EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Morgan	**V**	**E.on UK**

Heard at: Birmingham **On**: 27 October 2025

Before: Employment Judge Broughton

Appearances:
For Claimant: Written submissions
Respondent: Written submissions

COSTS JUDGMENT

The respondent's application for costs on the basis of the claim having no reasonable prospects of success is refused.

The possibility of a costs award in relation to unreasonable conduct is reserved.

Reasons

1. The Tribunal may make a costs order, and shall consider whether to do so where, inter alia, a party 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".

2. A Tribunal may also make a costs order in circumstances where a claim has, or had, no reasonable prospects of success.

3. It may be made on the application of a party or of the Tribunal's own initiative.

4. In considering a costs application, a three-stage test applies, requiring the Tribunal to consider: first whether the ground is made out; if so, second, whether to exercise a discretion to actually award costs; and third, if the above discretion is exercised in favour of making a costs order, the Tribunal needs to make an assessment of the sum to be awarded.

5. 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.

6. In deciding whether to make a costs order, the employment tribunal does not have to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed which is not to suggest that causation is irrelevant or to lose sight of the totality of the relevant circumstances.

7. The key issue in the respondent's application related to the Claimant's conduct centred around his continued pursuit of this claim in circumstances where they said the Claimant was aware he had no reasonable prospects of success.

8. They expressly referenced that the Claimant stated twice during cross-examination that these proceedings allowed him to 'have his day in court', whatever the outcome, which they said came at the (significant) expense the Respondent.

9. They had also set out in a Cost Warning Letter (CWL) why they considered the Claimant's claim had no reasonable prospects of success. The Cost Warning Letter was submitted alongside their application. In short, the Respondent set out the conduct the Claimant was accused of during the disciplinary process, and the various policies he was, therefore, alleged to have breached. They said the Claimant had the benefit of legal advice at the time the CWL was sent to him.

10. The respondent contended that because the Claimant subsequently accepted, under cross-examination, that his actions fell within the relevant policy provisions and amounted to gross misconduct, it was unreasonable for him to have continued to pursue the claim after the CWL.

11. However, it seemed to me that this may have been a dawning realisation on the part of the Claimant and it would not always be in the interests of justice to dissuade parties from admissions, however late they may be made.

12. Moreover, an employee being guilty of gross misconduct does not automatically mean their dismissal will be deemed fair. There may, for example, be arguments on consistency, or mitigation, alternative reasons or significant procedural failings.

13. Those were all possible arguments in this case, at least some of which had potential merit. These were set out in my summary reasons at the time.

14. In all those circumstances, I cannot say that the claims always had no reasonable prospects of success, nor that the claimant should, necessarily, have known this. Claimants are entitled to argue for a declaration of unfairness even if, realistically, their compensation may be severely limited, or discounted, potentially to zero.

15. The Respondent also submitted that the Claimant was dishonest, evasive and inconsistent throughout these proceedings, which, they said, amounted to unreasonable conduct. There was some truth in that.

16. The claimant took on secondary work, although the respondent's policy on this was unclear. It was, however, for a competitor, UW, albeit, as they were simply a reseller, the claimant claimed to initially not understand this.

17. The work included encouraging individuals to change their energy suppliers, some of whom were, inevitably, E.on customers. He said, however, that he did not realise this until the hearing which was, at best, surprising. That said, it was possible that he was also causing some customers to switch to E.on.

18. Of greater concern, however, was the fact that, contrary to his claims at the time, the Claimant did not at any stage end his relationship with UW, even when expressly claiming to have done so. This only became fully clear during the hearing before me and following late, disputed disclosure.

19. That said, surprisingly, the claimant had not been expressly told that he should immediately cease his competing activity.

20. The claimant also admitted before me that he had not been honest in the internal investigation regarding who he had spoken to about UW and that he had asked at least 2 colleagues not to mention it.

21. There were a number of occasions when the claimant's pleaded ignorance stretched credibility. It appeared likely that he was aware of others engaging in similar activities that he was covering for.

22. The Respondent submitted that it was unreasonable for the Claimant to have knowingly pursued his claims, in circumstances where he was aware that he had been dishonest throughout the disciplinary process, and therefore ought to have been aware that his claim would fail, having also had the benefit of legal advice and support and being in receipt of the CWL.

23. That appeared to be a different way of putting the no reasonable prospect contentions.

24. In that regard, the Claimant was right to say that the respondent's policy on second jobs was unclear and discussions about clarifying it were never actioned.

25. There were a number of failings in the investigation, such as regarding typos, name errors, timings and unsigned statements, but these are not uncommon and there was nothing to suggest that the evidence gleaned was ultimately unreliable.

26. That said, it was not unreasonable for the Claimant to challenge the investigator continuing in his role after he became aware that his wife had raised an earlier complaint about the claimant.

27. It did appear that the respondent was, perhaps, more interested in catching others than in the claimant's alleged mitigation.

28. It was not unreasonable to challenge the extent of an employer's legitimate investigatory powers. It was also legitimate for the Claimant to challenge the harassment allegation that was pursued against him despite being unsupported by the alleged victim.

29. There were also delays in investigating the claimant's alleged comparator.

30. Because there were serious matters for the respondent to address regarding the clarity of their policies, the training of their staff, the flaws in the investigation and the questions left unanswered, I cannot say it was unreasonable conduct for the claimant to pursue his claims notwithstanding his acknowledged dishonesty and the difficulties faced given his ultimate admissions of competing activity.

31. Nonetheless, I have considered whether the very late admissions, in relation to competing activity and earlier dishonesty, as well as delays in providing full and clear disclosure of his position with UW (including the fact that he continued to receive commissions and had only suspended his account) and his evasiveness, inconsistency and implausibility both amounted to unreasonable conduct and caused the trial to be unnecessarily extended.

32. It seems to me likely that they did.

33. I am, of course, entitled to make a costs award on my own initiative but do not consider it would be in the interests of justice for me to do so without allowing the parties to make representations on this point and, indeed, on the claimant's ability to pay.

34. The claimant was originally due to attend this hearing but withdrew at the last minute without providing a clear or evidenced reason. He should have already submissions on his inability to pay if he was going to rely on it.

35. All of that said, it is unlikely that the amounts involved (being significantly lower than those claimed by the respondent) would warrant a further hearing under the principle of proportionality in the overriding objective and so the parties are encouraged to reach a resolution within 14 days and, if successful, to notify the tribunal.

36. If not, written representations should be provided by the parties on both the possibility of an award on the above basis and the amount, within 28 days, whereupon a decision will, again, be made on the papers unless either side request a hearing.

Employment Judge Broughton

Date: 31 October 2025