Neutral Citation Number: [2025] EAT 178

Case No: EA-2024-001024-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 December 2025

Before :

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

QR

Appellant

- and –

THE GI GROUP LIMITED

Respondent

- -

- -

Mr Rad Kohanzad for the **Appellant**
Ms Caroline Musgrave-Cohen (instructed by Tandon Hildebrand) for the **Respondent**

Hearing date: 4 November 2025

- -

JUDGMENT

SUMMARY

BREACH OF CONTRACT; PRACTICE AND PROCEDURE - COSTS

The claimant brought a claim for breach of contract, contending that there was a binding oral contract between her and her employer under which it had been agreed that her employment would end and her employer would pay her £40,000. The employment tribunal dismissed the claim, holding the parties had not made a binding, complete contract. Subsequently the ET made an order that the claimant paid £10,100 towards the respondent's costs because of some procedural applications made by her representative which stood no reasonable prospects of success. The claimant appealed against both judgments.

Held:

(1) Breach of contract: the employment tribunal did not conflate the questions of whether there was a settlement agreement complying with the requirements of s.203 of the Employment Rights Act 1996 with the different question of whether the parties had made a binding contract as a matter of common law. Rather, the employment judge considered that, owing to the statutory background known to both parties, they understood that a final, binding agreement would not take place unless and until the agreement was reduced to writing and the Claimant received legal advice upon it in accordance with s.203 of the 1996 Act.

(2) Costs: on the facts, the employment judge's conclusion that the procedural applications stood no reasonable prospect of success was centrally relevant to whether the claimant acted unreasonably for the purpose of rule 76(1)(a) of the Tribunal Rules 2013. The employment judge was entitled to make a costs order under that rule owing to the unreasonable conduct of the claimant or her representative, and there was no sufficient cause for concern that the claimant's representative was not acting on her behalf. However, the employment tribunal erred in its decision as to the amount of costs because (i) in applying rule 84, it did not focus on the claimant's ability to pay but instead looked at the joint income of the claimant and her husband; and (ii) the tribunal did not give adequate reasons for the decision to award £10,100 in costs.

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. This is an appeal against two judgments and accompanying reasons of the employment tribunal ("ET"), both sent to the parties on 1 July 2024. I shall refer to the Appellant, who was the claimant before the ET, as the "Claimant" and the respondent to the appeal as the "Respondent". I granted the Claimant anonymity in a separate Order following an application she made after the hearing in an email dated 25 November 2025.

2. In the first judgment, at a preliminary hearing ("PH") the Employment Judge ("EJ") dismissed the Claimant's claim for breach of contract, based on an allegation that she and the Respondent had reached an agreement on or after 6 December 2022 under which the Respondent agreed to pay her £40,000 and her employment would terminate by mutual agreement. The EJ decided that the parties had not reached a legally binding complete agreement.

3. The second reserved judgment concerned costs following the PH. In a reserved judgment, the EJ ordered the Claimant to pay the Respondent £10,100 towards its costs of the PH.

4. The Claimant was represented by Mr Kohanzad and the Respondent by Ms Musgrave-Cohen. She appeared below but Mr Kohanzad did not. I am grateful to both Counsel for their clear and helpful submissions.

Background and the ET Decision

5. The factual background to this matter is set out in the ET's written reasons in relation to the breach of contract claim (the "breach of contract judgment").

6. The Claimant was employed by the Respondent, a company owned by Mr and Mrs Pantelias which specialises in the manufacture and supply of marine parts, from 24 August 2011 until her employment terminated on 10 March 2023. At the date of termination she was working as a Head of the Purifier Sales Department.

7. In November 2022 the Claimant made a request for flexible working. After this was declined by the Respondent, she brought an appeal against the refusal and also lodged a formal grievance. A meeting was arranged for 6 December 2022 to discuss these matters. The Claimant was represented at the meeting by Mr Alexandrou, a former solicitor who had been struck off the roll, and Mrs Pantelias attended for the Respondent, assisted by an HR advisor, Ms Rhodes.

8. After Mrs Pantelias rejected the Claimant's appeal, she instructed Ms Rhodes to negotiate with the Claimant to see if a settlement agreement could be reached (§12). Negotiations took place between Mr Alexandrou and Ms Rhodes while the Claimant and Mrs Pantelias spoke separately, in a conversation which the ET described as "not friendly" (§14).

9. The negotiations between the representatives resulted in agreement of a number of points, including that the Respondent would pay the Claimant £40,000 in three instalments and her

employment would end on 31 December 2022 by mutual agreement (§16). The ET made these findings at §§17-22:

> "17. It was also agreed and understood by the Claimant on 6 December that an agreement would be drawn up, that she would give up her employment rights (i.e. to claim at a Tribunal) in return for the payment which was agreed. The Claimant also understood that she would have to obtain legal advice and have a lawyer sign to say that advice had been given to, as Mr Alexandrou was not qualified to do so.
>
> 18. It was also agreed on 6 December that the Claimant could remain at home whilst the written agreement was finalised and that she would not be required to work, but would be paid. Further, that the terms of the agreement would be confidential to the parties and that neither party would use derogatory language about the other in public.
>
> 19. What was not explicitly discussed on 6 December was that the Claimant's restrictive covenant, which she had signed in 2013, would remain valid. This was the expectation of the Respondent, but nothing direct was said by Miss Rhodes or agreed between the parties. Neither did Mr Alexandrou mention on the 6 December that the Claimant would expect to be released from it.
>
> 20. Whilst the fact that a reference would be given was agreed, the terms of that reference were not discussed, and that remained something which the parties knew would have to be finalised as part of the written agreement.
>
> 21. It was agreed that Miss Rhodes would create the first draft of the written agreement and she did so and sent it to Mr Alexandrou on 13 December 2022. Along with copies of the Claimant's contract and restrictive covenants.
>
> 22. Mr Alexandrou's reply the same day was that he would pass it to the Claimant and discuss the content with her and "once Inese approves then I will refer back to you and Inese will arrange to visit her solicitor for independent legal advice".

