Case No. 1400565/2020
1400415/2022
1403376/2023

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr J Langton	AND	Amdocs Systems Group Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by video) **ON** 10 October 2025

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Mr D Leach, Counsel
For the Respondent: Mr J Cohen, King's Counsel

ORDER

The Claimant's application for costs is dismissed.

RESERVED REASONS

1. In this case the Claimant sought his costs of bringing the claims on the indemnity basis.

General Background

1. The Claimant had previously brought an unlawful deductions from wages claim (claim number 1400873/2018 ("Claim 1"). He presented three further claims about further deductions, due to not paying the Escalator in an income protection scheme as follows:
    a. 1400565/2020 ("Claim 2") on 28 January 2020;
    b. 1400415/2022 ("Claim 3") on 28 January 2022; and
    c. 1403376/2023 ("Claim 4") on 10 May 2023.

2. Judgment on Claim 1, in respect of liability, was given on 15 July 2019, with written reasons being provided on 13 August 2019. The Respondent

appealed the liability decision, which the EAT dismissed on 24 August 2021. The Respondent further appealed to the Court of Appeal, which the Court of Appeal dismissed on 22 July 2022.

3. A final hearing on claims 2, 3 and 4 was listed on 12 to 15 February 2024, however it was postponed due to a lack of judicial availability. It was relisted to be heard on 21 to 23 October 2024.

4. On 22 February 2024, the Claimant applied to strike out claims 2, 3 and 4. The application was made on the basis that the Respondent had no reasonable prospects of success in defending the primary case that the manner in which the Respondent purported to vary the contract was not available to it by reason of the Judgment in the Court of Appeal and on the basis of other legal arguments. Therefore it would not be necessary for the Tribunal to determine the alternative cases. That application was dismissed by Employment Judge Midgley, following a hearing on 19 July 2024.

5. At the final hearing on 21 to 23 October 2024, the Respondent did not need to cross-examine the Claimant. The Respondent did not call witness evidence. The parties made submissions of about 2 hours each and provided written submission on an ACAS uplift point. The hearing proceeded on the basis of the documentary evidence. A reserved Judgment was sent to the parties and these reasons should be read in conjunction with that Judgment.

6. The claims put the primary case on the basis that the Claimant's contractual terms were never contained in the manual but were in an offer letter and summary of benefits and that the power, under clause 11, to vary the terms of the manual had no bearing on his contractual entitled to the annual escalations due to him. In the alternative it was said that the Respondent was in breach of the implied term not to exercise any discretion in a Wednesbury unreasonable (or irrational or capricious) way. It was further argued that:

    a. No purported power to vary the terms of the manual could be exercised where no manual capable of being varied exists.
    b. A policy of insurance had not been incorporated into the contract.
    c. The Respondent was estopped by conduct from contending any variation remained open to it.
    d. Clause 22 operated to ensure any conflict between the summary of benefits and the 2016 Manual in favour of the summary of benefits.
    e. There was an implied term that the Respondent would not exercise any power of variation as to the Claimant's entitlements retrospectively after the commencement of receipt of benefits.
    f. Further the Respondent would not act in breach of the implied term of trust and confidence.

g. The Respondent estopped by conduct in proceedings, a species of res judicata, and/or the rule in Henderson v Henderson.

7. The defence of the claim included:
    a. The Respondent had varied the manual in 2019 and 2023, pursuant to clause 11
    b. The fact that it could not evidence what the original manual said did not impact on its ability to vary the manual
    c. It had an express power of variation
    d. It was denied that the Respondent was estopped from varying the contract.

8. The arguments raised by the Claimant at the final hearing can be summarised as:

    a. Following the Court of Appeal Judgment it was clear the contractual terms as the IPS and the escalator were not contained in the manual.
    b. Any argument that the manual could be amended was fallacious because it was not possible to amend something which did not exist.
    c. The manual from May 2016 was not susceptible to relevant amendment.
    d. The employee handbook was not a manual. The 2019 version could not be a manual because it was not published on the intranet and only sent to the Claimant.
    e. Estoppel by conduct in proceedings or abuse of process pursuant to the rule in Henderson v Henderson.
    f. Entitlement could not be limited to sums covered by insurance.
    g. The effect of clause 22 said that where something has been agreed which conflicts with incorporation of provisions in the manual, those provisions would not be incorporated.
    h. An implied term not to vary after the commencement of receipt of benefits.
    i. The Braganza implied term and the implied term of mutual trust and confidence.

