Case No: 3314463/2022

EMPLOYMENT TRIBUNALS

Claimant: Miss L Chivanga

Respondent: Allica Bank Limited

Heard at: Cambridge (by CVP) **On:** 9-11 December 2024, 31 January 2025, 11 April 2025, 23 May 2025 and 6 June 2025

Before: Employment Judge L Brown

Members Ms Davies

Mr Davie

Appearances

For the claimant: In person

For the respondent: Ms Arya - Counsel

RESERVED COSTS JUDGMENT

The application for a preparation time order by the Claimant against the Respondent made following conclusion of oral Judgment on the 6 June 2025 ('the Costs Application') succeeds in the sum of **£205.00.**

REASONS

Procedural History

1. This hearing was disrupted and had to be relisted three times for reasons we now set out.

2. The hearing commenced on the 9 December and went part-heard on the 11 December 2025. The Claimant gave evidence on the 9 and 10 December 2024. We tried to ensure completion of the hearing in the three days set aside for evidence and said that the cross-examination of the Claimant must finish by 1.00 pm on the second day of the hearing on the 10 December 2024, so as to allow the Claimant from midday on the 10 December to midday on the 11 December to complete her cross-examination.

3. At 2.15 pm on the second day of the hearing the Claimant commenced her cross-examination of the Respondents only witness. I said that we would give oral Judgment and I indicated that we would sit as a Tribunal to deliberate on the Friday the 13 December following the hearing concluding on the 11 December 2025, with oral Judgement to be given on Tuesday the 17 December 2025.

4. However, it became clear that the Claimant required more time to cross-examine the Respondents witness on the 11 December, and she had some childcare issues that meant she thought she could not complete her cross-examination of Ms Nutkin that day. It transpired in the event that she could continue her cross-examination that day and did so until 4.00 pm but had still not completed her cross-examination by that time.

5. The hearing was therefore relisted to conclude on the 31 January 2025 with the Claimant cross-examining from 10.00 am to 12.00 and for the Tribunal then to hear closing submissions so that we could then deliberate that day after cross examination of Ms Nutkin concluded that day, with oral Judgment then taking place on another date to be set in 2025.

6. I said I would re-list the matter for oral Judgment on a date to be fixed with the parties.

7. At this point in the hearing the Claimant was still cross-examining the Respondents only witness Ms Carly Nutkin.

8. The hearing was therefore re-listed for one day for the Friday 31 January 2025 for one day. I set a timetable and ordered that from 10.00 am until 12.00 am Ms Chivanga would complete her cross-examination of Ms Nutkin. I said we would have written submissions to be exchanged prior to that hearing with each party being given another fifteen minutes to address this Tribunal orally that day.

9. Prior to the 31 January 2025 this Tribunal had been alerted to the fact by an email from Counsel for the Respondent that a matter had arisen about

Ms Nutkin, while under oath, and following the last hearing, contacting her Solicitors, and in particular the external solicitor for the Respondent, about the claim and in particular in order to make her complaints about me as a Judge.

10. This was a disappointing development as the witness Ms Nutkin had been given clear instructions not to discuss the case under oath. We told the Respondent we were considering now whether to strike out the Respondents response based on this conduct. The Claimant addressed us on this issue and said that the Response should be struck out.

11. After deliberating we concluded that whilst disappointing conduct by the witness for the Respondent this had not corrupted her evidence. We noted that she had made one indirect comment about her evidence when she said,

'..*My anxiety is through the roof, as it was when I was managing Lynette. Involving HR in every meeting with Lynette was a way to protect myself and Lynette but I feel as though this isn't being taken into consideration*. **[our emphasis added] '.**

However, we concluded this comment was a complaint about my conduct as the Judge not taking her evidence into consideration rather than seeking input into her evidence that was not concluded at this point. We noted other than this there was no other reference indirect or otherwise to her evidence and the reply from the external solicitor did not discuss her evidence in any way.

12. We did note that she had started her communication by saying: -

'I am conscious I am under oath but wanted to reach out to talk about yesterday.'

