EMPLOYMENT TRIBUNALS

Claimant: Mr I Kirby

Respondent: Lancaster University

HELD AT: Manchester in chambers without parties **ON:** 8 May 2025

BEFORE: Employment Judge Cookson
Mrs M Plimley
Ms P Owen

JUDGMENT ON COSTS

The claimant is ordered to pay to the respondent the total sum of £800 in respect of the respondent's costs
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REASONS

1. Following a hearing between 10 and 13 March 2025, the claimant's complaints of unlawful deductions from wages in relation to holiday pay, and unfair dismissal by reason of having made a protected disclosure and detriment on the ground of a protected public interest disclosure were dismissed.

2. At the conclusion of the hearing the respondent made an application that the claimant had acted unreasonably in pursuing his claim. The claim for costs was limited to the respondent's legal costs in attending the final hearing.

Employment Tribunal Rules of Procedure 2024

72. Definitions

In this Part—
"paying party" means a party liable to pay costs;

"preparation time" means time spent by the receiving party (including by any of the receiving party's employees or advisers) in working on the case, except for time spent at any final hearing;

"receiving party" means a party entitled to be paid costs.

73. Costs orders and preparation time orders

(1) A costs order is an order that the paying party make a payment to—

(a) the receiving party in respect of the costs that the receiving party has incurred while represented by a legal representative or a lay representative, or

(b) another party or 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 a hearing.

74. When a costs order or a preparation time order may or must be made

(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,…

75. Procedure

(1) A party may apply for a costs order or a preparation time 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.

(2) The Tribunal must not make a costs order or a preparation time order against a party unless that party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order).

76. The amount of a costs order

(1) A costs order may order the paying party to pay—

(a) the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined—

i. 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 the Tribunal applying the same principles;

ii. in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019, or by the Tribunal applying the same principles;

(c) another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses for the purpose of, or in connection with, an individual's attendance as a witness at a hearing;

(d) an amount agreed between the paying party and the receiving party in respect of the receiving party's costs.

(2) ……

(3) A costs order under sub-paragraphs (b) to (d) of paragraph (1) may exceed £20,000.

82. Ability to pay

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.

Submissions

3. In support of the application Mr Searle highlighted to us the following matters – the claimant had made an unreasonable application for costs in relation to the vacation of previous hearing despite there being clear evidence for the application for a postponement which was supported by medical evidence. The respondent has incurred costs to deal with that application.

4. Mr Searle also referred to us to the comments made by Employment Judge Barker at the hearing on 28 August 2024 when she had raised with the claimant the apparent contradiction at the heart of his case that he accepted there was no legal obligation to pay workers for an extra statutory bank holiday, but if it made a payment it was obliged to do so on a particular basis . He also argued the basis on which the protected disclosure detriment claims had been pursued showed the claimant was acting unreasonably because his case had been put to the respondent's witnesses not on the basis that he had made protected disclosures but because he had brought claim number 2404615/2023.

5. Mr Searle accepted that cost are the exception in the employment tribunal but the university, which is funded though public funds and fees paid by students had incurred over £98,000 in legal cost. This is case which should have lasted 2 days at most and the claimant had failed to focus on the essential elements of his case. The application for costs was limited to counsel's costs for this hearing and the necessary attendance of the instructing solicitor on the first day.

6. The claimant objected to the application. He told us that he did not accept that his position was contradictory and as a litigant in person it was not unreasonable for him to carry on with his case. In relation to the postponement issue he had a hunch that the respondent was using a tactic to delay the final hearing. He does not accept that his pursuit of his claim was unreasonable – he accepts the amount of holiday pay claimed was small, but

he believes it is principle which applies to many others. He reasonably believed the university was failing in its legal obligations.

7. The claimant told us that he is semi-retired. He usually earns around £1000 per month which covers his outgoings.

Information about means

8. Both parties indicated that they wished the issue of costs to be considered without a further hearing. The claimant was ordered to provide information about his means by 2 April 2025 and the respondent had the opportunity to make representations about the information provided.

9. The claimant sent us a financial statement and some copies of bank statements. We did not receive any representations about the information provided from the respondent, but the Tribunal did have some concerns about the extent of the information provided. In his financial statement the claimant referred to an NFU pension statement but did not provide any further information about that and clear about that was provided. In a document about remedy from November 2023 the claimant said this

> "Relevant Information
> Following my dismissal I have applied for Universal Credit however as I have savings in excess of £16,000 I don't qualify for benefits.
>
> I have taken a pension drawdown equivalent to roughly a years salary (28,000) to cover my lost salary and to take me through to the Hearing in June 2024. I then intend to pay this sum back into my pension once I have received the remedy award from the University and have been reinstated."

10. It seems therefore that the claimant has a pension in drawdown, but he has chosen not to provide us with information about that. His financial statement says he has £4,721 in savings which is consistent with the bank statements, but the Tribunal cannot determine from the information he chose to provide whether this is all that is left of £28,000 or whether there are other savings.