9. In the Judgment at the final hearing the conclusions included:
    a. The Claimant arguments, that Court of Appeal had concluded that the terms of the IPS were not contained in the manual and were only contained in the summary of benefits, were rejected. There was not a finding that the manual contained no provisions about IPS. There was an assumption it did not contradict the summary of benefit. No view was expressed by the Court of Appeal on future variation or the variation in October 2019.
    b. The Claimant's primary position was that the terms of the IPS and escalator were not contained in the manual. The Claimant placed reliance on the ET Judgment in the first claim and submitted that the

findings of the EAT in relation to clause 22 were obiter, that argument was rejected.

c. In relation to the construction of clause 22, the Claimant's contentions were rejected.
d. The Henderson v Henderson point fell away, because the Respondent did not seek to rely on the 2016 Handbook, because it was not sent to the Claimant.
e. The Claimant's arguments in relation to Estoppel by conduct were rejected and there was no finding that the Respondent was estopped by conduct.
f. The Claimant's arguments that because the contents of the 2003 manual were unknown it should be taken it was a blank sheet of paper and did not exist and therefore there was nothing to amend, were rejected. It was concluded the parties intended to be bound by the summary of benefits and the manual. Contrary to the Claimant's case, it was accepted that the Respondent had the power to unilaterally amend the manual.
g. The Claimant's contentions for an implied term that the Respondent could not vary the terms after the start of the receipt of benefits were rejected.
h. It was concluded that for there to be a change to the manual, there needed to be a change of the manual for all employees.
i. For there to be an effective variation the variation needed to be in accordance with the implied terms.
j. The Claimant was not sent the employee handbook applicable to all employees in October 2019 and therefore it was not a document capable of amending his terms and conditions.
k. The Respondent was in breach of the Braganza implied term in relation to the purported amendment on 17 April 2023.

10. The Claimant appealed the Judgment on grounds that the Judge erred in relation to the construction of the contract. This included the way the Claimant's case had been stated in relation to clause 22 and the construction of clause 22 itself. Further the Judge erred in the construction of the contract generally and the conclusions of the effect of the Judgment of the Court of Appeal. the Judge had erred in declining to find that even if a power of variation was available it was not open to limit the benefits payable to sums covered by insurance. That the Judge erred in not implying a term that the Claimant's contract could not be varied after he started receiving benefit. The Judge erred in the conclusions on estoppel.

The application

11. The application was brought on the following grounds:
    a. The Respondent engaged in unreasonable conduct of the proceedings in defending the claims on the basis that there had been

an effective variation of the Claimant's contract on 29 October 2019 (or 17 April 2023).

b. In tandem with (a), the Respondent's response(s) to the claim(s) had no reasonable prospects of success because there was never any prospect of the Respondent demonstrating on the evidence that there was an effective variation on 29 October 2019 (or 17 April 2023).

12. The application for costs and the skeleton argument of the Claimant made reference to the Respondent unreasonably delaying or resisting disclosure. This was confirmed in oral submissions as being further matters as to why the claim should not have been defended.

The Application

13. References in square brackets are references to pages in the bundle for the costs hearing.

<u>The Claimant's submissions</u>

14. The Claimant's submissions were as follows.

15. The Respondent's case was that the claimed sums were not due because of the variations made on 29 October 2019 and 17 April 2023. Reliance was placed on paragraphs 161 to 162 of the Judgment in relation to findings that I was not satisfied the Claimant was sent the handbook applicable to all employees on 29 October 2019 and that it was not of general application to all employees. The Respondent ought to have known that the handbook sent to the Claimant was not capable of effecting the variation at least up to 14 April 2023.

16. In relation to the purported variation in April 2023 it was found that the variation was targeted solely at the Claimant (para.173 Judgment). it was submitted that this was more obvious when the timing of the uploading of the manual on 13 April 2023 took place. The Claimant relied upon a letter dated 7 September 2023 [p461], saying that it appeared to have been created between his solicitor's request for information on 27 March 2023 and the answer to the request on 17 April 2023. He also relied upon the Respondent's response in which it said it remained their position the handbook applicable to his employment from 29 October 2019 onwards was the version sent to him on that date until he was provided with the version on 17 April 2023 and there being no denial of what he had asserted.

17. Reliance was placed on the finding that no attempt was made to vary the Claimant's contract before the Respondent changed its insurance cover (para.168 Judgment). Further that the Respondent already knew that the

Claimant was incapacitated and in receipt of benefits under the scheme, when purporting to effect the variation (para.169; 172 Judgment).