10. It appears that the draft agreement sent by Ms Rhodes included a restrictive covenant because, shortly afterwards, Mr Alexandrou told Mr Rhodes by email that the restrictive covenant was a "non-starter" and it had not been agreed at the meeting (§23). In subsequent correspondence, the parties were unable to agree the restrictive covenant, leading Ms Rhodes eventually to inform Mr Alexandrou in an email of 10 February 2023 that the offer was withdrawn (§32). After a further grievance process, the Claimant resigned on 10 March 2023 (§35).

11. On 8 June 2023 the Claimant brought a claim in the employment tribunal contending, among other matters, that she had been unfairly dismissed, discriminated against because of sex and race and the Respondent was in breach of the agreement to pay her £40,000. In its response, the Respondent denied the claims.

12. **The breach of contract judgment**. The PH was listed to deal with case management and to decide a preliminary issue of whether there was a concluded agreement reached between the Claimant and Respondent on 6 December 2022 or after: see reasons at §2. The hearing took place between 8 and 10 May 2024. It seems the first day of the hearing was spent dealing with various applications made on behalf of the Claimant by Mr Alexandrou, which I deal with in relation to the costs judgment.

13. After making its findings of facts at §§5-35, the ET summarised the law on contracts and settlement agreements under s.203 of the Employment Rights Act 1996 ("ERA"). Its conclusion were at §§42-57. The structure of the reasoning is as follows:

    (1) The ET first recorded that heads of agreement were agreed at the meeting on 6 December 2022 but noted that no written agreement was completed and signed that day (§§42-3).

    (2) After summarising the Claimant's argument that there was an enforceable verbal agreement reached on 6 December 2022 followed by a separate agreement which was never finalised, the EJ decided that there was no evidence from which she could infer the parties intended to make two separate agreement (§§43-47). She thought it would make no sense for the Respondent to agree to pay £40,000 without a guarantee that the Claimant would not bring a claim in the employment tribunal - which would require a written agreement meeting the conditions in s.203 of ERA - and nor for the Claimant to enter into such an agreement in return for nothing (§§43-44). Nor did Mr Alexandrou's emails after 6 December 2022 indicate that an agreement had been reached on that day.

    (3) Next, the EJ considered whether there was a "complete, operable and conditional agreement on 6 December" (§48). She noted that the principal terms had been agreed but that both parties understood the agreement "needed to be reduced to writing" and the Claimant would need to see a solicitor in order to make it a binding settlement agreement, which did not happen (§49).

    (4) She then turned to the subsequent emails, stating that "negotiations continued after 6 December, about the remaining terms of the contract", observing that they showed "a back and forth of compromise and dispute over various points, but significantly over restrictive covenants" (§50). After referring to the correspondence about this "sticking point", the EJ stated:

> "54. I do not accept the Claimant's submission that there was an agreement and that the Respondent moved away from it. I find that there were elements of agreement, but not a complete agreement.
> .....
>
> 56. The Claimant's evidence that she was aware that to have a concluded agreement she would need to receive legal advice and that she did not visit a solicitor and did not sign an agreement, shows that she knew herself that no legally binding complete agreement was created.
>
> 57. There was therefore no concluded contract and therefore no breach of contract."

14. **The costs judgment**. The background to the costs judgment was that, prior to the PH, on 3 May 2024 Mr Alexandrou had sent an email to the ET, attaching witness statements. He made

an application to the ET for various matters, including (it seems) that the response should be struck out and that, if the response was not struck out, the ET should order specific disclosure of certain documents and reschedule the PH. The basis of the application to strike out was a contention that the Respondent had not given full disclosure and the witness statements served on the Claimant by the Respondent did not include addresses, dates or signatures and were not endorsed with statements of truth, said to have meant the witness statements were "deficient", causing prejudice to the Claimant.

15. On 7 May 2024 the Claimant made a further application for, it seems, anonymity, stating that she suffered from stress and anxiety and identifying her "would be prejudicial to her state of health and would not serve any public interest".

16. At the PH between 8-10 May 2024, the ET issued various case management orders, including listing the case for a final hearing in December 2025 in respect of the matters other than the breach of contract claim. According to the record of the Case Management Orders sent to the parties on 1 July 2024, the first day of the PH was spent dealing with the above applications: see §41. It records that the Claimant's applications for a strike out, postponement and anonymity were dismissed, for oral reasons given at the time: see §§5-7. No request for written reasons was made.

17. After the ET gave oral judgment on the breach of contract issue, at the end of a hearing the Respondent made an application for costs. In its reserved judgment on this matter, which I refer to as the "costs judgment", the ET ordered the Claimant to pay the Respondent £10,100 toward its costs. Its reasons were as follows:

    (1) The EJ recorded her understanding of the submissions of the parties (§§6-17). The Respondent's application was made on the basis of rule 76(1)(a) and rule 76(1)(b) of the rules in force at the time, the Tribunal Rules of Procedure 2013.

    (2) The ET referred to evidence from the Claimant as to her means, and evidence from her husband as to his disposable income (§18-19).

    (3) The EJ briefly referred to the law, referring only to rule 76(1)(a) and not rule 76(1)(b) and stating she had a discretion to decide whether it was right and proper to award costs. She observed that she could consider the Claimant's ability to pay both in deciding whether to award costs and in the event that costs were awarded.

