# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Linton

**Respondent:** The Athelstan Trust

**Heard at:** **Bristol**

**On:** **31 October 2025**

**Before:** **Employment Judge Livesey**

**Representation**
Claimant: In person
Respondent: Miss Linford, counsel

# JUDGMENT

1. In relation to the issue of remedy, the Claimant is not entitled to an award under s. 38 of the Employment Act 2002.

2. The Claimant's application for costs and/or time preparation time order is dismissed.

# REASONS

**Background**

1. By a claim dated 17 March 2021, the Claimant brought complaints of discrimination on the grounds of disability, unfair dismissal on the grounds of having made a public interest disclosure and a failure to provide written terms and conditions. All of his claims were dismissed at a hearing which took place in July 2025, save that under s. 38 of the Employment Act 2002. The Judgment and Reasons dated 17 July were sent to the parties on 1 August.

2. This hearing was subsequently listed to deal with the issue of remedy but, on 24 October, the Claimant had also reiterated an earlier application that he had made for costs which had to be dealt with.

3. Unless otherwise stated, page references below in square brackets are to pages within the hearing bundle which had been prepared in advance of the last hearing, R1. A supplemental bundle had also been prepared, pages to which have been cited in braces.

## Remedy

4. As was made clear from paragraphs 5.32 to 5.34 of the Judgment and Reasons of 17 July 2025, it was found that the Respondent had substantially complied with the requirements of s. 1 of the Employment Rights Act through the letter of engagement [186]. It was agreed, however, that the following requirements had not been met; s. 1 (4)(b) (intervals of remuneration), (4)(d) (holiday and sick pay), (4)(e) (notice), (4)(g) (whether permanent or fixed term), (4)(j) (applicable collective agreements) and (4)(l) to (n) (training). There was also incomplete compliance with s. 1 (4)(ga) for the reasons stated in paragraph 5.34.

5. Section 38 (2) applied in the case in which, when proceedings were begun, an employer was in breach of its s. 1 or s. 4 duty. Under s. 38 (2), even if the Claimant had received no award in respect of any other claims which had been advanced, he was still entitled to recover a sum in respect of the employer's breach but he still had to have been successful in respect of one or more of those other claims (*Advanced Collection Ltd-v-Gultekin* UKEAT 1037714 6 February 2015).

6. Accordingly, the Claimant was not entitled to recover under s. 38, a position which she had accepted in his written submissions.

## Costs

7. In the Claimant's submissions provided on 24 October, he referred to his earlier application of 27 August 2024 [557-560] in the sum of £12,588. His arguments at the hearing were twofold;

   7.1 That the Respondent had behaved unreasonably in the manner in which it had conducted its response in that it ought to have conceded the issue of disability sooner than it did. He would not have instructed counsel for the remitted hearing before Employment Judge O'Rourke on 13 August 2024 had the concession been made sooner than the morning of 12 August;

   7.2 That the Respondent ought to have had instructions to have dealt with the costs issue at the conclusion of the liability hearing in July and its failure to have properly instructed Miss Linford in that respect was also unreasonable conduct. This hearing, he said, had been unnecessary.

   <u>Legal principles</u>

8. Rule 74 (1) imposed a two-stage test; first, a tribunal had to ask itself whether a party's conduct fell within rule 74 (2). Here, the Claimant alleged that the Respondent had conducted itself unreasonably within the litigation as defined by rule 74 (2)(a). If he was right, I had to go on to ask myself whether it was appropriate to exercise my residual discretion in favour of awarding costs against it.

9. When the threshold requirements for an order for costs were met under rule 74 (1)(a) and/or (2) of the 2024 Rules, it did not follow that, because a tribunal may have then made a costs order, it was bound to do so. There was always a residual discretion;

"*The discretion is very broad and it would require a clear error of principle to justify an appeal, whether for or against an order for costs.*" (*FDA and others-v-Bhardwaj* [2022] EAT 97)

10. As the Court of Appeal reiterated in *Yerrakalva-v-Barnsley Metropolitan Borough Council 2012 ICR 420, CA*, costs in the employment tribunal were still the exception rather than the rule. It commented that the tribunal's power to order costs was more sparingly exercised and it was more circumscribed than that of the ordinary courts, where the general rule was that costs followed the event as the unsuccessful litigant normally had to foot the legal bill for the litigation.