18. It was submitted the Respondent made no meaningful attempt to explain the reasons for the purported variation and called no witness evidence in that or any regard, such that it could not discharge its evidential burden. It was submitted that the Respondent's position, that as a matter of law it did not need to adduce evidence, was not the case because it was obvious that there was a prima facie case and the evidential Burden would shift in relation to the Braganza arguments. Further that the Respondent relied on a hope that something would turn up. Its position that it was seeking to go back to the situation in 2023 was misconceived in that it had been concluded the common intention in the contract had not been to limit payments to the insurance cover (para.165, 167, 174 Judgment). Further no meaningful explanation was provided as to why witness evidence was not called, relying upon Efobi v Royal Mail Group Ltd [2021] IRLR 811 at paragraph 41, which says

"*The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324, [1998] Lloyd's Rep Med 223 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.*"

19. The Claimant also relied on submissions that the Respondent unreasonably delayed or resisted disclosure and provision of information and that went to show why the claim was unreasonably defended. This was on the basis that the Claimant was saying he had been singled out.

20. Reliance was placed on the case management order dated 13 September 2022, ordering disclosure for claims 2 and 3 was to be provided by 2 December 2022. On 11 March 2023 [p427], the Claimant asked for a copy of the handbook immediately preceding the version given to him on 29 October 2019. The Respondent replied attaching a copy on 15 March 2023 [p427].

21. On 27 March 2023, the Claimant requested copies of the handbook applicable to other employees and correspondence in relation to the handbook applicable for other employees from October 2019. The handbook currently published on the intranet and a copy currently available to other employees if different to that of the claimant [p431]. This was chased on 3 April 2023. The Respondent solicitors said they were waiting for instructions on 5 April 2023. It was further chased on 6 April 2023.

22. The Respondent responded on 17 April 2023 [p436]. It was submitted that there was not a mention of the 1 November 2019 version of the handbook and that was not revealed until later.

23. A further request for information was made on 20 April 2023, with a detailed explanation as to what was required [p443].

24. There had been settlement discussions and the Respondent sought a postponement of directions. The Claimant did not consent and on 8 August 2022 said he wanted disclosure. The full explanation as to what happened was provided on 15 August 2023 [p450].

25. It was submitted that the disclosure was relevant on the basis that it was referred to in the judgment.

26. There were then further requests for information on 27 September 2023 in relation to who discovered the errors with version C on the intranet [p463]. The Claimant then made an application for disclosure [p467]. The application was responded to on 12 January 2024. The Respondent said that the information was not relevant, however provided the information sought. [p476-478]

27. It was submitted that this showed the Respondent knew the decision was capricious and that it had understood its case was hopeless.

28. The Claimant relied upon the Respondent subsequently indicating it did not intend to vary the contract. In an e-mail dated 26 February 2025, the Respondent said,

    "*Having confirmed you will receive the escalator payment, as noted previously we do not consider it is necessary or appropriate to give a clear*

and unambiguous assurance that Amdocs will not attempt any future change whatsoever to your contract of employment that might adversely impact your entitlement to IPS benefit increasing on a 5% compound basis annually. This is not something which we are obliged to do and nor would it be appropriate to compromise any right the Company may have in this regard. However, I can confirm that the Company does not currently intend to make any future amendment to your terms and conditions of employment."

29. It was submitted the Respondent had an ulterior commercial motive, in that it was trying to seek an objective that was extraneous to the litigation in hand. The Claimant relied on the Respondent saying that the point as to whether the Respondent had the power to amend the contract was of considerable importance to it. It was open to the Respondent to seek declaratory relief in the civil courts. It was submitted orally that it was not good enough for the Respondent to say that it achieved something unexpectedly in the Judgment and therefore it was not reasonable to defend the claim. Reliance was placed on the Respondent, in its written submission, saying that if it was not for the Judgment it would not have had the contractual power to vary.

30. It was accepted there was considerable overlap with whether there were no reasonable prospects of success. The Claimant relying on that the manual variations did not work, the 2019 manual was a bespoke creation for the Claimant and they were targeted at him. Reference was made to IBM United Kingdom Holdings Ltd and another v Dalgleish [2018] ICR 1681 and the burden of proof in relation to the Braganza issue.

31. It was also argued that the points which were found against the Claimant had reasonable prospects of success.

The Respondent's submissions

32. The Claimant had sought to appeal the Judgments from the final hearing and the dismissal of the strike out application. On rejection of the appeal, on the sift, the Claimant had sought a rule 3(10) hearing. It was submitted that the fact the Claimant had done this, showed that Respondent had gained something of significant importance.

33. At paragraph 9 of the written submissions it was said that the effect of the Judgment was that whereas before the Respondent would not have a contractual effective variation power it now did. This was explained as meaning that after claim 1, the Tribunal had concluded the Respondent did not have the right to vary, however the Court of Appeal said that if there was an inconsistency between the right to vary clause and the summary of

benefits it needed to be resolved. The Judgment for claims 2 to 4 resolved that issue.