    (4) The EJ's conclusions were at §§22-27. Having decided that the strike out and postponement application were not likely to succeed, the application for anonymity was inappropriate and the breach of contract claim had "little prospect of success" (§§23-24), she concluded as follows:

> "25. Dealing with these applications had taken a whole day of Tribunal time and a considerable amount of extra work by the Respondent to respond to these. None of these applications had any reasonable prospect of success and

> the Respondent had pointed this out by way of correspondence in respect of the Breach of contract claim.
>
> 26. I therefore have concluded that it would be appropriate to make an award of costs in this case, due to the misuse of the Tribunal time and the inevitable dismissal of these applications.
>
> 27. Taking into account the joint income of the Claimant and her husband and taking into account the cost of the Respondent's time in relation to the various applications as set out on their Schedule of costs, I have concluded that a sum of £10,100 should be paid by the Claimant to the Respondent."

The Legal Framework

18. A claim for damages for breach of a contract "connected with employment" may be brought in the employment tribunal so long as it is outstanding on termination of employment, subject to limits on the amount recoverable: see s.4 of the Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The restrictions on contracting out in s.203 of ERA are relevant to the breach of contract appeal. It states, so far as is material:

> "**203.- Restrictions on contracting out.**
>
> (1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports-
> (a) to exclude or limit the operation of any provision of this Act, or
> (b) to preclude a person from bringing any proceedings under this Act before an employment tribunal
>
> (2) Subsection (1)-
> ....
> (f) does not apply to any agreement to refrain from instituting or continuing any proceedings within the following provisions of section 18(1) of the Employment Tribunals Act 1996 (cases where conciliation available)-
> (i) paragraph (b) (proceedings under this Act),
> (ii) paragraph (l) (proceedings arising out of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000),
> (iii) paragraph (m) (proceedings arising out of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002),
> if the conditions regulating settlement agreements under this Act are satisfied in relation to the agreement.
>
> (3) For the purposes of subsection (2)(f) the conditions regulating settlement agreements under this Act are that-
> (a) the agreement must be in writing,
> (b) the agreement must relate to the particular proceedings,
> (c) the employee or worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal ,
> (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice,

> (e) the agreement must identify the adviser, and
> (f) the agreement must state that the conditions regulating [settlement agreements under this Act are satisfied.
>
> (3A) A person is a relevant independent adviser for the purposes of subsection (3)(c)-
> (a) if he is a qualified lawyer,
> (b) if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union,
> (c) if he works at an advice centre (whether as an employee or a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre, or
> (d) if he is a person of a description specified in an order made by the Secretary of State.
>
> (3B) But a person is not a relevant independent adviser for the purposes of subsection (3)(c) in relation to the employee or worker-
> (a) if he is, is employed by or is acting in the matter for the employer or an associated employer,
> (b) in the case of a person within subsection (3A)(b) or (c), if the trade union or advice centre is the employer or an associated employer,
> (c) in the case of a person within subsection (3A)(c), if the employee or worker makes a payment for the advice received from him, or
> (d) in the case of a person of a description specified in an order under subsection (3A)(d), if any condition specified in the order in relation to the giving of advice by persons of that description is not satisfied.
>
> (4) In subsection (3A)(a) "qualified lawyer" means-
> (a) as respects England and Wales, a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act), and
> (b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice), or a solicitor who holds a practising certificate.

19. Other statutory provisions, such as ss 144 and 147 of the Equality Act ("EqA") are to similar effect. Although s.144(1) of the EqA uses different language from s.203 of ERA, it has been interpreted in the same way so as to mean that a term of a contract is unenforceable so far as it prevents someone bringing tribunal claims unless the agreement meets the conditions in s.147: see ***Clyde & Co v Bates Van Winkelhoff*** [2011] IRLR at §§41-42.

20. The effect of these provisions is that an agreement is void only "in so far as it purports" to preclude a person from bringing complaints to enforce their statutory employment rights. It does not make the agreement void for all purposes. It was common ground that Mr Alexandrou was not an "independent advisor" or a "qualified lawyer" within the meaning of s.203 ERA or s.147 of the EqA.

21. At the time of the hearing, the rules on costs were governed by Tribunal Rules 2013 and references below in this judgment are to that version of the rules.

22. As to when a costs order could be made, at the material time rule 76(1) stated:

> "(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, 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) or the way that the proceedings (or part) have been conducted;
> (b) any claim or response 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 the relevant hearing begins"

23. A tribunal is not obliged to make a costs order when it considers one of the grounds rises but under rule 76(1) had a discretion to do so (save under rule 76(3), not relevant here). The procedure for applying for and making a costs order was in rule 77. Rule 78 set the amount of costs order.

24. There are, it follows, three stages in making a costs order, summarised by Singh J (as he then was) at §14 in ***Abaya v Leeds Teaching Hospital NHS Trust***, UKEAT/0258/16/BA, 1 March 2017 and applied and endorsed in many other cases.

(1) At stage one the employment tribunal decides if one of the threshold conditions for making costs order is met. The different elements of rule 76(1)(a) and (b) were summarised by HHJ Eady QC (as then was) in ***Ayoola v St Christopher's Fellowship*** UKEAT/0508/13/BA at §19. In applying rule 76(1)(a), a tribunal must look at the whole picture, ask if there has been unreasonable conduct by the claimant, identifying the conduct, what was unreasonable about it and what effect it had: ***Yerrakalva v Barnsley Metropolitan Borough Council*** [2012] ICR 420 per Mummery LJ at §41. The question under rule 76(1)(b) is confined to considering whether the "claim or response" had no reasonable prospect of success, and a "claim" is defined in rule 1.

(2) At stage two, the ET must consider whether to exercise its discretion to make an award of costs. That is a consequence of the word "may" in rule 76(1). It is an error of law for the tribunal to jump straight from stage one to stage three: see, among many others, ***Ayoola*** at §17, ***Abaya*** at §15.