11. I recognised that, in terms of causation, it was unnecessary to show a direct causal connection but the conduct complained of and the alleged costs incurred (*McPherson-v-BNP Paribas* [2004] ICR 1398 and *Raggett-v-John Lewis* [2012] IRLR 911, paragraph 43), but there nevertheless had to have been some broad correlation between them (*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). I was required to have regard to the "*whole picture of what happened in the case*" (per Kerr J, paragraph 22, *Sunuva-v-Martin* UKEAT/0174/17). A costs order was restorative, not punitive (*Lodwick-v-Southwark London BC* [2004] EWCA Civ 306) and an order could not have been made simply because a party had got something wrong.

Discussion and conclusions

12. In respect of the alleged wasted costs of the August 2024 hearing (paragraph 7.1 above), the Claimant argued that the Respondent had had Dr Nabavi's report, which had strongly supported the existence of his disability, since January 2022, but it had continued to dispute the issue before Employment Judge Green at the subsequent Preliminary Hearing later that month. Although Judge Green had then determined that the Claimant had not been disabled, that decision was overturned on appeal by the Employment Appeal Tribunal ('EAT') two years later, in February 2024. The matter was remitted for re-hearing at a further Preliminary Hearing before Employment Judge O'Rourke on 13 August 2024. The Respondent's continued resistance of the issue, he said, caused him to have to instruct counsel. He maintained that the Judge criticised the Respondent for having "*delayed excessively in declaring its position on disability, only conceding the issue. The day prior to the hearing*" which resulted in "*wasted preparation costs*".

13. In fact, that was not a quotation from the Judgment but, rather, a submission which had been made on his behalf, which the Judge had set out in his Judgment at paragraph 5 (c) [156]. The Judge did not himself criticise the Respondent's position and/or the date upon which it was adopted.

14. Further, that Preliminary Hearing had been listed to address other applications in any event (strike out and deposit order applications), so it was not as if it was needless or wasted.

15. The Claimant argued that the Respondent had not made any fresh applications under rules 37 or 39 (as they then were) ahead of that hearing and they ought not to have been in the Notice [147].

16. I considered the file in detail and, having done so, I considered that he was right; the Notice which had been sent out on 21 March 2024 had been at the instigation of Regional Employment Judge Pirani. It had included the disability issue remitted from the EAT (paragraph (a)) but, despite the contents of the fourth recital in the EAT's Order (which had simply stated that Judge Green's deposit order had been set aside for [120]), Judge Pirani had nevertheless included a consideration of strike out and deposit within it. (paragrahs (b) and (c) [147]). The file suggested that he had done so on the basis that the original matters which had been listed for determination before Employment Judge Green had all needed to have been reconsidered upon remittal from the EAT (the matters listed before Judge Green had included consideration of the Respondent's applications for strike out and/or deposit order as set out in their original response (paragraph 3 [46]) [70-1]).

17. The Claimant alleged that it was not until the morning of the hearing on 13 August that the Respondent's applications under rules 37 and 39 had become focused upon the issue of knowledge of disability. Judge O'Rourke determined that the principles in *Serco* were engaged because the applications had been previously determined by Judge Green (paragraph 7) and/or that they lacked merit because the burden of proof lay upon the Respondent and such factual matters fell to be determined at the final hearing (paragraph 8) [156].

18. Whilst I did not share the Judge's view of the application of *Serco,* since the applications under rules 37 and 39 had been advanced on an entirely different basis (knowledge of disability, rather than the merits of the s.103A claim as previously), he was plainly right to have determined the application in the Claimant's favour for the reasons expressed within paragraph 8. That was not to say that the Respondent was unreasonable in having run those arguments. They had been given the green light to do so by the Regional Employment Judge who had determined how the Notice of Hearing ought to have been framed in March.

19. Accordingly, even with the disability issue conceded 24 hours before the hearing, there was still every reason for counsel to have been instructed given that there was a substantial amount of case management to undertake and, more importantly, the fact that the Claimant faced applications under rules 37 and 39.