34. The Claimant had relied upon the following arguments at the final hearing, however he was only successful in the last one:

    a. The Respondent's arguments were blocked by the decision of the Court of Appeal, because it decided that the IPP terms were contained only in the Summary of Benefits and not the Manual ("the Court of Appeal argument").
    b. Clause 11 of the Claimant's contract of service was stripped of its contractual effect in respect of variation of IPP rights by clause 22 ("the Clause 22 Argument").
    c. There was an estoppel by conduct so that the Respondent could never vary the Manual, because it abandoned a variation argument during the EAT appeal ("the Estoppel by Conduct Argument").
    d. The Manual could never be amended because no one knew what the 2003 Manual said, and it had to be shown that the Manual said something about IPP rights before those rights could be varied.
    e. There was an implied term which prevented variation of the Manual after receipt of benefits began.
    f. The revised Manuals were not effective to achieve variation, in the case of the 2019 Manual because the manual sent to the Claimant was not applicable to all employees in 2019, and in the case of the 2023 Manual because the Respondent did not prove that it had taken into account all relevant considerations in its decision making.

35. It was submitted that the Claimant was pursuing hopeless arguments, which included a deliberate misreading of what the Court of Appeal said and the EAT had decided what clause 22 meant. Those arguments lengthened the litigation and made it more complicated than it needed to be.

36. The Claimant had applied to strike out the response on the basis it had no reasonable prospects of success. That argument was rejected. It was submitted that at the time of the strike out application, the parties were ready for the final hearing and the Respondent was not calling witness evidence. The Claimant could have made the successful points he relied upon at the final hearing to say there were no reasonable prospects of success and made a strike out application in relation to them.

37. The Respondent submitted that the Claimant had won the battle but not the war. The claim had been brought on the basis that the Respondent was never entitled to vary the contract and had deployed numerous arguments to try and persuade the Tribunal that the Respondent had no such power. It was argued that if a judgment was consented to, the Claimant would have said that the Respondent was bound by the way in which claims 2 to 4 had

been brought and that the Respondent was estopped from relying on a variation clause. Support for this could be seen in the estoppel by conduct argument.

38. The Judgment needed to be looked at in a nuanced way. The Claimant had gained money, however the Respondent had gained the clarity of the contractual right. It was not accepted that there was an ulterior commercial motive, because whether there was a right to vary was the 'concrete action' on which the litigation was based. The Respondent would always have to defend the action.

39. In terms of the purported variation in October 2019 the Respondent had sought to argue that on a matter of construction, what individual notification meant and that by sending the Claimant the copy of the handbook individually it had complied. The decision had turned on the Tribunal's construction of the word 'manual' and the answer to what that was, was not obvious at the relevant time.

40. In relation to the Braganza issue, when the Claimant started work in 2023 the terms of the insurance policy reflected what was in the summary of benefits. There had been a coupling or a reflection between the two. That changed in 2008 when the new insurance policy was taken out. With the escalator removed from the policy there was no longer equivalence between it and the summary of benefits. The intention of the Respondent had been for the cost of the benefit to be neutral, save for the requirement for it to pay insurance premiums. The workforce by the time of the litigation was different and were not on the same contracts as the Claimant. The Respondent was seeking to recouple or re-align the insurance policy to the summary of benefits and the rights of the other members of the workforce.

41. Paragraph 147 of the Judgment dealt with two points, what the Respondent's intention was and what the common intention of the parties was. Noting that the subjective intentions of the parties are not relevant to determining what the common intention was.

42. It had argued that what was contained in the grievance outcome dated 6 February 2020, explained that the Respondent had intended the income protection scheme benefits to be a zero cost situation and it had never intended an employee to receive more than that paid by the insurer. The argument had been that it could not be irrational to vary the terms so that the limit of liability was that paid by the insurer. That argument had not been accepted and it was found there were other factors to take into account.

43. In terms of not calling witnesses, the explanation for the reason why the Respondent sought to vary the contract had been provided in writing in the grievance. It was not suggested that considerations other than the

recoupling the benefit to the insurance policy were thought about. It was a reasonable argument that there was a desire to equalise the insurance policy and the benefit to the Claimant. Further the events were historic and the Respondent did not have witness from the 2000s to call.

