EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A Paraskeva	AND	Wessex Water Services Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 16 April 2025
By CVP

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person**
For the Respondent: **Ms J Renney-Butland, In-house Solicitor**

ORDER

The respondent's application for the claimant to pay a proportion of its costs of defending this action is refused and that application is dismissed.

REASONS

1. In this case the respondent seeks a contribution towards its costs of defending this action against the claimant.
2. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 50 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. General Background
4. the claimant commenced employment with the respondent in 2023 and was subject to a probationary period of six months. On 29 September 2023 the claimant was called to an investigation meeting to investigate complaints and allegations of alleged bullying and inappropriate conduct which had been brought against the claimant by other members of staff. In response the claimant raised a grievance which was investigated but not upheld. The claimant was informed of this on 1 November 2023 and went absent on sick leave from 3 November 2023. He appealed the grievance outcome which was investigated and dismissed. In December 2023 the claimant presented these proceedings against the respondent alleging age discrimination and detriment arising from protected public interest

disclosures. The alleged detriments were extension of the six months probationary period and alleged bullying by managers and HR advisers. The respondent offered the claimant a form of exit package by way of a potentially commercial settlement to avoid further legal costs, but this was rejected by the claimant.

5. The Tribunal then listed a preliminary case management hearing and notice was sent to the parties on 22 December 2023, with a prospective hearing date of 6 June 2024. The claimant applied to vacate this hearing on 13 May 2024 citing reasons of ill-health. In fact, the real reason for the application appears to be that the hearing had clashed with another tribunal hearing which was listed for seven days, in which the claimant was suing a different former employer for alleged detriment arising from public interest disclosures. On 5 June 2024 the Regional Employment Judge granted the claimant's request for an adjournment, but he noted that it was unclear why the claimant had failed to notify the tribunal and the respondent as soon as he knew about the clash of dates with the other tribunal hearing. The respondent asserts that this is because the claimant deliberately concealed the fact that he had issued an almost identical claim against his former employer. The case management hearing was then relisted by the tribunal for 27 November 2024, nearly a year after the date of issue of this claim.
6. On 18 October 2024 the claimant then wrote to the respondent to state that he had now withdrawn this claim. On 29 October 2024 judgment was issued confirming that this claim was dismissed on withdrawal by the claimant. The respondent asserts that the claimant withdrew this claim because he knew all along that it had no realistic prospect of success and the allegations have been made in bad faith. The respondent asserts the claimant cynically ran an unmeritorious claim until immediately prior to the adjourned preliminary hearing in the hope of forcing the respondent to make some sort of settlement.
7. <u>The Application for Costs</u>
8. In an amended and reduced application for its costs by letter dated 15 January 2025 the respondent now applies for costs in the sum of £337.50 plus VAT (totalling £405.00) on the basis that the claimant acted vexatiously, abusively and otherwise unreasonably in seeking a late postponement of the preliminary hearing on 6 June 2024. This was on the basis that the claimant had sought deliberately to mislead the tribunal by suggesting that his request for the adjournment was for medical reasons whereas it transpired that the true reason was that he was unable to attend the hearing on 6 June 2024 because he was attending another tribunal hearing against his former employer. The respondent asserts that the claimant's failure to progress his claim, misleading the tribunal and the respondent, and then withdrawing his claim without further action, was unreasonable and caused the respondent to incur unnecessary legal costs.
9. The claimant resists the application. The claimant's explanation for this conduct is as follows. In the first place he was genuinely ill with a serious kidney condition and was undergoing a series of medical examinations. He was not fit to return to work until October 2024. He says that he applied for a postponement of the case management preliminary hearing because he was not sure that he would be well enough to attend it pending confirmation of appropriate treatment. Secondly, the claimant asserts that he withdrew his claim on 18 October 2024 in circumstances where he was fit to return to work and had discussed the matter with a new line manager. He felt reassured because those managers whom he had alleged had caused him detriment have been redeployed elsewhere. Having been thus reassured he decided to return to work with a clean sheet and to give notice of withdrawal of these proceedings. He denies that he has acted unreasonably in either respect.
10. <u>The Rules</u>
11. The relevant rules are the Employment Tribunals Procedure Rules 2024 ("the Rules").
12. Rule 74(1) provides: "The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of the 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." Rule 74(2) provides: "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 the party made less than seven days before the date on which that hearing begins.