11. The information which we received about outgoings in is somewhat difficult to interrogate. We were provided with extremely limited information about outgoings in the financial statement and the copy bank statements were not clear. It does seem likely that the claimant has some debts from some of the references to a credit card company and to a debt payment in his direct debits seen in the bank statements. The information was unclear, but we did not consider that it would be in accordance with the overriding objective to delay our decision further in the absence of any presentations for the respondent. Based on the information which was available to us we concluded that this is a claimant with somewhat limited means, but with some disposable income and some accessible savings.

Our approach to the Rules, discussion and our conclusions

12. In the absence of a deposit order Rule 74(1) imposes a three-stage test in considering costs: first, the tribunal must ask itself whether a party's conduct falls within rule 74(1)(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.

13. In terms of the first stage, the unreasonableness of the claimant's conduct in bringing or pursing the claim, we concluded that the threshold had been met. The claimant is a litigant in person. As Mr Searle reminded us, lay people are not immune from orders for costs: far from it, as the cases make clear. However, we also recognised that we cannot judge a litigant in person by the standards of a professional representative. Justice requires that tribunals do not apply professional standards to lay people and we recognise that lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser.

14. We accept Mr Searle's submission that the information recorded by Employment Judge Barker in her case management order is significant. The case management hearing summary records this

(8) Previous case management orders have contained a summary of the case and it is not necessary to repeat the facts here. However, it is important to note that the claimant will say that he accepts that the respondent did not have a legal obligation to pay workers (as opposed to employees, or "staff" as the claimant referred to them) for an extra statutory bank holiday either for the Queen's funeral or the King's Coronation. His case is made on the basis that, having issued an email to "staff" (employees) to inform them that they would make such a payment, which he believes he received inadvertently, the respondent agreed to make a payment to him to acknowledge the extra bank holidays. The respondent accepts this, and part of the respondent's case is that this was done as a goodwill gesture.

(9) It is the claimant's case that having agreed to make a goodwill payment to him, and a goodwill payment to all workers and casual staff, the respondent was then obliged to (1) notify all workers (or "students" as the claimant referred to them during the hearing) that they were receiving a goodwill payment and why; and (2) the respondent was then obliged to pay the workers for the bank holidays at the same rates and on the same basis as employees. The claimant gave the reason for (2) as that the difference in payment rates was "unfair". He also said that he acknowledged that the respondent did not have an obligation to inform all workers as he suggested.

(10) The Tribunal noted that his arguments are somewhat contradictory. However, the claimant told the Tribunal that he had issued legal proceedings previously against the respondent on the basis that it had published information online (which is assumed to be its intranet) that it would pay workers for shifts cancelled due to Covid. When it did not then make such

payments, the claimant said that the Tribunal found that having promised to do so the respondent was then obliged to do so and he won his case. I noted that this did not appear to be the same as the circumstances of the current case.

15. We concluded that the claimant should have recognised this was a clear warning to the claimant that he needed to explain what the legal basis of his claim about holiday pay was. Of course, no deposit order was made by Employment Judge Barker, but nonetheless this tribunal concluded that the claimant was clearly warned that he needed to consider the basis on which he put his claim. Instead of heeding that, the claimant continued to pursue his claim against the respondent, without at any stage seeking to explain his legal claim beyond the explanation he had offered to Employment Judge Barker, in essence that he thought what the university had done was unfair.

16. In relation to his holiday pay claims the claimant failed to put forward any suggestion of what he says his entitlement to holiday pay was, relying on the fact that in a letter from duty in response to an application for an unless order from the respondent before it filed its response to the first claim Employment Judge Horne had said this:

"It is relatively clear what remedy the claimant is seeking. He wants to be paid holiday pay at the "12.55% formula", that is, the rate of 12.55%, multiplied by his hourly rate, multiplied by the hours he worked between 1 October 2021 to 30 September 2022, and the hours he worked between 1 October 2022 and 21 April 2023. He will give credit for any holiday pay he has actually been paid.

He also appears to want a declaration that his statement of particulars of employment should contain a term entitling him to holiday pay at the 12.55% formula between 21 April 2023 and 30 September 2023. Whether or not the claimant is entitled to any of that is another matter. That is what will be decided at the final hearing.

The tribunal's letter of 16 May 2023 ordered the claimant to specify the amount he is claiming, but it is hard to see why the respondent would want to wait for the claimant to calculate the precise figures before deciding what evidence it wants to rely on. At the final hearing, the tribunal will determine the claimant's entitlement to annual leave under regulations 13 and 13A of the Working Time Regulations 1998 and the amount of a week's pay under regulation 16. If once those issues are determined, the claimant's entitlement to holiday pay would exceed the amount that would be reached by applying the 12.55% formula, the tribunal will cap his award the amount he would receive under the 12.55% formula. If the claimant wants that cap to be lifted, he will have to apply to amend his claim. If it is the claimant's case that holiday pay at the 12.55% formula was properly payable under the terms of his contract, the tribunal will decide what if any agreement was reached.