(3) At stage three, the tribunal assesses the amount of costs in accordance with the rules.

By rule 84, when deciding whether to make a costs order and, if so in what amount, the tribunal "may" have regard to the paying party's ability to pay.

The Grounds of Appeal

25. The Notice of Appeal is said to be against the judgment of 1 July 2024. Following the Order of John Bowers KC, sitting as a Deputy High Court Judge, on the sift, in an email of 22 November 2024 the Claimant made clear that the appeal was against both the costs and the breach of contract judgments.

26. In relation to both appeals, I bear in mind the general principles governing how an appellate court must approach the reasons of an employment tribunal summarised by Popplewell LJ at

§§57-58 of ***DPP Law v Greenberg*** [2021] IRLR 1016, including that a tribunal judgment should be read fairly and as a whole, without being hypercritical, and where an employment tribunal has correctly stated the legal principles, the EAT should be slow to conclude it has not applied them.

27. **The breach of contract appeal**. Ground 1 of the Notice of Appeal states that the "ET erred in conflating whether a contractual agreement was binding with whether it was binding by virtue of s.203 ERA". That is the only point which Mr Kohanzad relied upon in relation to the appeal against the breach of contract judgment. He argued that there could be a binding oral agreement even if the parties contemplated a written contract would follow; that properly analysed, the agreement on 6 December met the conditions to be a binding agreement; and that, to the extent parties contemplated a written agreement, they were obliged to negotiate in good faith to agree that, separate, agreement.

28. The question whether an agreement has been reached is an objective one (subject to issues about mistake which need not detain me), but evidence about the parties' subjective understanding or subsequent conduct is admissible insofar as it sheds light on whether an agreement was reached or whether it was intended to be legally binding: see e.g. Leggatt J (as he then was) in ***Blue v Ashley*** [2017] EWHC 1928 (Comm) at §§63-64, referring to the House of Lords' judgment in ***Carmichael v National Power*** [1999] ICR 1226. An agreement may lack contractual force because, for example, it is incomplete, because its operation is subject to a condition which fails to occur or because, when the parties' words and conduct are analysed in context, they did not intend it to be legally binding.

29. The EJ asked herself whether there was a complete and unconditional agreement on 6 December: see §48. Her ultimate answer, at §54, was that there were "elements of an agreement, but not a complete agreement" at that date. Underpinning that conclusion were the EJ's findings that the Claimant agreed and understood an agreement would be drawn up under which she would give up her rights to make claims in the tribunal in return for the agreed payment (§17); the parties knew the reference could have to be finalised as part of the written agreement and it was agreed that Ms Rhodes would complete the first draft (§§20-21); the parties understood no binding settlement agreement would arise until the agreement was in writing and Claimant had seen a solicitor (§49); and negotiations continued after 6 December about the remaining terms (§50). Although important matters had been agreed, such as the sum to be paid and the date of termination, all these factors suggested that no complete binding agreement was made on 6 December.

30. Mr Kohanzad submitted, however, that the EJ fell into error at §48 of her reasons, in stating that "nothing was reduced to writing and therefore no formal agreement was made"and in referring at §49 to the fact that the Claimant "would need to see a solicitor in order to make [the agreement] into a binding settlement agreement". He argued these paragraphs showed that the EJ had conflated the conditions for a binding settlement agreement, governed by s.203 ERA and the cognate provisions in the EqA, with the conditions for a binding contract, governed by common law rules.

31. I accept an agreement between an employee and employer need not be in writing, nor meet the other conditions in s.203 of ERA, in order to be an enforceable contract, just as Mr Kohanzad argued. The effect of s.203 ERA is not to make an agreement void for all purposes; it only makes an agreement void "in so far as it purports" e.g. to prevent an individual bringing tribunal proceedings. But I do not accept the EJ, when her judgment is read fairly and as a whole, conflated or confused the conditions for a binding settlement agreement under s.203 of ERA with the question whether there was a binding agreement at all on 6 December. The EJ correctly directed herself that an agreement did not have to be written down to be a contract: see §37. Her statement in §48 that no "formal agreement" was made on 6 December reflected her findings that the parties both understood the agreement needed to be in writing and the Claimant needed to receive legal advice before it became binding. Such a reading is underlined by §56, in which the EJ referred to the Claimant's own evidence that she was aware that "no legally binding complete agreement was created" (my emphasis) unless and until she received legal advice from a solicitor. Similarly, when §49 is read in its context, the EJ's reference to a binding "settlement" agreement meant no more than a binding agreement: that is, a binding agreement to settle the potential claims. Read fairly and in context, the comments at §48 and §49 were directed to whether there was any binding agreement reached on 6 December.

32. The EJ did not, in other words, treat compliance with the conditions in s.203 of ERA as negating the existence of a binding contract on 6 December. Rather, when the decision is read fairly and as a whole, she considered that, owing to the statutory background known to both parties, the Claimant as well as the Respondent reasonably understood that a final, binding agreement had not been reached on 6 December 2022 because they both understood that no binding contract would arise unless and until the agreement was reduced to writing and the Claimant received legal advice upon it. The other factors to which I have referred at §29 above supported that conclusion.

33. Translated into slightly more legal language, the EJ's conclusion was that the parties reasonably understood that the agreement was subject to the condition precedent that no binding agreement would exist unless and until the conditions in s.203 ERA were met. Alternatively, the EJ's decision could be analysed as a finding that, when the parties' words and conduct were interpreted against the statutory background known to them both, they did not intend the agreement to be binding unless and until it met the conditions in s.203 ERA and the cognate provisions ss 144 and 147 of the EqA: see, e.g., Leggatt J in ***Blue v Ashley*** at §§55-6. In this regard I do not accept Mr Kohanzad's submission that a lack of intention to create legal relations depends solely upon the nature of the relationship between the parties. As *Chitty on Contracts* (35th edition) makes clear at §4-235, the cases in this area cannot be exhaustively classified. Nor do I accept his argument that an implied duty to negotiate in good faith would supplement any gaps or incompleteness in the oral agreement reached on 6 December. That was not how the case was put before the EJ and even if such a duty applied, it is very unclear how it would resolve e.g. the agreement of a restrictive covenant.