13. Under Rule 75(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. Under Rule 75(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).
14. Under Rule 76(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 …"
15. Under Rule 82, in deciding whether to make a costs, preparation time, 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.
16. The Relevant Case Law
17. I have been referred to and have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Dyer v SS Employment EAT 183/88; Monaghan v Close Thornton [2002] EAT/0003/01; Brooks v Nottingham University Hospitals NHS Trust [2019] WLUK 271, UKEAT/0246/18; NPower Yorkshire Ltd v Daley EAT/0842/04; Radia v Jefferies International Ltd [2020] IRLR 431 EAT; Arrowsmith v Nottingham Trent University [2011] ICR 159 CA; AQ Ltd v Holden [2012] IRLR 648 EAT Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Barnsley BC v Yerrakalva [2012] IRLR 78 CA.
18. The Relevant Legal Principles
19. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had." However, the Tribunal should look at the matter in the round rather than dissecting various parts of the claim and the costs application, and then compartmentalising it.
20. Unreasonable conduct in this context has its ordinary meaning – see Dyer v SS Employment. This can include a party making wholly unsubstantiated allegations, rejecting settlement, failing to check important legal principles, and pursuing a claim with no reasonable prospect of success. Each case will depend upon its own facts.
21. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.
22. In FDA and Others v Bhardwaj it was held that: "The citation of authority in applications for costs must be strictly constrained to those which genuinely establish a point of principle

not apparent from the words of the rules themselves. Costs awards do not operate by precedent. They are fact specific and to be determined as summarily as possible. The expectation must be that nothing more than the words of the relevant rule require addressing before the ET exercises its discretion on the particular facts of the case. When the threshold requirements for an order for costs are met under rule 76(1)(a) and/or (b) of the 2013 ET rules, it by no means follows that, because it may make a costs order, it will proceed to do so. It has a discretion. The discretion is very broad, and it would require a clear error of principle to justify an appeal, whether for or against an order for costs. In a case involving multiple issues, it will often be unrealistic to hive off some issues from others when addressing whether costs should be awarded and, if so, in what amount. Most cases stand or fall as a whole, even though in many cases there will be some issues on which the losing party is successful or partly successful. Issue-based costs orders are on the whole to be avoided.

23. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
24. In Brooks v Nottingham University Hospitals NHS Trust the EAT confirmed that dealing with an application for costs requires a two-stage process. The first is whether in all the circumstances the claimant has conducted the proceedings unreasonably. If so, the second stage is to ask whether the tribunal should exercise its discretion in favour of the claiming party, having regard to all the circumstances. In the case of reasonable prospects of success, the first stage is whether that ground is made out, and if it is, then to apply the exercise of discretion as to whether or not to award costs. When exercising that discretion at the second stage a tribunal can take account of reliance upon positive legal advice which had been received by the unsuccessful claimant, but positive professional advice will not necessarily insulate a claimant against a costs award. In the absence of any evidence as to the actual advice given, and the basis on which that advice was provided, it would be reasonable for a tribunal to assume that a legally represented claimant has been properly advised as to the risks and weaknesses of his or her case, and of the potential for an adverse costs order. Where privilege has been waived, such evidence would ordinarily need to explain the instructions given, the context in which the advice was provided, and the evidence considered.
25. There is considerable overlap between the two grounds in Rules 76(1)(a) and (b). This was analysed by HHJ Auerbach in Radia: [61] It is well established that the first question for a tribunal considering a costs application is whether the cost threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.
26. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests, the EAT has held that the status of a litigant is a matter which the tribunal must take into account – see AQ Ltd v Holden in which Richardson J commented: “Justice requires the tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought about by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests for an order of costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.” However, Richardson J also acknowledged that it does not follow from this “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". These statements were approved by Underhill P in Vaughan v London Borough of Newham.