13. However, we concluded that she hadn't discussed her evidence in any detailed way and so we decided not to strike out the claim. We did not conclude that our trust in the witness had been destroyed by her conduct and we concluded that a fair trial was still possible in accordance with the legal tests set out in cases such as **Sud -v London Borough of Hounslow – EAT 2014,** and **Ms S Chidzoy v British Broadcasting Corporation: UKEAT/0097/17/BA.**

14. We also considered whether it would be proportionate to strike out in accordance with the case of **Bolch-v-Chipman 2004 IRLR 140** which established as follows: -

(1) there must first be a conclusion by the ET not simply that a party has behaved unreasonably but the proceedings have been conducted unreasonably by her or on her behalf

(2) the ET will need to go on to consider whether a fair trial is still possible, albeit there can be circumstances in which a finding of unreasonable conduct can lead straight to a strike out where there has been "wilful, deliberate or contumelious disobedience" of an ET Order De Keyser Ltd-v-Wilson 2001 IRLR 324 or conduct so serious it would be an affront to the ET to permit the party in question to continue Arrow Nominees Inc-v-Blackledge 2000 EWCA Civ 200.

15. We concluded that *Bolch* suggested strike out should only be ordered where a fair trial is no longer possible and concluded that whilst disappointing conduct, we did still have trust in the Respondents witness, a fair trial was still possible, and it would not be proportionate to strike out.

16. When we reconvened that morning to deliver our decision on the matter of whether we should strike out, and after delivering an oral judgment, at around 12.30 am we were told by Counsel for the Respondent that the witness Ms Nutkin had left the hearing due to the fact she had not appreciated she would be required to be at the hearing all day, and we noted that this was based on the fact she had expected her cross examination to have concluded by 12.30 that day as indicated by me at the last hearing that was adjourned part-heard.

17. Due to the conduct of Ms Nutkin, i.e., leaving the hearing without first appearing before us while her Counsel asked for her to be excused, I ordered that a witness statement be filed by her setting out why she had left the hearing that day without the permission of the Tribunal. I also ordered that a witness order was issued ensuring Ms Nutkins attendance at a further re-listed hearing, which was set for the 14 April 2025.

18. Prior to the next hearing as ordered a witness statement was filed by Ms Nutkin. Her witness statement said in part as follows:-

2. I provide this statement in accordance with paragraph 4 of EJ Brown's Case Management Orders dated 31 January 2025, which were sent to me on 4 February 2025 ("ET CMOs"). Per EJ Brown's order, I make this statement to set out why I left the hearing early at 12.30 pm for a work commitment.

3. I was present at the Tribunal hearing on 11 December 2024 when the hearing of this case went part heard, and the remainder of my evidence had to be relisted for 31 January 2025, in part due to the Claimant having unexpected childcare arrangements to attend to towards the end of the day.

4. During the 11 December hearing, I recall a discussion about the timetable for 31 January, and that my further giving of evidence was scheduled for 10 am – 12.00 pm for the further listed date. I marked out my diary that day for that time slot only to enable me to attend the hearing remotely. I felt it was clear from the discussion in December during the hearing that I would not be required after that time, and did not consider I needed to advise anyone about my availability beyond the required time, i.e. 12:00 pm.

5. On 31 January 2025, I emailed the Respondent telling them that I had a hard stop at 12 that day, as I had another meeting booked, and asked them to make the judge aware of the same. I did this as a courtesy. In response, the Respondent's in-house solicitor, Rebecca Olawale-Cole asked me if I could be available till longer or at least till 1pm to complete cross examination. I explained this wasn't possible. She did follow on with an email asking if I was able to come back from my meeting and rejoin the hearing after lunch. She explained that it would be helpful if I could stay for as long as possible. If I had been told before the hearing that another matter needed to be addressed, I may have been in a position to change my meeting.

6. I eventually managed to reschedule my work commitment and was able to push my meeting back to 12.30 to allow for more time for the hearing. The meeting was with an external party as well as with senior executives at my current employer. It was very difficult to reschedule the meeting on short notice and I wasn't prepared to as it has an impacted on my current objectives. I could not stay longer as after the meeting, which was scheduled to run until 1:30, I had another meeting from 1:30 pm to 2:30 pm. I then had to drive from

3 pm to 4 pm to enable me to see my son's football match that started at 4 pm. I wasn't going to let him down by not attending.