44. Further Braganza was a difficult decision and based on extraordinary facts. The burden of proof was explained in IBM United Kingdom Holdings Ltd and another v Dalgleish [2018] ICR 1681, namely in the following paragraphs:

"*49. Moses LJ addressed the question of burden of proof more directly at para 110. He accepted that the implied duty of trust and confidence between employer and employee does generally require an employer to give his reasons for the exercise of a discretion to pay or withhold a bonus. But he said that failure to give reasons will not necessarily establish irrationality:*

> *It is for the employee to establish the irrationality of the decision. He must be able to demonstrate some feature of the award, or the circumstances in which it was made, which tends to show its perversity. If he can do so, then the absence of any explanation . . . will lend powerful support to his case. If there is nothing to show that the award is outwith the range of additional payments a reasonable employer, in similar circumstances, would award, I take the view that silence would not be sufficient to demonstrate irrationality.*

50. Jacob LJ agreed with both judgments. Because of Moses LJ s proposition that, even if the employer remains silent, it is still for the employee to show irrationality, that decision is not consistent with Mr Cavanagh's submission.

57. … In order to decide whether an employer's decision in a given case satisfies the rationality test we have described (in para 45 above) the court may need to know what the employer's reasons were and may also need to know more about the decision-making process, so as to assess whether all relevant matters, and no irrelevant matters, were taken into account. The legal burden of proof lies with the claimants throughout. If, however, the claimants show a prima facie case that the decision is at least questionable, then an evidential burden may shift to the employer to show what its reasons were. In such a case, if no such evidence is placed before the court, the inference might be drawn that the decision lacked rationality. However, in all cases the legal burden of proof rests on the claimant.

226. Accordingly, as we read the judge's judgment, he failed to apply the Wednesbury test in relation either to Holdings as regards the Imperial duty or to UKL as regards the contractual duty. It seems to us that, in referring to the reasonable employer test, as he often did, he may have incurred the risk identified by Baroness Hale DPSC in Braganza v BP Shipping Ltd

[2015] ICR 449, para 29, quoted at para 38 above, that concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker. In particular, reference to the reasonable employer may lead to the application, even if unconsciously, of a test diluted and distorted from the true test of irrationality, as enunciated, for example, by Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] ICR 14, 37; [1985] AC 374, 410:

By irrationality I mean what can by now be succinctly referred to as Wednesbury unreasonableness . . . It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

227. In what Baroness Hale DPSC (quoting both passages at para 23 of Braganza) described as an obvious echo of this, Lord Sumption JSC said in Hayes v Willoughby [2013] 1WLR 935, para 14:

Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions . . . A test of rationality, by comparison, applies a minimum objective standard to the relevant person s mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

45. The argument that the Respondent was seeking to create a position where the Claimant got the money and the Respondent was not self-funding pay on top was a reasonable argument and it was not such that it was so unreasonable that the Tribunal would be bound to reverse the evidential burden. Further that the test concerns, to what the explanation goes to and not the reasonableness of the outcome. There had been a reasoned decision in the grievance outcome and there was a reasonable argument. It was not unreasonable to argue that the reason for the amendment was to correct the situation back to that which existed in 2023. There was a wide body of law which explained that the circumstances often provide the necessary evidence of intention, including that they may be inferred from the circumstance in which they acted. Even though was an evidential burden, the burden of proof remained on the Claimant.

Claimant's reply

46. A strike out application had not been made, in relation to the facts, because often a Tribunal will say that the facts need to be heard. It was decided to pursue the legal arguments only in the strike out application.

47. The Claimant had been completely successful in the unlawful deductions from wages claims. It was submitted that a consent judgment could have been entered with a caveat.

48. The hurdle on the Claimant to shift the evidential burden in Dalgliesh was not that high.

The law

The Rules

49. The relevant rules are the Employment Tribunal Procedure rules 2024 ("the Rules").

50. Rule 74provides:

> (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) …

51. Rule 76 provides:

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

52. Under Rule 84, 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.

The Relevant Legal Principles

53. 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 [2003] [2003] IRLR 82 CA "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 or responses were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley EAT/0842/04. 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 74. As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva [2012] IRLR 78 CA "*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 that dissecting various parts of the claim and the costs application, and compartmentalising it. It commented that the 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. 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 [2004] ICR 1398 CA, and also Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13 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. It is unnecessary to show a direct causal connection, (McPherson v BNP Paribas [2004] ICR 1398 and Raggett v John Lewis [2012] IRLR 911, paragraph 43), but there nevertheless has to have been some broad correlation between the unreasonable conduct alleged and the loss (Yerraklava-v-Barnsley MBC [2010] UKEAT/231/10). Regard had to be taken of the '*nature, gravity and effect*' of the conduct alleged in the round (both McPherson and Yerraklava above).