17. However, there were two problems with the claimant relying on this right up until this hearing. First as made clear in the agreed list of lists, the claimant

did not accept that Employment Judge Horne was right in his summary of the claimant's case and in fact he expressly disputed that the 12.55% formula should be taken into account. That being the case it was for the claimant to set out what he was claiming was the unlawful decision of wages which had been made.

18. The claimant has consistently referred to the decision of the Supreme Court in in *Harpur Trust v Brazel* to say that the university was using an improper method of calculation and of course he is right that for part year workers, the practice of paying holiday pay at 12.07% was found to be unlawful. However, the claimant has consistently failed to offer any basis for his argument that the statutory rules for the calculation of annual leave should apply in relation to the two bank holidays in question when they are days of leave which are in addition to the 5.6 weeks statutory leave under the Working Time Regulations (which the claimant has not disputed).

19. What is more the claimant argued that his holiday pay had been incorrectly calculated but nowhere in his evidence did he offer us details of the hours and days he had worked and the pay he had received over the relevant reference periods. In other words the claimant made no attempt to tell us to give us any reasoned account of the amount of holiday pay he should have received which would show he had suffered an underpayment of wages.

20. The claimant had similarly failed to address the fundamental elements of his "whistleblowing" complaints. In relation to his complaint that he had been unfairly dismissed, the claimant offered us very little evidence that he was an employee. In his witness statement and in his answers to cross examination and in the questions to put to the respondent's witnesses, the claimant's case was that the reason why his engagement in the procurement team (the alleged employment) and his engagements in other roles, were terminated was his first tribunal claim in these proceedings, not the protected disclosures he relied upon.

21. We concluded that the claimant has pursue this case unreasonably. As noted above, we recognised that the claimant was a litigant in person. We accept that he had a genuine sense of grievance, and we did conclude that the communications issued by the university to "ERS" workers and to staff were not clear. That did not help matters, but we accept that the claimant came to the tribunal having failed to pay sufficient attention to the guidance provided to him by judges in the course of case management hearings which spelt out in clear terms what he would have to show to succeed in his claims. His failure to engage with that meant that his claims had no reasonable prospect of success and his pursuit of this claim to a hearing in those circumstances was unreasonable. The claimant ought to have recognised from the information provided that a sense of grievance is not enough to succeed in a claim.

22. Having said that we do not accept that the respondent is entitled to criticise the claimant because the amount of holiday pay, he was claiming was modest. It was clear the claimant genuinely believed that his claim would

have wider implications for other staff and in any event employees and workers are entitled to redress under employment legislation even if all that is made is a declaration in their favour.

23. We concluded on that basis that the threshold for a costs order had been met under Rule 74(2). We therefore had to conclude whether we should exercise our discretion to make a costs order.

24. We reflected on that carefully. As the Court of Appeal reiterated in *Yerrakalva v Barnsley Metropolitan Borough Council and anor* 2012 ICR 420, CA, costs in the employment tribunal are still the exception rather than the rule. In that case the Court of Appeal noted that the tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event. We had to decide whether to use that power to award costs in the circumstances here.

25. We concluded that we should exercise our discretion to make a costs order in this case. The claimant's failure to engage with the legal issues was a serious failing. The claimant had brought a previous claim against the respondent. He had experience of the process and must have known that he would have to prove his claims. Despite that the claimant had not properly considered whether he could prove his claims. The claimant was also aware from his previous litigation of the significant costs the respondent would incur in dealing with his claim. Despite knowing that he still failed to properly engage with the litigation process and must have realised that meant the respondent would waste its costs.

26. When it came to the amount we should award in costs to the respondent, we had regard to the claimant's means. Although we had misgivings about the quality of the financial information provided to us, as noted above, we could see that the claimant's means appear to be limited. We do not consider to be in accordance with the overriding objective for us to make an order which could cause significant financial hardship for the claimant. We had found the claimant to have acted unreasonably but as explained in our liability judgment we also concluded that the respondent could be criticised for the equivocal information it provided to staff about payments for the additional days holiday. The claimant had rightly identified that using the fixed percentage approach to holiday pay was unlawful (at the time), albeit that was not relevant to the additional bank holiday, and we understood the claimant's sense of grievance when it was clear that the reason for the decision to terminate the claimant's engagements with the respondent was related to his first claim in this case. We accepted that was some mitigation.

27. We concluded that the claimant's unreasonable conduct had extended the length of the hearing and although we did not find it in accordance with the overriding objective to order the claimant to pay all of the respondent's wasted costs, equally we considered he should pay a contribution to those wasted costs. in the circumstances we concluded that we should order the claimant to pay the respondent the sum of £800 towards its costs. We

recognise that will not compensate the respondent for its costs of its hearing, but we conclude that is an appropriate and fair sum in the circumstances.

Approved by Employment Judge Cookson

Date: 18 June 2025

SENT TO THE PARTIES ON

24 June 2025

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FOR THE TRIBUNAL OFFICE