7. During the hearing, I again asked the Respondent to confirm if the judge was aware I was only available until 12:30, but it appears that the issue about the correspondence (which as mentioned above I was not previously aware of) took up the morning. So far as was possible, I did attempt to move my meeting to 12:30 from 12:00 but was not able to push it further on the day, due to other commitments already in my diary for the rest of the day.

8. I append to this statement a copy of my diary for 31 January 2025, and a photo of my son's football match schedule (redacted for the privacy of other children who appear on that page). The meeting from 12:30 to 1:30 pm is marked as "external appointment". I am cautious about providing any further details of that meeting as it relates to the business of my new employer.

9. As the Tribunal is aware, I no longer work for the Respondent. I have assisted with these proceedings out of choice, notwithstanding it being a most difficult and stressful experience for me personally, and for my family. This has involved my having also to balance the demands of my full-time job with another bank and my being a mother to a young son.

10. I am sorry that my not being available for the full day on 31 January 2025 has caused the Tribunal and the parties' inconvenience. This was not intentional. I was not aware that I needed to be available for the whole day, and I was not informed that my evidence would run longer than 12:00. I was also not aware that there was an issue for the Tribunal to consider ahead of my evidence resuming, which is what delayed my giving evidence. My decision not to attend in the afternoon was not out of disrespect but due to my professional work commitments and personal commitments which I was not able to re-schedule to another day at the time.

19. After considering this statement we concluded that no deliberate disrespect had been intended to this Tribunal and that Ms Nutkin had communicated with the in-house solicitor Ms Rebecca Olawale-Cole about her time constraints on the 13 January 2025.

Claimants Application for Costs

20. The Claimant then made an application for a preparation time order. In it she claimed for her costs of the whole claim she had brought and did not seek to distinguish between different hearings that were adjourned, for example by way of reference to the hearing that was then adjourned on the 31 January 2025 due to Ms Nutkins non-availability that day. She claimed in total for 99 hours at an hourly rate of £41 per hour totalling £4,059.00.

21. As to the Claimants costs application the Respondents said as follows: -

    21.1 The Claimant sought to claim for all time preparing for her claim and the hearings.

    21.2 She submitted that a reasonable time frame could not be more than time spent for preparing and attending the hearing on the 31 January 2025 this being the adjourned hearing due to Ms Nutkin leaving the hearing, as in accordance with Rule 72 it relates to time spent by the receiving party in working in preparing for the case except for any time at a final hearing and that it could not include time spent at hearing on the 31 January 2025. She said therefore that we could only look at time spent by Claimant between the hearing concluding part heard on

the 11 December 2024 and January 2025 for some preparation in relation to the hearing for the hearing on the 31 January. She said that there was always going to be preparation in any event for the adjourned hearing on the 31 January 2025 as she ran out of time when cross-examining, and that the Claimant had still claimed preparation time for six hours for the hearing on the 31 January 2025 together with 8 hours for attending the hearing which was not claimable. She said 6 hours of preparation for the hearing was on overestimate where the preparation was needed in any event whether or not the hearing on the 31 January 2025 then became adjourned.

21.3 I stated that I wanted to focus on what happened on the 31 January 2025 as it was said there was a miscommunication between the witness and the in-house solicitor and that this was the time the Claimant lost, and I asked her to clarify whether what she was actually saying was that she cannot claim for that lost time because it was a hearing? I had in mind that the Claimant then had to prepare again for another hearing on the 11 April 2025.

21.4 Counsel accepted that on another view because the Claimant was not able to complete Ms Nutkins cross examination on the 31 January 2025 there may have been some more preparation on the Claimants behalf between that date and on the 11 April 2025.

21.5 I asked as to the potentially wasted time for further preparing for that 11 April 2025 hearing what did they say about that? The Respondent stated that the Claimant would have to say how much time that was but having said that at the moment the figures are estimated by the Claimant as 6 hours of preparation for the 31 January hearing and 5 hours for preparing for attendance on the 11 April hearing that this was an overestimated figure.

21.6 I stated that I considered the most relevant period for this application was the five hours preparation for the 11 April 2025 hearing. Counsel stated that five hours was an over-estimation.

21.7 As to the threshold test on application for costs the Respondents argued that as to the adjournment that what happened on the 31 January 2025 that this was twofold. She submitted that some of the hearing time in the morning on that day was taken up because of the issue that happened vis a vis the Claimant contacting the external solicitors for the Respondent and that she accepted that the issue arose because of the Respondents witnesses behaviour, and that whilst we found the conduct to be disappointing however it did not corrupt Ms Nutkins evidence nor impair the fairness of the hearing.