54. When considering an application for costs the Tribunal should have regard to the three-stage process outlined in Hossaini v EDS Recruitment Ltd [2020] ICR 512 at paragraph 64 and the two stage process identified Monaghan v Close Thornton [2002] EAT/0003/01 at paragraph 22:

    a. Has the cost threshold(s) been crossed or triggered, e.g. was the conduct of the party against whom costs is sought unreasonable?
    b. And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances, in other words whether or not it considers it appropriate to make an award of costs in that case?
    c. And if so, how much should it award

No reasonable prospects of success

55. Under rule 74(2)(b) the focus is on whether the claim or response itself had reasonable prospects of success. In Radia v Jefferies International Ltd EAT 0007/18 the EAT gave guidance on how tribunals should approach such costs applications.

    "*67. Where the Tribunal is considering a costs application at the end of, or after, a trial, it has to decide whether the claims 'had' no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start, and considering how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may, and should, take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time.*

    68 The foregoing is, in my judgment, in principle the correct approach to take. Read with care, and in light of the particular facts of that case, I do not read the observations of Slade J in Swissport Ltd v Exley UKEAT/0007/16 UKEAT/0008/16, [2017] ICR 1288 at paras 62–68 any differently. The Tribunal may draw on the evidence that it has read and heard at the full hearing, provided that it does so to inform its view of the prospects at the earlier time, based on what was known, or could reasonably have been known, back then.

    69 Further, the mere fact that there were factual disputes, which could only be resolved by hearing evidence, and fact finding, arising from the final Hearing, does not necessarily mean that the Tribunal cannot properly

conclude that the claim had no reasonable prospects from the outset, nor that it cannot conclude that the complainant could or should have appreciated this from the outset. That still depends on what they knew, or ought to have known, were the true facts, and what view they could reasonably have taken of the prospects of the claims, in light of those facts..."

56. Sir Hugh Griffiths observed in Marler v Robertson [1974] ICR 72: *"Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms"* and that statement is apposite here.

57. The test is objective (Vaughan v London Borough of Lewisham and ors [2013] IRLR 713 (EAT) at para.14(6)).

Unreasonable conduct

58. Unreasonable has its ordinary English meaning and is not to be interpreted as if it means something similar to vexatious (Dyer v Secretary of State for Employment EAT 183/83). When considering making an order under this ground account should be taken of the 'nature, gravity and effect' of a party's unreasonable conduct (McPherson v BNP Paribas [2004] ICR 1398 CA). It is important not to lose sight of the totality of the circumstances and when exercising the discretion it is necessary to look at the whole picture. I had to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had. I reminded myself to be careful not to label conduct as unreasonable when it could be legitimate in the circumstances.

59. In Radia it was held:

"62. At the first stage, accordingly, it is sufficient if either r 76(1)(a) (through at least one sub-route) or r 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.

63. … However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of

success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.

64. This means that, in practice, where costs are sought both through the r 76(1)(a) and the r 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?"

60. In AQ Ltd v Holden [2012] IRLR 648 it was held that when deciding costs a Tribunal was entitled to take into account the fact that no application had been made to determine the prospects of success of a claim. Such a thing was not decisive, but it was not irrelevant. In Vaughan v London Borough of Lewisham [2013] IRLR 713, it was recognised that Respondents did not always for understandable practicable reasons seek a deposit order even where they are faced with weak claims, so that failure to do so "is not necessarily a recognition of the arguability of the claim.

61. Under Rule 76(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000. Under Rule 76(1)(b) a costs order may order the paying party to pay an amount to be determined by way of detailed assessment, carried out either by the County Court or by an Employment Judge applying the principles of the Civil Procedure Rules 1998. Where the receiving party does not regard the limit of £20,000 to be sufficient an order for summary assessment should not be made in those circumstances, see Kovacs v Queen Mary and Westfield College [2002] IRLR 414 CA.

Indemnity Costs

62. Where costs are to be assessed either by summary or detailed assessment, they will normally (and otherwise by default) be assessed on the standard basis, unless there are grounds to assess the costs on the indemnity basis. Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party. The test of when to award costs on the indemnity basis is, broadly speaking, whether the conduct of the paying party is such as to take the case outside the norm: see Excelsior Commercial & Industrial Holdings v Salisbury Hammer Aspden & Johnson [2002] EWCA Civ 879, in which in paragraph 32 as an example of one of the "infinite variety of situations" in which an indemnity basis order might be appropriate, Wolff LJ suggested a

case in which the parties had not conducted the litigation in a proportionate manner. However, in Kiam v MGN Ltd [2002] 2 All ER 242 CA Simon Brown LJ at paragraph 12 observed that in general the indemnity basis would be appropriate where there was conduct which was "unreasonable to a high degree" and not merely "wrong or misguided in hindsight". See also Digicel (St Lucia) v Cable & Wireless [2010] EWHC 888 (Ch)in which Morgan J stated at paragraph 28: "the minimum nature of that conduct required to engage the court's discretion would seem, except in very rare cases, to be a significant level of unreasonableness or otherwise inappropriate conduct …" However, any assessment on an indemnity basis should be made in order properly to compensate the receiving party, and should not be regarded as a penal measure, see Beynon v Scadden [1999] IRLR 700 EAT.