27. Where a party has been lying this will not of itself necessarily result in a costs award being made, although it is one factor that needs to be considered. As per Rimer LJ in Arrowsmith v Nottingham Trent University it will always be necessary for the tribunal to examine the context, and to look at the nature, gravity effect of the lie in determining the unreasonableness of the alleged conduct.
28. Withdrawal of Claim:
29. Where a claim has been withdrawn, the question for the Tribunal is not whether the withdrawal of the claim is itself unreasonable, but whether the party concerned has acted unreasonably in the conduct of the proceedings, see McPherson v BNP Paribas. A tribunal should not therefore award costs simply because the claimant has withdrawn his or her claim. It should determine whether the conduct overall is unreasonable, and this includes the impact of the later withdrawal.
30. Conclusion
31. The application before me today relates to the limited matters of the claimant's conduct in (i) applying for a postponement of the original case management preliminary hearing for expressly stated medical reasons, when the real reason was because of a clash of dates with another hearing against his former employer; and (ii) taking no further action until a late withdrawal of the claim shortly before the relisted case management preliminary hearing. (I note however that the case management hearing had been relisted to be heard on 27 November 2024, and the claimant withdrew this claim some six weeks earlier on 18 October 2024.) This is said to be unreasonable conduct and the application is brought under Rule 74(1)(a).
32. The claimant's explanation for this conduct is as follows. In the first place he was genuinely ill with a serious kidney condition and was undergoing a series of medical examinations. He was not fit to return to work until October 2024. He says that he applied for a postponement of the case management preliminary hearing because he was not sure that he would be well enough to attend it pending confirmation of appropriate treatment. Secondly, the claimant asserts that he withdrew his claim on 18 October 2024 in circumstances where he was fit to return to work and had discussed the matter with a new line manager. He felt reassured because those managers whom he had alleged had caused him detriment have been redeployed elsewhere. Having been thus reassured he decided to return to work with a clean sheet and to give notice of withdrawal of these proceedings.
33. In the first place I conclude that the claimant did act unreasonably in making an application to postpone the first preliminary hearing on the basis of ill health. I accept that this could well have been a justifiable reason to make such an application at that time, but it is notable that the claimant made no such application to postpone the seven day hearing which was listed at the same time. It obviously would make sense to seek a postponement of the shorter hearing rather than to lose the seven day trial date, but that is not the point. He felt well enough to attend the seven day hearing in the other claim, but failed to tell the Tribunal in his application about the clash of dates and why he could not attend the shorter preliminary hearing.
34. In my judgment this was unreasonable conduct such as to engage Rule 74(1)(a). However, if the real reason had been given by the claimant at that time then the postponement of the preliminary hearing would surely have been granted in any event. In addition, the claimant's application was on 13 May 2024 nearly four weeks before the prospective date of the preliminary hearing, and it cannot be said to have been a deliberately late application so as to inconvenience the respondent or the tribunal. The respondent cannot really be said to have been prejudiced nor to have incurred any additional costs when in all likelihood the preliminary hearing would have had to have been postponed in any event. Applying the two-stage process in Monaghan v Close Thornton I find that the costs threshold is triggered, but I do not exercise my discretion to award any costs in this respect.

35. Secondly, with regard to the withdrawal of the claim, the claimant has given a sensible explanation as to why he withdrew the claim at that time. He wanted to return to work, he had a new line manager, and those whom he alleged had caused him detriment would no longer be managing him. He withdrew his claim at that time on 18 October 2024 at least six weeks before the relisted case management hearing which was due on 27 November 2024. That withdrawal saved the respondent further preparation time and also saved unnecessary time within the hard-pressed Tribunal service. I cannot find that the claimant's decision to withdraw his claim at that stage for the reasons given can be said to have been unreasonable conduct in the course of these proceedings.
36. For these reasons I refuse the respondent's application for costs, and it is hereby dismissed.

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Employment Judge N J Roper
Dated 16 April 2025

Judgment sent to Parties on
02 May 2025 By Mr J McCormick

For the Tribunal Office