21.8 The other reason was because of Ms Nutkins not being able to stay on after lunchtime that day and that we had commented that we did not find this deliberate not disrespectful.

21.9 She said that as to the difficulties that arose while she was under oath during that period that was this not conduct that rose to vexatious abusive or that was otherwise unreasonable, and on that point the Respondent submitted the threshold test was not met, and that even

if she had stayed on that day and not left the hearing it was still quite ambitious to do all that in one afternoon, and that in any event it was not completely borne out of the Respondents conduct as there was another significant reason in that she had to leave early due to assuming her part in the hearing would finish at 12.00 am that day.

Ms Nutkins conduct

22. At this juncture we return to the issue of the witnesses conduct whilst under oath which caused us to lose the morning of the hearing on the 31 January. We note that we described this conduct as 'disappointing' but that it did not mean a fair trial was not possible and so the hearing continued. However, the debate about this issue did mean we lost 2.5 hours on the morning of the 31 January 2025 and her conduct was concerning enough for this Tribunal to have spend significant amounts of time on the communications and whether or not we still had the requisite trust in the witness for the Respondent to continue to advance its Response and for a fair trial to take place.

23. We find that the issue arising from this communication caused us to lose the morning of the hearing and even had Ms Nutkin not then left the hearing it is likely we would not have concluded the hearing that day in terms of cross-examination and then hearing closing submissions.

24. In short, this issue meant that we had lost valuable time and that inevitably another day had to be fixed to conclude cross-examination, and that the Claimant would have had to refresh her memory to conclude cross-examination due to the conduct of the Respondents witness that day. We conclude another five hours would have to had have been spent on the matter at a cost of £41 an hour i.e., a total of £205.00 for the Claimant to refresh her memory for the final relisted hearing on the 6 June 2025.

The Law

30. The Employment Tribunal Rules of Procedure 2024 provide as follows:

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.

(2) A preparation time order is an order that the paying party make a payment to the receiving party in respect of the receiving party's preparation time while not represented by a legal representative.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings.

(4) The Tribunal may decide in the course of the proceedings that a party is entitled to either a costs order or a preparation time order but may defer its decision on the kind of order to make until a later stage in the proceedings.

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, or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which that hearing begins.

(3) The Tribunal may also make a costs order or a preparation time order (as appropriate) on the application of a party where a party has been in breach of any order, rule or practice direction or where a hearing has been postponed or adjourned.

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).

……...

77. The amount of a preparation time order

(1) The Tribunal must decide the number of hours in respect of which a preparation time order should be made, on the basis of—

(a) information provided by the receiving party on the preparation time spent, and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required. (2) The hourly rate is £44 and increases on 6 April each year by £1.

(3) The amount of a preparation time order must be calculated by multiplying the number of hours assessed under paragraph (1) by the rate under paragraph (2) which is applicable to the year beginning 6 April in which the preparation time was spent.

……..

31. Costs orders are the exception rather than the rule in employment tribunal proceedings, but that does not mean that the facts of the case must be exceptional (*Power v Panasonic (UK) Ltd* UKEAT/0439/04).

32. In terms of abusive, disruptive or unreasonable conduct, "unreasonableness" bears its ordinary meaning and should not be taken to be equivalent of "vexatious" (*National Oilwell Varco UK Ltd v Van de Ruit* UKEAT/0006/14).

33. In *Millan v Capsticks Solicitors LLP & Others* UKEAT/0093/14/RN the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3-stage exercise, which in essence is as follows:

37.1 Has the putative paying party behaved in the manner proscribed by the rules?

37.2 If so, it must then exercise its discretion as to whether it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).

37.3 If it decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may consider the paying party's ability to pay).

34. The tribunal does not need to identify a direct causal link between the unreasonable conduct and the costs claimed (*MacPherson v BNP Paribas (London Branch*) (No 1) [2004] ICR 1398).

35. The Tribunal has a discretion, not an obligation, to consider means to pay. This was considered in the case of *Jilling –v- Birmingham Solihull Mental Health NHS Trust* EAT 0584/06. It was established in that case that if we decide not to take into account the party's means to pay, we should explain why, and if we decide to do so, we should set out our findings about the ability to pay, what impact that has had on our decision whether to award costs and if so, what impact means had on our decision as to how much those costs should be.

