs application.

20. There is no evidence before me of the claimant having made any attempt to contact the Tribunal prior to the hearing on 30 April to explain her non-attendance or seek a postponement, or even to submit written representations if she was not able to attend. She took no further steps to progress her claim.
21. Moreover, the claimant has provided very limited explanation for the manner in which she has conducted the proceedings. In her letter of 27 May she refers in general terms to being in distress and in a difficult situation but provides very little detail or information. Although the claimant writes that she is unable to attend a hearing, she has not suggested that she was unable to write to the Tribunal, and indeed she has done so.
22. For these reasons, I am satisfied that the conduct of the claimant in both bringing and conducting the proceedings has been unreasonable, and that all of the claims had no reasonable prospect of success.
23. I have then gone on to consider whether I should exercise my discretion to make an award of costs and, if so, how much the claimant should be ordered to pay. In so doing, I have taken account of the very limited information before me about the claimant's ability to pay a costs order if one were to be made.
24. The claimant has provided some information about her ability to pay, stating that she is currently unemployed and in financial hardship. She has not however provided any information about what assets she has (for example, a car or family home) and the respondent suggests that she is likely to have access to some funds. The claimant has not submitted any evidence to support the comments made in her letter of 27 May.
25. The fact that the claimant is unemployed and unrepresented does not prevent a costs order being made (***Vaughan v London Borough of Lewisham and others UKEAT/0533/23***)
26. The costs which the respondent seeks to recover in its application are, in my view, reasonable. They do not extend to all of the costs incurred in defending this claim but are limited to the costs of preparing for and attending one hearing. Just 3.5 hours of time by the respondent's solicitor are claimed.
27. The claimant is therefore ordered to pay to the respondent costs in the sum of £1,155.00.

Employment Judge Ayre

26 June 2024

Sent to the parties on:

28<sup>th</sup> June 2024

Kate Foster Jones

FOR THE TRIBUNAL OFFICE

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