Case Number: 3303997/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Audrey Pereira**

Respondent: **(1) Wellingtons Antiques Limited**
(2) John Michael Wellington

Heard at: **Reading Employment Tribunal**

On: **4 August 2025 (by video)**

Before: **Employment Judge Annand**
Ms Telfer
Ms Brown

Representation

Claimant: Mr Van Heck, Counsel
Respondents: Ms Millin, Counsel

CORRECTED JUDGMENT ON COSTS APPLICATION

1. The Claimant's application for a costs order against the Respondent is refused.

REASONS

Introduction

1. On 4 August 2025, the Tribunal held a hearing to decide a) the Claimant's application for reconsideration of the remedy judgment, and b) the Respondent's application for a stay of the enforcement of the remedy judgment. The parties were informed during the hearing that the Claimant's application was granted, and the Respondent's application was refused. At the end of the hearing, the Claimant's counsel made an application for costs for his attendance at the hearing on 4 August 2025. He applied for a costs award in the amount of £1,000 plus VAT to cover the costs which he says

were unnecessarily incurred by the Claimant.

Procedural background

2. The final hearing in this case was held between 2-5 September 2024. An oral judgment on liability was given on 31 January 2025. A remedy hearing was held on 24 February 2025. An oral judgment was given at the hearing, and a remedy judgment was written up on 25 February 2025 and sent to the parties on 20 March 2025. The remedy judgment ordered the First Respondent to pay the sums awarded to the Claimant.

3. On 1 April 2025 and 21 April 2025, the Claimant applied for the remedy judgment to be reconsidered. She asked that the First and Second Respondent be made jointly and severally liable for the compensation awarded for her successful discrimination claims. On 8 April 2025, the Respondents wrote to the Tribunal to apply for a stay of the enforcement proceedings on the basis that the Respondents are appealing the liability decision to the Employment Appeal Tribunal. Later in April 2025, the Respondents sent the Tribunal a copy of the Grounds of Appeal.

4. On 20 May 2025, the Respondent's solicitors wrote a letter to the Employment Tribunal in response to the Claimant's application to make the First and Second Respondent be made jointly and severally liable for the compensation awarded for discrimination claims. The Respondent's solicitors pointed to the parts of the liability judgment where the Tribunal had set out why it was refusing the Claimant's application to find that the Second Respondent was her "employer".

5. On 29 May 2025, the Tribunal sent the parties a letter. In the letter it stated that my provisional view was that the Claimant's application for reconsideration should be granted because it was held by the EAT in *LB Hackney v Sivanandan* [2011] IRLR 740 and *Bungay v Saini* UKEAT/0331/10, [2011] EqLR 1130, that where the discrimination damage done by employees is the same indivisible damage as that for which the employer is vicariously liable, the normal compensation order against all respondents will be one of joint and several liability. Further, the Tribunal did not intend to depart from the usual practice, but the wording of the remedy judgment mistakenly refers only to the First Respondent.

6. The Respondents were requested to provide a written response to the Claimant's application by 5 June 2025, setting out if it was accepted or disputed that the judgment should be reconsidered, and the Respondents' response to the Claimant's application.

7. It was also noted I had seen the Respondents' letter of 20 May 2025, regarding the Tribunal's decision, as set out in the liability judgment, to refuse the Claimant's application to add the Second Respondent as an "employer", but my preliminary view was that was a separate issue from the issue whether the compensation awarded for the discrimination claims should have been made on a joint and several basis. The Respondents were invited to respond to that point.

8. Both parties were asked to write to the Tribunal by 5 June 2025 setting out their views on whether the Claimant's application for reconsideration could

be determined without a hearing.

9. On 4 June 2025, a letter was received from the Claimant's counsel stating that the Claimant's views were that a further hearing was not necessary. He also made some short submissions regarding the reconsideration application.

10. On 5 June 2025, the Claimant sent a further email to the Tribunal.

11. The Respondents did not respond to the Tribunal's letter of 29 May 2025.

12. On 18 June 2025, the Tribunal sent a further letter to the parties. It stated that following the Tribunal's letter of 29 May 2025, the Tribunal had received the Claimant's counsel's letter of 4 June 2025 and an email from the Claimant, but no communication had been received from the Respondents. As a result, under the Employment Tribunal Rules 2024, it would be necessary to have a further hearing to decide the Claimant's application for reconsideration. It was noted a hearing would be listed for three hours by video.