36. In *Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420 (paragraphs 39 – 41) it was emphasised that the tribunal has a broad discretion, and it should avoid adopting an over-analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate headings such as "nature", "gravity" and "effect". The words of the rule should be followed, and the tribunal should:

"Look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct …… in …. conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had".

37. The Court of Appeal in *Yerrakalva* made it clear that although causation was undoubtedly a relevant factor, it was not necessary for the tribunal to determine whether there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. Furthermore, the circumstances do not need to be separated into sections, each of which in turn forms the subject of individual analysis, risking the court losing sight of the totality of the relevant circumstances.

Conclusions

38. There are three stages in determining whether or not to award costs under Rule 74 ET Rules; first, whether the party has reached the threshold of establishing that a party had acted vexatiously, abusively or disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; and that a claim had no reasonable prospects of success. Second, if the threshold has been reached, the tribunal will go on to consider whether it is appropriate to make an order for costs. Finally, if it is appropriate to make an order for costs, the tribunal will go on to consider the amount of such order.

Threshold - Are There Grounds for Making a Costs Order?

(1) Conduct – Rule 74.2(a)

39. It is incumbent on the Tribunal to satisfy itself that the conditions in Rule 74(2)(a) apply before any order can be considered.

40. We note that the Respondent was professionally represented.

41. The Respondent's conduct meant that the tribunal had to conduct an additional hearing on the 11 April 2025 due to the conduct of Ms Nutkin, the only witness for the Respondent and thereby causing wasted time arising from her conduct by contacting the external solicitors for the Respondent while under oath, a matter we have described as disappointing, and which then meant the Claimant had to prepare again for the hearing on the 11 April 2025 and which estimate caused the Claimant wasted preparation time of another five hours. This put the Claimant to extra costs in terms of preparation time in the sum of £205.00.

42. In the circumstances, the tribunal finds that the Claimant has established that the Respondent's conduct was unreasonable as defined in Rule 74 (2)(a) of the Employment Tribunal Rules of Procedure in respect of the Costs Application, and that this threshold was met in terms of the test which was whether the Respondent 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, and we concluded that the threshold test was met.

43. We find that the conduct of Ms Nutkin was unreasonable. We find she was aware she ought not to have contacted the Trusts Solicitors but did so in any event thus causing time to be lost and causing another day having to be listed on the 11 April 2025 to conclude the hearing of this claim.

Should a Costs Order Be Made?

44. We consider a number of factors in deciding whether to exercise our discretion to make an order for a preparation time order. Although there are grounds for making an order against the Respondent, the decision to do so is still at the Tribunal's discretion.

45. As stated above, it remains the case that costs orders in the Employment Tribunal are the exception rather than the rule.

46. We bear in mind the Respondent was professionally represented, and their witness would know that she should not contact the Respondents solicitors as she knew she was under oath and she had been warned not to discuss her evidence by this Tribunal. Whilst we found she did not corrupt her evidence she did however refer to it in her communications having been told not to do so in any way by this Tribunal while under oath.

47. As for the ability of the Respondent to pay a costs order we heard no submissions on this, but they are a financial institution, and we heard no submissions that they could not afford to pay any preparation time order, presumably for the obvious reason they could do so. In the circumstances, we do not have regard to the Respondents ability to pay any costs order as they have failed to submit anything about this.

48. Looking at the whole picture, as *Yerrakalva* suggests we do, and the way the Response was conducted we find that the Respondent did conduct its Response unreasonably in the manner in which their only witness conducted herself whilst under oath causing this Tribunal to lose a hearing day and having to relist for a further day which caused the Claimant to have to spend further time in preparing for her final cross-examination of Miss Nutkin and which we estimated would have taken her a further five hours.

49. The application for a preparation time order is therefore granted for the lost preparation time of the hearing on the 11 April 2025 in the sum of £205.00 representing five hours of the Claimants time.

Authorised By:

Employment Judge L Brown

29 August 2025

RESERVED JUDGMENT &
REASONS SENT TO THE PARTIES ON:

3 September 2025

FOR EMPLOYMENT TRIBUNALS