63. In Howman v The Queen Elizabeth Hospital Kings Lynn UKEAT/0509/12 it was said at para 10, "*So when should an assessment on the indemnity basis be ordered? In civil proceedings in the courts, costs will be assessed on the indemnity basis rather than the standard basis where the conduct of the party has taken the situation away from the norm. The norm in civil proceedings in the courts has been that the unsuccessful party would be ordered to pay the costs of the successful party. That is to be contrasted with proceedings in employment tribunals where it is only in the particular circumstances identified in r 40(3) that a party will be ordered to pay the other party's costs. In our view, therefore, costs incurred in proceedings in employment tribunals should only be assessed on the indemnity rather than the standard basis when the conduct of the paying party has taken the situation away from even that very limited number of cases in the employment tribunal where it is appropriate to make orders for costs. That is why we think that the employment judge was right to say that it was very rare for an order to be made for costs to be assessed on the indemnity basis. In our opinion, it was open for the reasons which the employment judge gave to treat this case as one of those very rare cases in which such an order was appropriate…*"

64. In the commercial case of Fitzpatrick Contractors Limited v Tyco Fire and Integrated Solutions (UK) Limited [2008] EWHC 1391, the summary of the principles of indemnity costs in the civil courts included:

(i) Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which the litigation has been conducted. An order for indemnity costs can be made even where the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation (see *Reid Minty v Taylor [2002] 1 WLR 2800*).

(ii) However, such conduct would need to be unreasonable "to a high degree. 'Unreasonable' in this context certainly does not mean merely wrong or misguided in hindsight" (see Simon Brown LJ (as he then was) in *Kiam v. MGN Limited No. 2 [2002] 1 WLR 2810*).

(iii) It is always important for the court to consider each case on its facts and to decide whether there is something in the conduct of the action or the circumstances of the case in question which takes it out of the norm in a way which justifies an order for indemnity costs (see Waller LJ in *Excelsior Commercial & Industrial Holdings Ltd v. Salisbury Hammer Aspden and Johnson [2002] EWCA (Civ) 879*).

(iv) Examples of conduct that has led to such an order for indemnity costs include the use of litigation for ulterior commercial purposes (see *Amoco (UK) Exploration v. British American Offshore Ltd. [2002] BLR 135*) and the making of an unjustified and personal attack on one party by the other (see Clark v. Associated Newspapers (unreported) 21st September 1998).

Conclusions

65. The Judgment reached at the final hearing was not an easy task. There were complex arguments of law, including estoppel and how the Braganza implied term operated and the burden of proof in relation to it.

66. It was significant that the claim was brought on a primary basis that it was not possible for the Respondent to vary the contract and that it was prevented from doing so. The Claimant was unsuccessful in his arguments in relation to the effect of the Court of Appeal Judgment and the construction of clause 22. Those arguments were not strong. The Claimant was seeking an interpretation which was not in accordance with the natural reading of the decisions. The Court of Appeal did not say that the manual was not one of the contractual documents or that it said nothing. The Claimant was seeking to write in additional words to clause 22, to exclude the manual.

67. The estoppel by conduct argument was a difficult argument for the Claimant. The Claimant had already sought to strike out the response on this basis and failed. The doctrine is based on the success of an argument which caused a Judgment or order and then subsequently the party seeks to assume a contrary position. The Respondent had not been successful in an argument leading to an order. Despite recognising the developing nature of the doctrine, this was not an easy point for the Claimant to take.

68. The Claimant did not have strong arguments in these respects.

69. The Claimant's contentions in relation to the construction of the contract were also rejected. It was held that there was a power to vary the contract, subject to the Braganza implied term, contrary to his primary case.

70. Those matters were of importance to both parties. The Claimant sought to argue that the Respondent could have consented to a Judgment with a caveat that it did not accept that it was prevented from varying the contract. On the basis that the Claimant had sought to prevent the point being argued in a variety of different ways, including estoppel and the subsequent appeal, it did not appear likely such agreement could be reached and I did not accept that the Respondent was unreasonable in defending those issues.