13. It was also noted in the letter that the Tribunal had received the Respondents' application, dated 8 April 2025, for a stay of the enforcement proceedings pending the Respondents' appeal to the Employment Appeal Tribunal. It was noted this application would also be decided at the hearing. The letter set out that the Tribunal's preliminary view is that the Tribunal does not have the power to stay the enforcement proceedings, after the remedy judgment has been promulgated, because 1) the enforcement proceedings are not a matter for the Employment Tribunal but are dealt with by a different jurisdiction and 2) other than an application for reconsideration, the proceedings in the Employment Tribunal are concluded.

14. On 18 June 2025, a hearing was listed for 3 hours, by video, on 4 August 2025.

15. At the hearing on 4 August 2025, the Tribunal allowed the Claimant's application for reconsideration and refused the Respondent's application for a stay of the enforcement proceedings. Oral reasons were given for those decisions at the hearing.

The Claimant's application for costs

16. At the end of the hearing, the Claimant made an application for costs against the Respondents under Rule 74(2) of the Employment Tribunal Rules 2024 on the basis that the Respondents had acted unreasonably in the manner in which they had conducted the proceedings.

17. The Claimant argued the parties should not have needed to attend a further hearing. The Respondents should have replied to the Tribunal's letter of 29 May 2025. The Respondents' counsel had not been properly instructed, as was demonstrated by the fact that she did not have all the relevant paperwork before her (including the Tribunal's letter of 29 May 2025) and had to take instructions during the hearing about whether the Respondents had sent any response at all to the Tribunal in reply to the letter of 29 May

2025. Further, the Respondents had not put forward any proper basis for opposing the reconsideration application. The only argument put forward by counsel for the Respondents was that she had a note that at the remedy hearing counsel for the Claimant had asked that the remedy order be made against the First Respondent. The Claimant's counsel had said in his submissions he did not recall saying this but even if he had it was apparent from the Tribunal's letter that they had not made the order on this basis. It was noted in the letter of 29 May 2025 that the Tribunal did not intend to depart from the usual practice, but the wording of the remedy judgment mistakenly referred only to the First Respondent. In addition, the Respondents should have reviewed the merits of their application for a stay on receipt of the letter from the Tribunal of 18 June 2025 and not compelled a further hearing to be held.

18. In response, counsel for the Respondents argued that the bar is set very high for a costs order to be made. She disputed that there had been unreasonable conduct. Her notes did record the Claimant's counsel as asking for the award to be made against the First Respondent, and so it was not unreasonable for the Respondents to challenge the application for reconsideration. Even if the reconsideration application could have been dealt with on the papers, the Respondents' application for a stay would have still required a hearing.

19. In terms of explaining why the Respondents had not responded to the Tribunal's letter of 29 May 2025, counsel for the Respondents said it was not received by the fee earner in the case but was received by Mr Luiz-Barrea, who was not dealing with the case. He had been away on holiday, and it was not discovered until his return. The solicitor dealing with the case, Ms Thomas, was away from the office on the day of the preliminary hearing and so counsel for the Respondents was unable to take instructions from her. Her supervisor did not see the letter until the end of July.

20. Finally, counsel for the Respondents argued that although applications for reconsideration are often dealt with on the papers, it was not unreasonable conduct for the Respondents to want the Tribunal's opinion on the application for a stay of the enforcement proceedings.

The relevant law

21. Rules 73(1)(a) and 74(2)(a) of the Tribunal Rules 2024 gives employment tribunals the power to make a costs order against one party to proceedings to pay the costs incurred by another party on the grounds that a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings or part thereof.

22. Under Rule 75, 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. 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).

23. 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). 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. The third stage is the determination of the amount of any award.

24. In *Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2012] ICR 420, CA, the Court of Appeal stated that costs in the employment tribunal are still the exception rather than the rule. It commented 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, and the unsuccessful litigant normally has to foot the legal bill for the litigation. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the tribunal's power to specified circumstances — notably, unreasonableness in the bringing or conduct of the proceedings. The tribunal manages, hears and decides the case and is normally the best judge of how to exercise its discretion.

25. In *Yerrakalva,* the Court of Appeal stated that costs should be limited to those 'reasonably and necessarily incurred'. Furthermore, the amount of loss will not necessarily be determinative, since a tribunal may take into account other factors, such as the means and the conduct of the parties. The Court of Appeal confirmed that, in deciding whether to make a costs order, a tribunal does not have to determine whether or not there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed. Nevertheless, that was not to say that causation was irrelevant when deciding the amount of costs. 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.

26. The Court of Appeal also held in *Lodwick v Southwark London Borough Council* [2004] ICR 884, CA that it remains a fundamental principle that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party.

27. Under Rule 82, a tribunal may have regard to the paying party's ability to pay. A tribunal is not obliged by Rule 82 to have regard to ability to pay but is permitted to do so.