34. For these reasons I reject the appeal against the breach of contract judgment.

35. **The costs judgment appeal**. The starting point for the appeal against the costs judgment is what Mummery LJ said in ***Yerrakalva*** at §9:

> "An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings..."

36. Ground 1. This ground has two elements.

37. The first is that the EJ erred in deciding that the Claimant's claim had no reasonable prospect of success because she conflated the requirements of s.203 ERA with the requirements of a binding contract at common law.

38. I have already rejected the closely related argument in respect of the breach of contract judgment and for similar reasons reject this ground. Nor, in my judgement, did the EJ fall into error in §24 of the costs judgment when she took into account the Claimant's own evidence that she subjectively knew she needed to obtain legal advice before the agreement was binding.

39. The second element of this ground is a contention that it was perverse to find the Claimant's claim of breach of contract stood no reasonable prospect of success because (i) it was largely an "irrelevance" that she understood the agreement had to be reduced to writing and (ii) her argument that there were two agreements - one made orally on 6 December and then a subsequent one, never finalised, that she would not bring any tribunal claims - was arguable.

40. I do not accept this ground. First, it is unclear that the EJ decided that the claim for breach of contract had no reasonable prospect of success or, if so, that it was a reason for making a costs order under rule 76(1)(b). Though she referred to the claim having "little prospect of success" at §24, when it came to her actual decision to make a costs order she only referred to the "applications" at §§26-27, seeming to mean the applications dealt with on the first day; I return to this point in the section addressing ground 6. Second and in any event, I do not consider these grounds are sufficient to cross the high threshold of a perversity challenge. There was little to support the argument that there were two separate agreements, just as the EJ decided in her breach of contract judgment. The Claimant's own evidence that she subjectively knew no binding agreement was created on 6 December was relevant to the question whether the parties had objectively reached a binding agreement on 6 December (see ***Blue v Ashley***, above) and supported the EJ's conclusion that her claim had no or little reasonable prospect of success.

41. Ground 2. This ground is that the EJ wrongly asked herself whether the procedural

applications made by the Claimant had no reasonable prospect of success (rule 76(1)(b)) rather than whether the Claimant had acted unreasonably in the way that the proceedings had been conducted (rule 76(1)(a)).

42. Rule 76(1)(a) applies to the way the proceedings are conducted whereas rule 76(1)(b) applies to the "claim or response" having no reasonable prospect of success. It was common ground that rule 76(1)(b) is restricted to the claim form or response having no reasonable prospect of success and could not extend, therefore, to the procedural applications made by the Claimant (in accordance with ***Warburton v The Chief Constable of Nottinghamshire*** [2022] EAT 42). The costs' threshold condition potentially relevant to the applications was rule 76(1)(a) alone.

43. I start with the EJ's reasons.

(1) The EJ began by recording what she understood to be the Respondent's submissions at §6. She summarised the Respondent as submitting that (i) the Claimant's actions during the course of the hearing amounted to unreasonable conduct *and* (ii) both the applications and breach of contract claims stood no reasonable prospect of success. To the extent it concerned the applications, the second limb does not fit within the wording of rule 76(1)(b). Moreover, at the hearing before me, Ms Musgrave-Cohen said that this was *not* how she put her case before the ET. In fact her case was that (i) the way the unmeritorious applications was brought amounted to unreasonable conduct under rule 76(1)(a); and (ii) the claim for breach of contract stood no reasonable chance of success under rule 76(1)(b).

(2) However, in the succeeding paragraphs, in which the EJ summarised Ms Musgrave-Cohen's submissions, the EJ correctly set out the two different bases of the application: see especially §§11-12.

(3) In the legal section of the reasons, the EJ referred only to rule 76(1)(a). She did not set out what that rule states. It is perhaps odd that the EJ did not refer to rule 76(1)(b) when part of the Respondent's application, relating to breach of contract, was explicitly on the basis of that rule and, I was told, *not* on the basis of rule 76(1)(a).

(4) In the concluding section, the EJ set out her view that neither the strike out nor postponement application were likely to succeed and the breach of contract claim stood little prospect of success.

(5) Though the matter is not entirely clear, I consider that at §25 the EJ was addressing whether the threshold condition for a costs order was met. She stated only that "None of these applications had any reasonable prospect of success", and the Respondent had pointed this out in correspondence in respect of the breach of contract claim. Although Ms Musgrave-Cohen contended that in this paragraph the EJ was both finding that the threshold condition for unreasonable conduct had been met *and* exercising the discretion to make a costs award, that interpretation is hard to square with the absence of any express indication of exercising a discretion: it reads more as a finding that the

applications met the threshold condition for a costs order.

(6) The language of §26 is, however, suggestive of the EJ exercising a discretion because she referred to it being "appropriate" to make a costs order owing to the misuse of tribunal time and the "inevitable dismissal of the applications".

44. Mr Kohanzad had at least three points in his favour. The first is that the EJ appeared to have misunderstood the way the Respondent's submission about the applications, believing the Respondent to contend it was not only on the basis of unreasonable conduct but also on the basis that the applications stood no reasonable prospect of success (see §6 of the reasons, considered above). Second, nowhere did the EJ make an explicit finding that the Claimant (or her representative) acted unreasonably within the meaning of rule 76(1)(a) in making the applications. Third, at §25 the EJ decided that none of the applications had any "reasonable prospect of success", suggesting she may have been looking at the matter through the wrong lens of rule 76(1)(b), not 76(1)(a) (which was the sole basis upon which the Respondent sought costs in respect of the applications).