20. During the hearing, I asked Mr Linton whether Mr Downey would still have been instructed had the disability issue been conceded sooner. He initially stated that he 'still would have wanted him there'. I asked him whether he had taken steps to dis-instruct him following the concession. He said not. But he then said that Mr Downey's fee had been incurred and that he would already have been travelling from Ireland to represent him.

21. On a different issue, it was important to remember that Employment Judge Green had found that the Claimant had not been disabled at the hearing in January 2022, despite the existence of Dr Nabavi's report which the Claimant considered ought to have brought the Respondent to a concession. The EAT had not determined that the Claimant *was* disabled but, rather, that Judge Green had not addressed the issue correctly, hence its remittal.

22. From my perspective, the issue appeared to have been finely balanced. The Claimant had not identified *himself* as disabled (paragraph 7 [126]) and some of the supporting evidence appeared woolly (paragraph 4.11 of my Judgment and Reasons). This was not a case which had involved a condition which had been operative or overt at the material time, but, rather, it was said to have been latent and was claimed to have been 'likely to recur' (paragraph 4.13).

23. The Respondent may have ultimately conceded the issue of disability for a number of different reasons. It may have considered, for example, that it stood a better chance of defending the other liability issues on their merits. Its concession ought not to have been taken as an indication that the evidence stood overwhelmingly in the Claimant's favour and that a failure to have conceded it sooner had been unreasonable.

24. There was the further argument advanced by the Claimant as set out in paragraph 7.2 above; the hearing before me in July had finished towards the end of the second day (approximately 4:15 pm on 14 July). There had been a discussion about the balance of the time which had been listed during which both sides indicated that they would wanted written reasons had the decision gone against them. On that basis, it was agreed that the balance of the time would have been used by me to deliberate and prepare those written reasons.

25. During those discussions, Mr Downey did point out that there was an outstanding application for costs to have been dealt with. Miss Linford indicated that the application had not been listed as part of the hearing and she had not received instructions upon it. At the conclusion of the hearing on the 14th, it would not have been possible to have heard the arguments on costs as the court day had ended. We could have returned on the 15th to have done so and Miss Linford could have been asked to have taken instructions overnight, but the parties did not urge that course upon me. In many respects, it seemed sensible and more economic for any outstanding issues (remedy and/or costs) to have been dealt with at a further, short hearing by video.

26. The Claimant complained that Mr Downey would have been able to have represented him on the costs issue had the matter been dealt with during the listed hearing in July. That was not a matter raised at the time, but it did cause me to investigate the basis upon which Mr Downey had been instructed. The Claimant indicated that he had been paid upfront to represent him to pursue his claim and in respect of his costs application. He indicated that he had not received any personal benefit from the fact that two days had been saved from the hearing time. I could not therefore understand why Mr Downey was not present to represent the Claimant at this application if it was part of the basis upon which he had originally been briefed. Effectively, the hearing had gone part heard.

27. That as it may have been, I did not consider that anything that the *Respondent* had done had been unreasonable. In an ideal world, Miss Linford may have obtained instructions on the costs issue prior to the start of the final hearing but, as I have said, there would not have been time for it to have been dealt with on the second day of the hearing and the course that was taken in respect of the balance of the case was agreed.

28. In conclusion, I could well understand why the Claimant felt aggrieved at the manner in which his claim had been addressed. He had received an adverse

result at the hearing before Employment Judge Green which taken two years to overturn and which the Respondent had then conceded just before Employment Judge O'Rourke was to have dealt with it again. Regional Employment Judge Pirani had relisted rule 37 and/or 39 issues without the Respondent having made such applications and without those matters having been remitted by the EAT. Nevertheless, he had been unsuccessful in his claims and, even if he had passed the gateway test under rule 74 and had demonstrated unreasonable conduct in respect of the Respondent's late concession, I would not have exercised my discretion in his favour on costs having taken a step back and viewed the whole of the litigation in the round.

Employment Judge Livesey

Date 31 October 2025

JUDGMENT SENT TO THE PARTIES ON
20th November 2025
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Simon Fraser
.....
FOR THE TRIBUNAL OFFICE

**Notes**

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/
written record of the decision.