28. In *Howman v Queen Elizabeth Hospital Kings Lynn* EAT 0509/12, the EAT commented that any tribunal when having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

29. In *AQ Ltd v Holden* [2012] IRLR 648, EAT, the EAT stated that the threshold tests governing the award of costs or a preparation time order in what is now rule 74(2) of the Tribunal Rules 2024 are the same whether a litigant is or is not professionally represented, but that the application of those tests should take this factor into account. An employment tribunal cannot and

should not judge a litigant in person by the standards of a professional representative.

The Tribunal's decision

Stage 1: Did the Respondents act unreasonably?

30. The Tribunal accepted the submissions made by the Claimant in the application for costs that the conduct of the Respondents, and/or their representatives, was unreasonable in two respects:
    1) The failure to respond to the Tribunal's letter of 29 May 2025.
    2) The failure to take adequate steps to prepare for the hearing on 4 August 2025.

31. At the preliminary hearing on 4 August 2025, the Respondents did not have a good explanation for why they had not responded to the Tribunal's letter of 29 May 2025. While the Tribunal accepted that there was a short deadline for replying to the letter, it is usual practice for solicitors to ensure their cases are covered when they are absent on holiday. The Respondents could have written to the Tribunal to ask for an extension of time to reply or could have written in once the relevant solicitor had returned from leave. However, there had been no attempt to respond to the letter from when it was sent on 29 May 2025 to the date of the hearing on 4 August 2025, and no adequate explanation as to why not.

32. It was also apparent that counsel for the Respondents was not adequately prepared for the hearing. She did not have a copy of all the relevant documents, most importantly the Tribunal's letter of 29 May 2025. During the hearing, it was necessary for *the Tribunal* to send counsel for the Respondents a copy of all the relevant documents. It was also apparent that counsel for the Respondents had not been given adequate instructions as she needed to take instructions on at least two occasions to be able to assist the Tribunal, including seeking to ascertain if any response had been sent in by the Respondents, at any time, in reply to the letter of 29 May 2025.

33. The Tribunal did not however find it was unreasonable conduct for the Respondents to apply for a stay of the remedy judgment. Even though the provisional view of the Tribunal was, as set out in the letter of 18 June 2025, that the Tribunal did not have the power to make the order sought, the Tribunal recognised that this was not a straightforward matter. Neither party provided the Tribunal with any authorities that confirmed the position one way or another. The wording in Rule 64(2) of the Employment Tribunal Rules is not clear cut (Rule 64. *A party must comply with a judgment or order for the payment of an amount of money within14 days of the date of the judgment or order, unless (a) the judgment, order, or any of these Rules specifies a different date for compliance, or (b) the Tribunal has stayed (or in Scotland sisted) the proceedings or judgment*.)

34. The Tribunal also did not find it was unreasonable conduct for the Respondents to oppose the reconsideration application. Although the Tribunal did not consider that the Respondents' single opposing argument was a strong one, the Tribunal did not find that it met the threshold of being 'unreasonable conduct' for the Respondents to have made that argument.

35. Overall, the Tribunal found that although the Respondents had behaved unreasonably in some respects, it was probable that a further hearing would have been required in any event. Therefore, the Tribunal did not find that the unreasonable conduct had necessarily led to costs which the Claimant would not have incurred in any event.

Stage 2: Should the Tribunal exercise its discretion to award costs?

36. The Tribunal decided not to exercise its discretion to award costs in this case.

37. The Tribunal accepted it will have been frustrating for the Claimant to have been required to attend a further hearing, when she had acted in compliance with the Tribunal's letter and responded by 5 June 2025, and had indicated that her application for reconsideration could be dealt with on the papers. The Tribunal also accepts it would have been frustrating for the Claimant to have been informed that contrary to the Tribunal's instructions, the Respondents had not responded to the letter of 29 May 2025, and as a result, a further hearing would be required. However, that was not the only matter which the hearing was listed to consider.

38. While the Court of Appeal in *Yerrakalva v Barnsley Metropolitan Borough Council and anor* made it clear that a tribunal does not have to determine whether or not there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, the Tribunal considered it was important to take into account its finding that the Claimant would have likely incurred the costs in any event.

39. In this case, as the hearing was listed to decide both applications, and the Tribunal has not concluded that it was unreasonable for the Respondents to oppose the reconsideration application, and has not concluded that it was unreasonable for the Respondents to make an application for a stay of the enforcement of the remedy judgment, the Tribunal has decided not to exercise its discretion to make an award for costs.

Approved by:

Employment Judge Annand

9 August 2025

Corrected on 30 August 2025

JUDGMENT SENT TO THE PARTIES ON

18 August 2025

FOR THE TRIBUNAL OFFICE

Notes

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.