45. Although this argument was attractively advanced, on reflection I do not accept this ground is made out. As to the first point, it seems the EJ correctly set out the basis of the Respondent's applications at §§11-12 of her reasons, so correcting any misunderstanding about them at §6.

46. Second, I do not accept Mr Kohanzad's argument that in assessing whether the threshold of unreasonable conduct in rule 76(1)(a) was crossed, the EJ was bound to ask herself whether the Claimant subjectively knew, or in light of her personal characteristics ought to have known, that the applications were misconceived (though that might well be relevant to the exercise of discretion at stage 2). The term "unreasonably" in rule 76(1)(a) should not be construed as referring to conduct similar in kind to where a party acts "vexatiously, abusively [or] disruptively" under rule 76(1)(a) in accordance with what is called the *ejusdem generis* rule. Instead, it bears its ordinary meaning: see ***Dyer v Secretary of State for Employment***, EAT183/83, at p 16.

47. Third, as Mr Kohanzad accepted, whether the applications had a reasonable prospect of success was a relevant factor in considering whether the Claimant (or her representative) acted unreasonably in the conduct of the proceedings. I consider it was more than that: it was the only or central reason why it was said that the Claimant acted unreasonably for the purpose of rule 76(1)(a) in pursuing the applications. In that context it is entirely understandable why the EJ would focus on whether the applications had "no reasonable prospect of success" in deciding whether the threshold in rule 76(1)(a) had been crossed.

48. No doubt it would have been better if the EJ had expressly found and stated that the Claimant or her representative had acted unreasonably for the purpose of rule 76(1)(a). But an EJ is not sitting an exam. The EJ had rule 76(1)(a) firmly in mind because she referred to it at §20. On the particular facts of this case, I consider the reference to the applications not having "any reasonable prospect of success" in §25 is no sufficient basis upon which to conclude that the EJ applied the wrong legal principle. The better - and fairer - interpretation of her judgment

is that the EJ referred to lack of any reasonable prospect of success because of its central relevance to the question whether the Claimant or her representative had acted unreasonably within the meaning of rule 76(1)(a) in making the procedural applications.

49. Ground 3. This ground is that the ET failed to allow the Claimant to distance herself from the actions of her representative. Reliance was placed on ***Bennett v London Borough of Southwark*** [2022] IRLR 407, in which the Court of Appeal held that an employment tribunal erred in striking out claims owing to the conduct of a claimant's representative because it was not right to attribute that conduct to the claimant. Mr Kohanzad argued that the applications made by the Claimant's representative, Mr Alexandrou, contained such basic errors that they indicated failings on his part, not unreasonableness on the part of the Claimant, meaning that the EJ should have considered whether the Claimant should be held responsible for his failings and taken steps to investigate the position.

50. The starting point here is that, unlike the rule on strike out considered in ***Bennett***, which applied to unreasonable conduct "on or on behalf of a claimant" (subsequently found in rule 37 of the 2013 Rules), rule 76(1)(a) expressly allows a costs order to be made owing to the unreasonable action of a party or a "party's representative". In ***Beynon v Scadden*** [1999] IRLR 700 the EAT decided that rule 12 of the 1993 Rules, which only referred to a "party" in relation to unreasonable conduct, could apply to the unreasonable conduct of a representative. The wording of rule 76(1)(a) is a statutory *imprimatur* of that decision. However, the ultimate costs order is only that the "party" – and not the representative - makes a payment to the "receiving party" in respect of its costs: see rule 75.

51. This gives rise to the potential unfairness of a claimant being saddled with liability to pay a costs order where the unreasonable conduct was solely due to his or her representative. To that extent there is an analogy with ***Bennett***, even though it concerned a strike out. A potential civil remedy against the representative may be no more than a "figment of the imagination", especially where the representative is not a qualified lawyer (see ***Phipps v Priory Education Services Ltd*** [2023] ICR 1043 at §§33-35) In such circumstances, the fair solution may sometimes be to trigger the wasted costs jurisdiction against the representative, which a tribunal may do on its own initiative (see rule 82). It permits a claim by one party against the other party's representative and a claim by a party against their own representative, so long as the representative was acting for profit: see rule 80(2)(3).[1]

52. Owing to the unfairness I have identified, I accept that circumstances may arise where a tribunal can or should investigate, in accordance with its duty to act justly, whether unreasonable conduct was the responsibility of a party's representative which it is not right to attribute to the party. However, a tribunal will not owe a duty to inquire or investigate the matter in every case. As it was put by Sedley LJ in ***Bennett*** at §26:

[1] It seems, too, it may permit a claim by a party against their own representative for costs they are ordered to pay to the other party. ***Brown v Bennett (No.2)*** [2002] 1 WLR 713 at §§27-36 on the equivalent provisions in s.51 of the Senior Courts Act 1981, upon which the Tribunal Rules are modelled. It has been held that the case law on s.51 is relevant to the interpretation of the Tribunal Rules on wasted costs.

> "what is done in a party's name is presumptively, but not irrebuttably, done on her behalf. Where the sanction is the drastic one of being driven from the judgment seat, there must be room for the party concerned to dissociate herself from what her representative has done."

In ***London United Busways Limited v Dankali*** [2023] EAT 123, HHJ Auerbach said that while the "starting point" is a presumption that a representative acts with the authority and on the instructions of the party and tribunals do not "routinely" investigate the scope of authority, a tribunal may or should take further steps to investigate the matter where there is a "potential cause for concern" as to whether a representative has the instructions or authority of a party (§§50-52). I respectfully adopt that analysis.