71. Those matters were important background and part of the overall circumstances to take into account.

72. I remained acutely aware that the application is judged on the information known or readily available at the start and how things progressed during the litigation. The focus is on how things appeared when the claim began.

73. The Claimant relied on the findings that the 29 October 2019 manual was not capable of being a manual because it was not of general application. The contract did not define what a manual was. It was necessary for construction of the contract to take place. There were differing views between the parties as to what a manual was. There is a difference between a weak argument and one which has no reasonable prospects of success. The Respondent was relying on the requirement to notify each employee individually and it had therefore complied in respect of the Claimant. There was some merit in the argument. However it was not so weak, when looking at the time the litigation started and during it, that it could be said to have no reasonable prospects of success. Issuing a further manual did not necessarily mean that the Respondent accepted that its case was hopeless, the Claimant had been asking legitimate questions and it may have been that the Respondent was seeking to strengthen its position. There was an individual element to the clause and I was satisfied that it was a properly arguable point.

74. The Claimant argued that the way in which disclosure of information came about showed that the Respondent did not think it had reasonable prospects of success. It was apparent from the correspondence that the Respondent considered that its interpretation of what a manual was, was correct. This appeared to be more a perpetuation of that position rather than an acceptance that its case was hopeless.

75. The Claimant also said that he was targeted by the changes. It was apparent that the Claimant was the only person in the situation whereby the Respondent was having to top up insurance payments.

76. The Respondent's case was that it wanted to realign the Claimant to the position before its insurance policy changed, i.e. so that it was not paying a top up on the amounts received from the insurance company. This was the reason put forward in the grievance outcome and the final hearing as to why the decision was not irrational. Wanting to minimise financial exposure is not of itself something which is obviously irrational.

77. The arguments in relation to the Braganza point were not straightforward. The burden of proof remained on the Claimant throughout. If the Claimant showed a prima facie case, the evidential burden may shift onto the employer to show what its reasons were. If there is no evidence from the employer an inference might be drawn. Irrational means that the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied their mind to it could have arrived at it.

78. The Claimant argued that the lack of witness evidence meant that the Respondent could not discharge its evidential burden and there was an obvious prima facie case. The guidance in Dalgliesh said that if a prima facie case was shown the evidence burden may shift, not that it did shift. The Respondent had set out the reason why it had sought to vary the contract in the grievance outcome, it had not considered other factors and therefore there was no point in calling a witness. That was a tactical decision it was entitled to take. It was not correct that no explanation was provided, there was an explanation in the grievance.

79. Ultimately it was concluded that the Respondent did not take into account all relevant factors, however that did not mean that the Respondent had no reasonable prospects of success in its arguments that its decision was rational. I was not satisfied that the Respondent's arguments on the Braganza point had no reasonable prospect of success.

80. It was also suggested that there was an ulterior commercial motive. I rejected that the Respondent was seeking something extraneous to the litigation. The Respondent successfully defended the Claimant's primary case that there was no power to vary.

81. The lack of a strike out application, in relation to the Braganza and variation points, was not irrelevant. This was not a case in which witness evidence was being called by the Respondent and assessment of the prospects of success could have been undertaken on the documents. However it was understandable why matters not confined to law were not pursued as part of the application.

82. In the circumstances I was not satisfied that the Respondent unreasonably defended the claims or that they had no reasonable prospects of success in their response to them.

83. In the event that I was wrong in that conclusion, I would not have exercised my discretion to make a costs order.

84. Costs in the Tribunal are the exception rather than the rule. The outcome of the case was extremely important to both parties. There was a significant amount of uncertainty following the conclusions of claim 1 and its associated appeals. The parties had polar views as to whether there was any power to amend. The Claimant deployed many arguments to try and persuade the Tribunal that there was no such power and he was unsuccessful in each of them. Some of those arguments were weak. For the reasons outlined above, I did not accept the contentions about a consent judgment and neither party ever suggested during the litigation that such an idea was canvassed. From the nature of the arguments deployed in the case it did not appear that such a suggestion would have been acceptable to either party.

85. I accepted Mr Cohen's submission that the effects of the Judgment were nuanced. Mr Leach was correct that the Claimant succeeded in his claims, however he was also unsuccessful in the primary part of his case. The Respondent gained significant clarification that it did have the power to vary the contract. This can be seen from the nature of the Claimant's appeal. The Judgment has crystallised the relationship going forwards. Both parties achieved some form of success. In such circumstances it would not have been appropriate to make an order for costs and I would not have exercised my discretion to do so.

86. The application was dismissed.

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Approved by
Employment Judge J Bax
Dated: 13 October 2025

Judgment sent to Parties on
30 October 2025

Jade Lobb
For the Tribunal Office