53. On the facts of this case, however, I am not persuaded there was sufficient cause for concern so as to require the EJ proactively to investigate the scope of Mr Alexandrou's authority. It is clear that the Claimant and the EJ knew that Mr Alexandrou was not a qualified lawyer: hence the need for legal advice on the proposed settlement agreement (see the breach of contract judgment, §17). The Claimant was copied into the application to strike out the response dated 3 May 2024. According to Ms Musgrave-Cohen, the EJ gave time for breaks during which Claimant could discuss matters with her representative. The Claimant was present during the three-day hearing, in her evidence continued to assert that the witness statements were not valid as served (costs judgment, §15) and never sought to distance herself from her representative. In those circumstances, I do not consider the mere fact that the applications appeared to be very weak was a sufficient cause for concern that Mr Alexandrou was acting outside the scope of his authority. The EJ *might* have investigated the matter (and might have given consideration to making a wasted costs order); but that falls short of her being under a duty to do so.

54. Nor do I accept that the EJ should have asked if Mr Alexandrou was regulated or not, as asserted in §10 of the Grounds. A party is entitled to be represented by any person she chooses: see s.6 of the Employment Tribunals Act 1996 and ***Phipps*** at §33. Although I was treated to some details of the statutory framework regulating those who represent claimants in e.g. the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 - briefly alluded to in ***Phipps*** at §33 - it was not clear this applied to Mr Alexandrou. Nor was it contended that the financial services legislation prevented his acting as the Claimant's representative or that it imposed a duty on the EJ to inquire as to his regulatory status. There is no legal support for the EJ owing a duty to make inquiries into this matter.

55. Ground 4. This ground is that the ET erred "in going from a finding that the costs threshold was met to making an award of costs". It is said that the ET went directly to a finding that the threshold was met in §24 and §25 to a finding of costs at §26, missing the exercise of its discretion.

56. As Mr Kohanzad accepted, this ground depended for its support on the word "therefore" in §26 of the reasons: if that word were deleted, the argument would collapse. However, the EJ expressly directed herself on the need to exercise a discretion at §20, so that I must be slow to infer that she did not correctly apply the principle. Her use of the term "appropriate" in §25 is

redolent of exercising a discretion. It echoes precisely the term Eady J used in ***Ayoola*** at §17, where she said that a tribunal must address at the second stage "whether it is appropriate to exercise its discretion to award costs". Against that background, I do not consider "therefore" will bear the weight Mr Kohanzad sought to place on it. This appeal ground depends too much upon a hypercritical reading of the decision.

57. Ground 5. In this ground the Claimant contends that the ET erred because it did not ask itself or set out how much of the household income was attributable to the Claimant and how much to her husband. While the means of a third party can be taken into account, it is submitted that a tribunal must consider the impact on the paying party's own ability to pay.

58. Mr Kohanzad submitted that the EJ set out the Claimant's means at §18, referring to the fact she was financially dependent on her husband, and her husband's disposable income at §19; but when it came to the award of costs it simply referred to the joint income, without asking or setting out how much of the joint income was available to the Claimant. He contended that a similar point arose in ***Abaya***, where a claimant and his ex-wife had a joint surplus income of £327 a month but the tribunal did not state or find how much of that was attributable to the claimant's means when making a costs award of £5,000. Singh J accepted that an employment tribunal could enquire into the means of a third party but the "ultimate purpose of such an enquiry is to determine what the party's ability to pay is and what impact therefore the third party's position may have on his ability to pay, if any" (§25). In allowing the appeal, he stated at §27:

> "What the Employment Tribunal did not do anywhere in its Judgment was enquire or set out how the figure of £327 was to be broken down as the monthly surplus between the two relevant people's income. The Claimant could reasonably, in my judgment, complain that if it had gone about the exercise in a different way, focusing on the correct question, namely his own ability to pay, albeit possibly having access to third party funds, the Tribunal might have concluded that the appropriate quantum of costs should not be as high as £5,000 but might be a lower figure. In my judgment, therefore, again, whether one analyses this as an error of principle or as one of inadequacy of reasoning, Mr Crozier's [Counsel for the Claimant] submissions must be accepted"

59. In response, Ms Musgrave-Cohen contended that the discretion under rule 76 and rule 84 is broad and unfettered (see ***Beynon*** at §15), and each case depends upon its own circumstances. To the extent the judgment of the EAT in ***Abaya*** required a tribunal to break down the sums available to the paying party, that would amount to an unlawful fetter on the tribunal's discretion. Here, the ET found that the Claimant was financially dependent on her husband and at §27 sufficiently explained that, in those circumstances, it had taken into account the joint income in exercising its discretion.

60. It was not in dispute that (i) the EJ had a discretion under rule 84 to have regard to the Claimant's ability to pay; (ii) in fact, however, the EJ did have regard to ability to pay at §27, at least as regards the amount of the costs order; (ii) the focus of rule 84 is, in accordance with its language, on the "paying party's...ability to pay"; and (iii) a tribunal may properly have

regard to the resources of a third party to the extent that they affect the paying party's ability to pay. Examples of the last point are ***Beynon***, in which the union's means were taken into account, and ***Omooba v Michael Garrett Associates*** [2024] IRLR 30 at §§183-184.

61. In my judgement, a tribunal has a broad and unfettered discretion whether to have regard to a paying party's ability to pay under rule 84, but if it does do so the rule requires that the focus is on that individual person's ability to pay. The resources of a third party may be relevant, but only insofar as they impact on the paying party's ability to pay: see ***Abaya*** at §25. To that extent, the judgment in ***Abaya*** does no more than reflect the clear language of rule 84. It is not a fetter on a tribunal's discretion and is not in tension or conflict with ***Beynon***.

62. In the present case, I cannot see the EJ ever set out, referred to or asked herself how the husband's disposable income impacted on the Claimant's ability to pay. Just because she was financially dependent on him did not mean that she had access to all his disposable income; just because he had disposable income of £250-£300 a month did not mean that formed part of her ability to pay a costs award. I appreciate that brevity is a virtue in tribunal reasons and a costs decision may be reached on a broad-brush basis. I accept, too, that a tribunal is not required in every case to find an exact amount or percentage which was available to a paying party from a third party. ***Abaya*** should not be understood as erecting a legal rule to that effect when the wording of rule 84 is the best guide. But still the decision must show that the employment judge has examined the question through the proper statutory lens. That is especially so in the context of a costs award of around £10,000 which is, for most people, a lot of money. In §27, however, I do not consider that the EJ did that. She expressly took into account the "joint income of the Claimant and her husband": she did not focus solely on the Claimant's ability to pay - albeit as impacted by her husband's income - as rule 84 required.

63. I therefore allow the appeal on Ground 5.

64. Ground 6. This ground is that the ET provided inadequate reasons for deciding on the amount of its costs award of £10,100. The level of detail required of tribunal reasons is well established and the principles are summarised in ***Greenberg*** at §56(2): in broad terms the parties need to know why they have won or lost. Translated into the context of costs awards which are usually made on broad brush assessments, the duty requires that the tribunal must give some explanation of how the amount is calculated: see ***Ayoola*** at §51.

65. Ms Musgrave-Cohen asserted this in her skeleton at §23 that the EJ's only basis for making a costs order was that the Claimant acted unreasonably in making the procedural applications for the purpose of rule 76(1)(a), the effect of which was to require a whole day of tribunal time addressing them. She did not contend that the lack of reasonable prospects of the breach of contract claim formed any part of the reason for the costs order. Supporting her interpretation is the fact that the EJ only mentioned rule 76(1)(a) in the legal section and in her conclusions referred to the "inevitable dismissal of these applications" in §26 (meaning the applications which had taken a day of tribunal time) and to the Respondent's time "in relation to the various applications" at §27. Although the judgment is not entirely clear on this point, on balance I consider the better interpretation of the judgment is just as Ms Musgrave-

Cohen contended.

66. The only paragraph in the judgment addressing the amount of costs issue was §27. I have already held that the EJ did not focus in §27 on the Claimant's individual ability to pay, but Mr Kohanzad did not rely on the failure to disentangle her and her husband's income under this ground. The EJ said she had taken into account two factors: the joint income of the Claimant and her husband and the Respondent's time in relation to the various applications, referring to the Respondent's Schedule of Costs. (She had earlier referred to the applications taking a whole day of tribunal time and a considerable amount of extra work by the Respondent (§25).)

67. The Claimant knew about the Respondent's Schedule of Costs which, so far as I can tell, claimed £22,000 (excluding VAT) for all the work done to date and for the whole three days of the PH (and which did not set out separately, again so far as I can tell, the costs of dealing with the applications alone).

68. While I accept a costs assessment of amount may be very broad-brush and impressionist, there is no need for a precise casual link between the unreasonable conduct and costs and nothing approaching a detailed assessment is required, what I cannot see is any adequate analysis or explanation of why the sum of £10,100 was awarded. The statement that the EJ had taken into the account the joint income and the Respondent's time does not explain how those matters led to the figure of £10,100. Was that figure intended as an estimate of how much cost the Respondent incurred on the various applications alone (which was not set out in the Schedule of Costs but which seems a rather high amount given that the applications only took one day and presumably little preparation time)? Was the amount of costs incurred in dealing with the applications reduced owing to the Claimant's and her husband's means? Or was the figure a global assessment of how much of the total costs claimed in the Schedule it was thought just that the Claimant should pay, regardless of the actual effects of the unreasonable conduct? I do not know and nor does the Claimant.

69. Even having regard to the Schedule of Costs as supplementing what is said in §27 and acknowledging that very brief reasons may be sufficient, I consider the EJ has not given adequate reasons explaining how the ET arrived at the decision to award £10,100.

70. For these reasons I allow Ground 6.

Conclusion and Disposal

71. My conclusion is that the appeal against the breach of contract judgment is dismissed and grounds 5 and 6 of the appeal against the costs judgment are allowed. The ET's judgment to award costs of £10,100 is accordingly overturned.

72. On disposal of the appeal against the costs judgment, Ms Musgrave-Cohen submitted that the matter should be remitted to the same EJ because she had memory of the case. For the Claimant, Mr Kohanzad submitted it should go to a different employment judge because the EJ remained closely involved in the management of the case towards its final hearing and

there was an understandable risk she might not want to change her earlier decision.

73. I have had regard to the criteria in ***Sinclair Roche & Temperley v Heard*** [2004] IRLR 763. If the hearing returns to the same employment judge, it will lessen the length of the hearing because she alone knows the background. The hearing is sufficient close in time that there is little real risk the EJ will have forgotten about the case. Nor have I decided that her decision was totally flawed: I have only allowed the appeal on two points and have upheld the other aspects of the costs judgment under challenge. I accept the real human risk that any employment judge may want to reach the same conclusion on remission, but I consider this is not sufficient to outweigh the presumption that the EJ will deal with the matter professionally and fairly in light of the guidance in this judgment. Finally, there is another important consideration: in the absence of a written judgment on the reasons for the refusal of the applications made by the EJ, it is unlikely that another employment judge will understand the background, context and reasons that led to the EJ dismissing the applications in the first place. That, too, is a further reason for remittal to the same EJ.

74. For those reasons, I consider that remission should be to the same EJ, to reconsider her decision on costs in light of this judgment.